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References to Official Reports
are invariably given in all
cases found in the Official
Reports.

The Synopsis for each Sect
shows where exactly to l
for the point required.

Remarks in the footnotes
amplify and illustrate the
principles in the commentary

College Section.

**THE CODE OF
CRIMINAL PROCEDURE
(V. OF 1898)**

TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

THE CODE OF
CRIMINAL PROCEDURE

ACT V OF 1898

WITH

EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

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SECOND EDITION

VOLUME II

SECTIONS 201 TO 430



THE ALL INDIA REPORTER LTD.,
NAGPUR.

1941

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PRINTED AT
THE ALL INDIA REPORTER PRESS
NAGPUR

ABBREVIATIONS

A. O.	...	Government of India (Adaptation of Indian Laws) Order, 1937, as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.
A. I. R. 1921 All., Bom. etc.	...	All India Reporter, Allahabad, Bombay, etc. sections of the respective years.
All. or I. L. R. All.	...	Indian Law Reports, Allahabad Series.
Agra.	...	Agra High Court Reports.
All. L. Jour.	...	Allahabad Law Journal.
All. W. N.	...	Allahabad Weekly Notes.
All. W. R.	...	Allahabad Weekly Reporter.
App. Cas.	...	Law Reports, Appeal Cases (England).
Beng. L. R.	...	Bengal Law Reports.
B. R.	...	Bihar Reports.
Bom. or I. L. R. Bom.	...	Indian Law Reports, Bombay Series.
Bom. H. C. R.	...	Bombay High Court Reports.
Bom. L. R.	...	Bombay Law Reporter.
Bom. P. J.	...	Bombay Printed Judgments.
Bourke	...	Bourke's Reports.
Bur. L. Jour.	...	Burma Law Journal.
Bur. L. R.	...	Burma Law Reports.
Bur. L. Tim.	...	Burma Law Times.
Cal. or I. L. R. Cal.	...	Indian Law Reports, Calcutta Series.
Cal. L. Jour.	...	Calcutta Law Journal.
Cal. L. R.	...	Calcutta Law Reports.
Cal. W. N.	...	Calcutta Weekly Notes.
C. P. L. R.	...	Central Provinces Law Reports.
Cor.	...	Coryton's Reports.
Cr. C.	...	Criminal Cases.
Cr. Rg.	...	Criminal Rulings of the Bombay High Court.
Cr. L. J.	...	Criminal Law Journal.
E. R.	...	English Reports (England).
Hay	...	Hay's Reports.
Hyde	...	Hyde's Reports.
Ind. App.	...	Law Reports, Indian Appeals.
Ind. Cas.	...	Indian Cases.
Ind. Jur. (N.S.)	...	Indian Jurist (New Series).
Ind. Jur. (O.S.)	...	Indian Jurist (Old Series).
Ind. Rul.	...	Indian Rulings.
Kar. (I. L. R.)	...	Indian Law Reports, Karachi Series.
K. B.	...	Law Reports, King's Bench (England).
Knapp	...	Knapp's Reports.
Lah. or I. L. R. Lah.	...	Indian Law Reports, Lahore Series.
Lah. L. Jour.	...	Lahore Law Journal.

L. J.	... Law Journal (England).
L. R.	... Law Reports (England).
L. R. A.	... Law Reporter, Allahabad.
Low. Bur. Rul.	... Lower Burma Rulings.
Luck. or I. L. R. Luck.	... Indian Law Reports, Lucknow Series.
Luck. Cas.	... Lucknow Cases.
Mad. or I. L. R. Mad.	... Indian Law Reports, Madras Series.
Mad. H. C. R.	... Madras High Court Reports.
Mad. Jur.	... Madras Jurist.
Mad. L. Jour.	... Madras Law Journal.
Mad. L. Tim.	... Madras Law Times.
Mad. L. W.	... Madras Law Weekly.
Mad. W. N.	... Madras Weekly Notes.
Marsh.	... Marshall's Reports.
Moo. Ind. App.	... Moore's Indian Appeals.
Moo. P. C. C.	... Moore's Privy Council Cases.
Nag. (I. L. R.)	... Indian Law Reports, Nagpur Series.
Nag. L. Jour.	... Nagpur Law Journal.
Nag. L. R.	... Nagpur Law Reports.
N.-W. P. H. C. R.	... North-West Provinces High Court Reports.
Oudh Cas.	... Oudh Cases.
Oudh L. Jour.	... Oudh Law Journal.
Oudh L. R.	... Oudh Law Reports.
Oudh S. C.	... Oudh Select Cases.
Oudh W. N.	... Oudh Weekly Notes.
Pat. or I. L. R. Pat.	... Indian Law Reports, Patna Series.
Pat. H. C. C.	... Patna High Court Cases.
Pat. L. Jour.	... Patna Law Journal.
Pat. L. Tim.	... Patna Law Times.
Pat. L. R.	... Patna Law Reporter.
Pat. L. W.	... Patna Law Weekly.
Pat. W. N.	... Patna Weekly Notes.
Pun. L. R.	... Punjab Law Reporter.
Pun. Re.	... Punjab Records.
Pun. W. R.	... Punjab Weekly Reporter.
Q. B.	... Law Reports, Queen's Bench (England).
R. & J's.	... Rafique and Jackson's Oudh Privy Council Decisions.
Rang.	... Indian Law Reports, Rangoon Series.
Rang. L. R.	... Rangoon Law Reports.
Rat.	... Ratanlal's Unreported Criminal Cases.
R. R.	... Revised Reports (England).
R. S. C.	... Rules of the Supreme Court of England.
Sar.	... Saraswati's Privy Council Judgments.
Shome L. R.	... Shome's Law Reports.
Sind L. R.	... Sind Law Reporter.
Suther.	... Sutherland's Privy Council Judgments.
Suth. W. R.	... Sutherland's Weekly Reporter.
Times L. R.	... Times Law Reports (England).
U. P. L. R.	... United Provinces Law Reports.
U. P. B. R.	... United Provinces Board of Revenue.
Upp. Bur. Rul.	... Upper Burma Rulings.
Weir.	... Weir's Criminal Rulings.
W. R. (Eng.)	... Weekly Reporter (England).

OTHER ABBREVIATIONS

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C. A. ... Court of Appeal.	N. ... Note.
Cl. ... Clause.	O. ... Order.
Cr. ... Criminal.	P. ... Page.
F. B. ... Full Bench.	P. C. ... Privy Council.
F. C. ... Federal Court.	R. ... Rule.
F.-N. ... Foot-Note.	S. ... Section.
Jour. ... Journal.	S. B. ... Special Bench.

In foot-notes — ('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).

Full year reference is given prior to 1866, like (1818) and *not* ('18), (1865) and *not* ('65) and so on and to all English cases.

IMPORTANT NOTE

References to Official Reports are invariably given in all cases found in the Official Reports.

THE CODE OF CRIMINAL PROCEDURE, 1898
(ACT V OF 1898)

VOLUME II

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THE CODE OF
CRIMINAL PROCEDURE
ACT V of 1898

Volume II.

PART VI : PROCEEDINGS IN PROSECUTIONS — (*contd.*)

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES — (*contd.*)

201.* (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect.

Section 201

Procedure by Magistrate not competent to take cognizance of the case.

(2) If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Magistrate not competent to take cognizance.
4. "Shall return."
5. Oral complaints.

1. Legislative changes.

Changes introduced in 1872 —

There was no section in the Code of 1861 corresponding to this section. The provision contained in sub-s.(1) of this section was newly inserted as S. 145 in the Code of 1872.

* Code of 1882 : S. 201 — Same as sub-section (1).

Code of 1872 : S. 145.

Procedure by Magistrate not empowered to hear complaint.

145. If the Magistrate be not competent to receive the complaint, he shall refer the complainant to a Magistrate having jurisdiction.

Code of 1861 — Nil.

Section 201
Notes 1-3

Changes introduced in 1882 —

Section 145 of the Code of 1872 applied to all complaints *oral* as well as written. Section 201 of the Code of 1882 limited the section to complaints made in *writing*.

Changes introduced in 1898 —

Sub-section (2) has been newly added to the Code of 1898.

2. Scope of the section. — A Magistrate, when he receives a complaint under S. 190, is either competent to take cognizance of the case or he is not. This section deals with the procedure to be adopted where he is *not competent* to take cognizance of the case.

As to the procedure to be adopted in cases where the Magistrate is competent to take cognizance of the case but finds, during the course of the enquiry or trial, that he is not competent to inquire or try further, see Ss. 346, 347, 348 and chapter XXXII of the Code.

This section refers back to S. 190 and to Part A of chapter 15 and contemplates *incompetency to take cognizance* and not incompetency to hear or try. It does not bar a Magistrate not competent to take cognizance of the complaint from hearing the case if sent to him for hearing by a Court competent to do so under S. 192 or S. 528.¹

3. Magistrate not competent to take cognizance. — As to what Magistrates are competent to take cognizance of offences, see S. 190 and Notes thereto. It has been held that a Magistrate who has no local jurisdiction to inquire into or try an offence cannot take cognizance of it.¹

The question of jurisdiction must be decided at the outset by a perusal of the complaint. It is on the terms of the complaint that the Magistrate first has to inform himself as to the nature of the case and see whether, *from the allegations* made in the complaint, he has jurisdiction to entertain it.² This question the Magistrate himself must decide and should not seek or act on the advice of any other District or superior Magistrate.³

A Magistrate cannot refuse to take cognizance of a case, on any of the following grounds —

- (1) that though he is entitled to take cognizance of the charges named in the complaint, he is not entitled to take cognizance of a charge not named in the complaint but which could be made out from the allegations in the complaint;⁴
- (2) that the offence merits greater punishment than he is empowered to inflict;⁵

Section 201 — Note 2

1. ('39) AIR 1939 Lah 122 (123) : I L R (1938) Lah 619 : 40 Cr.L.J. 515, *Painda v. Mt. Gulab Khatun*.

Note 3

1. ('32) AIR 1932 Mad 427 (427, 428) : 33 Cr. L. J. 452, *Rathinam Pillai v. Emperor*;
2. ('21) AIR 1921 All 12 (12) : 22 Cr. L. J. 308 (FB), *Sheo Shankar v. Mohan*.
3. ('12) 13 Cr. L. J. 786 (786) : 17 I. C. 530 : 37 Bom 144, *Emperor v. Abdul Rahim*.
4. ('31) AIR 1931 All 10 (11) : 32 Cr. L. J. 360, *Sripat Rai v. Emperor*.
- ('07) 7 Cr. L. J. 6 (7) : 31 Mad 43 : 17 M L J 559 : 3 M L T 113, *Kristna Pillai v. Krishna Konan*.
5. ('88) 1888 Rat 375 (375), *Queen-Empress v. Gema*.

(3) that the offence is a petty one cognizable by the head of the village.⁶

Section 201
Notes 3-5

4. "Shall return." — Where a Magistrate finds that he is not competent to take cognizance of a case on a complaint *made in writing* to him, he shall *return* the complaint to be presented to the proper Court having jurisdiction, with an endorsement to that effect.¹ He need not and should not examine the complainant in such a case.²

Where a Magistrate, who had jurisdiction in two capacities, as the Headquarters Magistrate and Railway Magistrate, subordinate in each capacity to a different High Court, received a complaint in one capacity and transferred it to his own file in the other capacity, it was held that he must be deemed to have returned the same under this section to be presented to the proper Court, and to have accepted it as re-presented.³

5. Oral complaints. — Sub-section (2), which has been newly added in 1893, contemplates the presentation of *oral* complaints also.¹ See also S. 4 (1) (h).

In the case of oral complaints, the Magistrate should *direct* the complainant to the proper Court. See also Note 1.

202.* (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or

Section 202

Postponement for
issue of process.

* Code of 1882 : S. 202.

202. If the Chief Presidency Magistrate, or any other Presidency Magistrate whom the Local Government may from time to time authorize in this behalf, or any Magistrate of the first or second class, sees reason to distrust the truth of a complaint of an offence of which he is authorized to take cognizance, he may, when the complainant has been examined, record his reasons for distrusting the truth of the complaint, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by an officer subordinate to such Magistrate, or by a police-officer, or by such other person, not being a Magistrate or police-officer, as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint.

If such investigation is made by some person not being a Magistrate or a police-officer, he shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.

This section applies to the police in the towns of Calcutta and Bombay.

6. ('71) 7 Mad H C R App xxxi (xxxii).

Note 4

1. ('81) 2 Weir 323 (323, 324), *In re Munisami*.
- ('23) AIR 1923 Mad 50 (51) : 45 Mad 839 : 23 Cr. L. J. 619, *In re Mohiddeen*.
- ('26) AIR 1926 Pat 400 (400) : 5 Pat 447 : 27 Cr. L. J. 704, *Bengali Gope v. Emperor*.
- ('06) 4 Cr. L. J. 213 (214) : 10 C W N 1086, *Fani Bushan v. Kemp*.
- [See however ('07) 7 Cr. L. J. 6 (7) : 17 M L J 559 : 3 M L T 113 : 31 Mad 43, *Krishna Pillai v. Krishna Konan*. (Where it has been observed that he can send it to the Magistrate having jurisdiction, it is not clear under what section this can be done.)]
2. ('05) 3 Cr. L. J. 53 (54) : 28 All 268 : 1905 A W N 279, *Gullay v. Bakar Husain*.
- ('06) 4 Cr. L. J. 213 (214) : 10 C W N 1086, *Fani Bushan v. Kemp*.
3. ('30) AIR 1930 Nag 291 (291, 292, 293) : 32 Cr. L. J. 130, *Diwan Singh v. Emperor*.

Note 5

1. ('24) AIR 1924 Rang 35 (36) : 1 Rang 549 : 25 Cr. L. J. 229, *J. R. Das v. Emperor*.

Section 202

which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint :

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.

(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.

(2A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

Code of 1872 : S. 146.

146. If the Magistrate sees cause to distrust the truth of the complaint he may postpone the issuing of the process for compelling the attendance of the person complained against, and may direct a previous inquiry or investigation to be made into the truth of the complaint, either by means of any officer, subordinate to such Magistrate or of a local police-officer, or in such other mode as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

If such inquiry or investigation is made by means of some person other than an officer exercising any of the powers of a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Act on an officer in charge of a police-station, except that he shall have no power to make an arrest.

Code of 1861 : S. 180.

180. If the Magistrate sees cause to distrust the truth of the complaint, he may postpone the issuing of process for causing the attendance of the person complained against, and direct a previous enquiry to be made into the truth of the complaint, either by means of any officer subordinate to such Magistrate or of a local police-officer, or in such other mode as he shall judge most proper, for the purpose of ascertaining the truth or falsehood of the complaint. If such enquiry is made by means of some person other than an officer exercising any of the powers of a Magistrate or a police-officer, such person shall exercise all the powers vested by this Act in an officer in charge of a police-station, except that he shall have no power to make an arrest.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

Section 202
Note 1

Synopsis

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|--|---|
| 1. Legislative history. | 13. May inquire into the case himself or direct an inquiry or investigation. |
| 2. Scope and object of the section. | 14. "Inquiry." |
| 3. "Any Magistrate." | 15. Evidence in the inquiry — Sub-section (2A). |
| 4. Presidency Magistrates. | 16. Magistrate holding inquiry, if disqualified from trying. |
| 5. Complaint of an offence. | 17. Investigation. |
| 6. Complaint by Court or public servant. | 18. "Investigation by police." |
| 7. "Authorised to take cognizance." | 19. "Such other person." |
| 8. "Transferred to him under S. 192." | 20. Examination of the complainant — Proviso. |
| 9. "May, if he thinks fit." | 21. Powers of the inquiring or investigating officer. |
| 10. "For reasons to be recorded in writing." | 22. Police in the towns of Calcutta and Bombay — Sub-section (3). See Notes to Section 1. |
| 11. "Postpone the issue of process." | 23. Revision. |
| 12. Position of the accused. | |

Other Topics (miscellaneous)

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| Application of section. See Note 5. | Magistrate not competent to take any other course than to inquire or direct inquiry or investigation. See Note 13. |
| Direct investigation — | Maintenance case — Power to refer for inquiry. See Note 5. |
| by a Magistrate not competent to take cognizance of complaint. See Note 13. | Reference to be made — |
| by any person. See Note 19. | not after issue of process. See Note 11. |
| If the accused appears of his own accord. See Note 12. | not before examination of complainant. See Note 20. |
| Inquiry or investigation by whom to be made. See Note 13. | Report of investigation forms part of record. See Note 18. |
| Local investigation. See Note 17. | Representation of accused by a pleader. See Note 12. |
| Local investigation by a Magistrate — Magistrate acts judicially. See Note 15. | |

1. Legislative history.

Changes made in 1869 —

Under S. 180 of the Code of 1861, this provision was limited to cases triable by a Court of Session only.¹ Act VIII of 1869 extended it to all cases.²

Changes made in the Code of 1872 —

Under the Code of 1861, a Magistrate could direct an *inquiry* only; while under the Code of 1872 he could also direct an *investigation*.

Changes made in the Code of 1882 —

Section 202 of the Code of 1882 introduced many important changes:

- (1) The word "Magistrate," which was general, was limited to the *Chief Presidency Magistrate, Magistrate of the first or second class, and any other Presidency Magistrate specially authorized.*

Section 202 — Note 1

1. ('67) 8 Suth W R Cr 12 (13), *Queen v. Harrakchand*.
- ('68) 10 Suth W R Cr 49 (49, 50) : 2 Beng L R S N vi, *In re Foktu Shah*. (Per Loch, J.)
2. ('71) 16 Suth W R Cr 44 (44) : 8 Beng L R App xi, *Queen v. Gour Mohun Singh*.

Section 202
Note 1

- (2) The words "of an offence of which he is authorised to take cognizance" were added after the word *complaint* in order to restrict the scope of the word *complaint* to complaints of offences.
- (3) The words "when the complainant has been examined" were newly added.
- (4) The words "record his reasons for distrusting the truth of the complaint" were newly added and as a consequential change, the words "sees cause to distrust" were changed into "sees reason to distrust."
- (5) The words "and either inquire into the case himself or" were newly added.
- (6) The words "direct a previous inquiry or investigation" were omitted and the words "direct a previous local investigation" were substituted, thus taking away the power of inquiry except by himself. As a consequential change, the words "inquiry or" were omitted in para. 2 also.
- (7) The words "or by such other person not being a Magistrate or police-officer" were substituted for the words "or in such other mode."
- (8) The third paragraph, which ran as "This section applies to the police in the towns of Calcutta and Bombay" was newly added.

Changes introduced in 1898 —

There was only one important change introduced in the Code in 1898. The words "is not satisfied as to" were substituted for the words "sees reason to distrust."

Changes made in 1923 —

The Code of Criminal Procedure (Amendment) Act, XVIII of 1923, substituted sub-sections (1) & (2) making the following important changes:

- (1) The words "any Magistrate" were substituted for the words "The Chief Presidency Magistrate . . . first or second class."
- (2) The words "or which has been transferred to him under section 192" are new.
- (3) The words "if he thinks fit" have been substituted for the words "if the Magistrate is not satisfied as to the truth of the complaint" in order to widen the scope of the section.
- (4) The words "inquiry or investigation" have been re-inserted for the words "previous local investigation." This change also is made in para. 2, as a consequence.
- (5) The words "any Magistrate subordinate to him" have been substituted for the words "any officer subordinate to such Magistrate."
- (6) The words "when the complainant has been examined" were omitted and a proviso was added as follows:
"Provided that no such direction shall be made (a) unless the complainant has been examined on oath under the provisions of S. 200, or (b) where the complaint has been made by a Court under the provisions of this Code."
- (7) Sub-section (2A) was newly added.

Changes made in 1926 —

By the Code of Criminal Procedure (Amendment) Act, II of 1926, the proviso of 1923 was altered into the present proviso.

Section 202
Notes 1-2

2. Scope and object of the section. — Under this section a Magistrate, who has taken cognizance of an offence, or to whom a case has been transferred under S.192, may postpone the issue of process to the accused person in order to ascertain the truth or falsity of the complaint. This he can do, either by inquiring into it himself, or by directing an inquiry or investigation by a Magistrate subordinate to him or by any police-officer or any other person.

The scope of chapter XVI of the Code, which contains this section, is to separate unfounded from substantial cases even at the outset¹ and as such, the object of an inquiry or investigation under this section is to ensure that no person shall be compelled to answer a criminal charge unless the Court is satisfied that there is a *prima facie* case for proceeding and issuing a process against the accused person.² Such an inquiry or investigation is designed to afford the Court an opportunity of either confirming or removing any hesitation it may feel in respect of issuing process against the accused. The nature of the inquiry varies with the circumstances of each case and it is certainly not contemplated that it should be exhaustive. The degree of formality of the proceedings and the width and depth of the inquiry is entirely in the discretion of the Magistrate. The provision is enabling and not obligatory. As soon as the Magistrate has satisfied himself that process should issue, its object is fulfilled.³ The inquiry is not intended to supersede a regular trial.⁴

It is not necessary that a Magistrate should call for an inquiry under this section in every case. It is only when he *thinks fit*, that he may do so.⁵ But it is generally advisable that an inquiry be held

Note 2

1. ('15) AIR 1915 Mad 128 (129) : 21 Ind Cas 703 (704) : 37 Mad 181, *Mecran Saib v. Rahnavelu Mudali*.
2. ('68) 10 Suth W R Cr Cir 1 (1).
('39) AIR 1939 All 602 (606) : ILR (1939) All 851:40 Cr. L. J. 917, *G. A. George v. Uma Dutt*. (Before issuing process Magistrate should carefully consider allegations in complaint and satisfy himself that the statement of the complainant is based on reasonable grounds.)
('27) AIR 1927 Lah 30 (31) : 28 Cr. L. J. 26, *Gulab Khan v. Ghulam Md. Khan*.
('27) AIR 1927 Mad 19 (20, 21) : 49 Mad 918 : 28 Cri L Jour 129 (FB), *Appa Rao v. Janaki Ammal*.
('19) AIR 1919 Oudh 395 (395) : 22 Oudh Cas 321 : 20 Cr. L. J. 728, *Mt. Mahadei v. Ram Sahai*.
('21) AIR 1921 Pat 85 (87) : 21 Cri L Jour 519, *Gowkaran Lal v. Sarjoo Saw*.
('26) AIR 1926 Sind 188 (189) : 20 S L R 43:27 Cr.L.J. 494, *Atmaram v. Topandas*.
[See ('29) AIR 1929 Pat 644 (646) : 9 Pat 155 : 31 Cri L Jour 961, *Hema Singh v. Emperor*.]
3. ('30) AIR 1930 Pat 30 (32) : 30 Cri L Jour 554, *Parmanand v. Emperor*.
('10) 12 Cr.L.J. 385 (386) : 11 I. C. 249 : 1 U B R 73, *Nga Tha Tu v. Emperor*.
4. ('31) AIR 1931 Bom 524 (526) : 55 Bom 770 : 33 Cr.L.J. 72, *Emperor v. Finan*.
('10) 12 Cr. L. J. 385 (386) : 1 U B R 73 : 11 I. C. 249, *Nga Tha Tu v. Emperor*.
('19) AIR 1919 Oudh 395 (395) : 20 Cr. L. J. 728 : 22 Oudh Cas 321, *Mt. Mahadei v. Ram Sahai*.
- ('30) AIR 1930 Pat 30 (32) : 30 Cri L Jour 554, *Parmanand v. Emperor*.
5. ('20) AIR 1920 Pat 270 (270, 271) : 21 Cr. L. J. 220, *Abdul Khalique v. Surja*.

Section 202
Notes 2-5

where the complainant is not speaking from his own knowledge.⁶

Where, however, such an inquiry is made obligatory as under S. 10 of the Child Marriage Restraint Act of 1929, the failure to do so vitiates the whole trial.⁷

A Magistrate acting under this section can only consider the report of any inquiry or investigation directed by him⁸ and not any report made previously and not directed by him⁹ or an inquest report made by another Magistrate under S. 176¹⁰ or any previous departmental inquiry.¹¹ The purpose of the inquiry under this section being only to decide whether to issue process to the accused or not, it is not competent for the Magistrate to treat the evidence recorded in such an inquiry as *evidence* in the case and forthwith put the accused on his defence and convict him.¹²

3. "Any Magistrate."—The section, as it stood before the amendment of 1923, permitted only the Chief Presidency Magistrate, Presidency Magistrates authorized in this behalf by the Local Government and any Magistrate of the first and second class only to act under this section. But now the use of the words '*any Magistrate*' removes the restrictions on third class Magistrates and Presidency Magistrates. Now *any Magistrate* authorized to take cognizance of a complaint, or to whom a case is transferred under S. 192, can act under this section.

4. Presidency Magistrates.—Before the amendment of 1923, a Presidency Magistrate (other than the Chief Presidency Magistrate) not empowered by the Local Government could not direct a local investigation under this section.¹ In Madras, the Local Government had invested all Presidency Magistrates with such power. Now, no such special vesting of power is necessary.

Where Presidency Magistrates have been declared by the Provincial Government, under S. 21, sub-s.(2), to be subordinate to the Chief Presidency Magistrate, an *Additional* Chief Presidency Magistrate can, by virtue of S. 18, sub-s.(4), make over a complaint to an ordinary Presidency Magistrate for inquiry and report under this section.²

5. Complaint of an offence.—The section, by its terms, applies only to cases where a Magistrate takes cognizance of an offence *on complaint* under S. 190 (1) (a) and not otherwise.¹

6. ('21) AIR 1921 Cal 561 (563):22 Cr.L.J. 255, *Sukumar v. Mofi Zuddin Ahmed*. ('06) 10 Cal W N 1090 (1091): 4 Cr. L. J. 217, *Thakur Prasad Singh v. Emperor*.
7. ('34) AIR 1934 Rang 167 (168): 36 Cr. L. J. 75, *S. D. Vardon v. Hearsey*.
8. ('31) AIR 1931 Lah 56 (56): 12 Lah 383: 32 Cri L Jour 616, *Mangal v. Kalu*.
9. ('27) AIR 1927 All 136 (137): 28 Cr. L. J. 140, *Naubat v. Emperor*.
10. ('13) 22 I. C. 165 (166): 15 Cr. L. J. 21 (All), *Bagar v. Bansi*.
11. ('32) AIR 1932 Cal 121 (122):33 Cr.L.J. 218, *Surendranath v. Police Sergeant*.
12. ('87) 1887 Pun Re No. 33 Cr, p. 70 (72, 73), *Rallia v. Ahsan Shah*.
12. ('69) 1 N W P H C R 306 (306, 307), *In re Kewul Singh*.

Note 4

1. ('88) 12 Bom 161 (163), *In re Janaki Das*.
2. ('34) AIR 1934 Cal 405 (406): 61 Cal 467: 35 Cr.L.J. 729, *Kanayalal Bengani v. Kanmull Lodha*.

Note 5

1. ('73) 1873 Rat 77 (77).
- ('13) 14 Cri L Jour 218 (219): 19 I. C. 314 (All), *Sarperaz Khan v. Emperor*.
- ('24) AIR 1924 Lah 729 (730): 25 Cri L Jour 1315, *Jahangir v. Emperor*.

Therefore, a Magistrate cannot direct an inquiry or investigation under this section in the following cases —

- (1) Cases, in which he takes cognizance of the offence on a police-report under S. 190 (1) (b)² or on information under S. 190 (1) (c).³
- (2) Petition under S. 107, which is not a complaint of an offence at all.⁴
A Magistrate has, however, in this case, the right to call for a report from the police, apart from the provisions of this section.⁵
See Note 14 to S. 107.
- (3) Petition under S. 488 for maintenance, which is not a complaint of any offence.⁶
- (4) Complaint under S. 552 for restoration of abducted females, which is not a complaint of an offence.⁷

6. Complaint by Court or public servant. — Where the complaint is by a *Court*, it was formerly held that the Magistrate had no power to act under this section because there was already an inquiry and the accused was sent in custody under S. 476 and there was no issue of process to be postponed.¹ Clause (b) of the proviso added by the amendment of 1923 also specifically made action under this section unnecessary. This was found to cause many difficulties; also, cases might arise in which an inquiry or investigation should be

2. ('99) 1899 All W N 87 (89), *In re Kandhaiya Lal*.
- ('13) 14 Cri L Jour 387 (387, 388) : 20 I. C. 211 (Cal), *Sarba Mahton v. Emperor*.
- ('80) 1880 Pun Re No. 8 Cr, p. 15 (16), *Kudan v. Sonun*.
- ('19) AIR 1919 Pat 319 (320) : 51 I. C. 173 : 20 Cr. L. J. 413, *Eqbal Khan v. Emperor*.
- ('02) 2 Weir 241 (242), *In re Rangachari*.
- ('21) AIR 1921 Pat 302 (303) : 22 Cri L Jour 735, *Tiloki Mahton v. Emperor*.
- ('13) 14 Cr. L. J. 297 (297) : 19 I. C. 953 : 40 Cal 854, *Abdullah Mandal v. Emperor*.
3. ('88) 1888 Pun Re No. 24 Cr, p. 43 (45), *Narain Singh v. Empress*.
- ('94) 1894 Pun Re No. 15 Cr, p. 48 (49), *Fattch Ali v. Empress*.
- ('02) 2 Weir 241 (242), *In re Ranga Chari*.
- ('21) AIR 1921 Pat 302 (303) : 22 Cri L Jour 735, *Tiloki Mahton v. Emperor*.
- ('13) 14 Cri L Jour 600 (601) : 21 I. C. 472 : 7 S L R 75, *Imperator v. Shoukatmal*.
4. ('32) AIR 1932 All 670 (671) : 54 All 1036 : 34 Cr. L. J. 42, *Laxmi Narain v. Emperor*.
- ('28) AIR 1928 Lah 694 (694) : 29 Cr. L. J. 866, *Hari Singh v. Jagta*. (Overruled on another point in AIR 1938 Lah 861.)
- ('26) AIR 1926 Mad 521 (522, 523) : 49 Mad 315, *Sanjivi Reddi v. Koneri Reddy*. (Per Coutts-Trotter, C. J.—Desirability of express provision being made, conferring power in terms upon Magistrates to refer petitions under S. 107 for investigation under section 202 pointed out.)
- See also Section 107 Note 14.
5. ('38) AIR 1938 Lah 861 (863, 864) : ILR (1938) Lah 640 : 40 Cr. L. J. 193, *Ismail v. Jagat Singh*. (Contrary view taken in AIR 1928 Lah 694 held could not be supported either on principle or authority.)
- ('32) AIR 1932 All 670 (671) : 54 All 1036 : 34 Cr. L. J. 42, *Laxmi Narain v. Emperor*.
- ('91) 2 Weir 51 (51), *Ekambara v. Murugappa*.
- ('26) AIR 1926 Mad 521 (525) : 49 Mad 315, *Sanjivi Reddi v. Koneri Reddy*. (Per Vishwanatha Sastri, J.)
6. ('05) 2 Cri L Jour 421 (422) : 1905 P R No. 29 Cr, *Sardaran v. Amir Khan*.
- ('28) 111 Ind Cas 669 (670) : 29 Cr. L. J. 909 (Lah), *Makhan Singh v. Mt. Harnamo*.
- ('88) 11 Mad 199 (200) : 2 Weir 628, *Venkata v. Paramma*.
7. ('33) AIR 1933 Nag 374 (376) : 35 Cri L Jour 404 : 30 N L R 76, *Tulsidas v. Chetandas*.
- ('02) 4 Bom L R 609 (611), *Thakoredas v. Bhawandas*.

Note 6

1. ('20) AIR 1920 Nag 64 (65, 66) : 21 Cr. L. J. 310, *Devidin v. Narayana Rao*.
- ('07) 5 Cr. L. J. 123 (127) : 3 L B R 234, *Nur Md. v. Ko Aung Gyi*. (Per Fox, C. J.)
- ('09) 9 Cri L Jour 41 (48) : 1 I. C. 597 : 32 Mad 49, *In re Aiya Kannu Pillai*.

Section 202
Notes 6-9

made before a person is put on trial. Therefore the Legislature again, by Act II of 1926, amended the proviso under which now an inquiry or investigation may be directed even in the case of a complaint by a Court under S. 476.

As regards a complaint by a public servant, the section does not make any difference. The Magistrate has just as much right to investigate preliminarily under this section, whether the complaint is filed by a public servant or by anyone else.²

7. "Authorised to take cognizance." — A Magistrate cannot act under this section unless he has authority to take cognizance of the offence mentioned in the complaint. Thus, a Magistrate cannot take cognizance of an offence mentioned in S. 197 without the previous sanction of the Provincial Government and where he receives a complaint without such sanction, he cannot send the case to a subordinate Magistrate for inquiry under this section.¹

8. "Transferred to him under S. 192." — These words are new and were added by the amending Act XVIII of 1923 "to cover cases which have been transferred to a Magistrate under S. 192, as well as cases of which he has taken cognizance himself."¹ Before this amendment, it was held that a Magistrate, to whom a case had been transferred for disposal, had no jurisdiction to direct an inquiry or investigation under this section.² Now this is no longer law and a Magistrate to whom a case has been transferred under S. 192 can act under this section. But a transfer under S. 528 does not come within the ambit of this section and a Magistrate to whom a case is transferred under S. 528 cannot order an inquiry under this section.³

When a Magistrate has examined witnesses under S. 202 and, believing them, transferred the case for trial to another Magistrate, the latter has been held to have no power to examine those witnesses again under S. 202 and then proceed to dismiss the complaint under section 203.⁴

9. "May, if he thinks fit." — Under the Codes of 1872 and 1882, it was held that a Magistrate could not act under this section without discrimination¹ and unless he "sees cause or reason to distrust the truth of the complaint."² The Code of 1893 gave a little more

2. (21) AIR 1921 Sind 48(49):15 S L R 149: 23 Cr. L. J. 31, *Bassarmal v. Emperor*.
(30) AIR 1930 Pat 30 (31, 32) : 30 Cri L Jour 554, *Parmanand v. Emperor*.

Note 7

1. (31) AIR 1931 Oudh 392 (393, 394): 32 Cr. L. J. 991, *Bhagirath v. Ali Hamid*.

Note 8

1. Report of the Select Committee of 1916.

2. (15) AIR 1915 Cal 20 (21) : 22 Ind Cas 422 (422) : 15 Cri L Jour 70, *Mahamad Imamuddin v. Debendra Nath*.

(20) AIR 1920 Pat 563 (565) : 5 Pat L J 47 : 21 Cr. L. J. 594, *Ram Barai Singh v. Ram Pratap*.

3. (38) AIR 1938 Nag 433 (434) : 39 Cri L Jour 981, *Qamarali v. Mt. Tulsi*.

4. (37) AIR 1937 Oudh 81 (82) : 37 Cr. L. J. 1128 : 12 Luck 523, *Shoo Balak Singh v. Sant Bux Singh*. (If complaint is transferred at the very outset by one Magistrate to another, he can act under Section 202.)

Note 9

1. (81) 1881 All W N 23 (23), *Empress v. Lallu*.

2. (86) 9 All 85 (87) : 1886 A W N 307, *Queen-Empress v. Puran*.

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Notes 9-10

latitude to the Magistrate's discretion and a Magistrate could act under this section, if he was "*not satisfied as to the truth of a complaint.*"³ Even these words were considered too narrow and by the amendment of 1923 the Magistrate can now act under this section on any ground "*he thinks fit.*" It is, thus, entirely within the discretion of the Magistrate whether or not an inquiry or investigation under this section should be ordered.⁴ A complainant has no *right* to require his complaint to be forwarded to the police⁵ or to another Magistrate for investigation or inquiry.

10. "For reasons to be recorded in writing." — Where the Magistrate in any case in which he thinks fit, decides to act under this section, he is bound to record his reasons for doing so in writing.¹ As to the effect of a failure to so record the reasons, see Note 23.

- (96) 1896 Rat 844 (846), *Queen-Empress v. Shidlingappa*.
 ('73) 20 Suth W R Cr 17 (17, 18), *Queen v. Abhecn*.
 ('79) 4 Cal L R 134 (135), *In the matter of Diyogi Bhagut*.
 ('86) 14 Cal 141 (145, 146), *Baidya Nath Singh v. Muspratt*.
 ('88) 1888 Pun Re No. 24 Cr, p. 43 (45), *Narain Singh v. Empress*.
 ('97) 20 Mad 387 (387) : 2 Weir 240, *Empress v. Kannappa Pillai*.
 ('02) 2 Weir 241 (242), *In re Rangachari*.
 (1900) 1900 All W N 187 (188), *Empress v. Tota Ram*.
 [See ('84) 1884 Rat 206 (206), *In re Chhatrasangji*. (Non-existent civil proceedings not good ground for postponing investigation *sine die*.)]
 3. ('02) 1902 All W N 195 (195), *Empress v. Autla Duba*.
 (1900) 27 Cal 798 (800), *Jhummuck Jha v. Pathuk Mandal*. (Reason to doubt the truth of the complaint.)
 (1900) 27 Cal 921 (924, 925), *Mahadeo Singh v. Queen-Empress*. (Reason not to believe truth of the complaint.)
 ('01) 28 Cal 652 (661) : 5 C W N 457 (FB), *Dwaraka Nath v. Beni Madhab*. (Reason to doubt.)
 (1900) 4 Cal W N 305 (306), *Budh Nath Mahato v. Empress*.
 ('21) AIR 1921 Pat 85 (87) : 21 Cr. L. J. 519, *Gawharan Lal v. Sarjoo Saw*. (In case of doubt.)
 ('10) 11 Cri L Jour 351 (351) : 6 Ind Cas 390 (All), *Chhedi Kandu v. Emperor*.
 ('13) 14 Cri L Jour 493 (493) : 20 Ind Cas 749 (All), *Ram Pershad v. Moti*.
 ('13) 22 Ind Cas 165 (166) : 15 Cri L Jour 21 (All), *Baker v. Bansi*.
 4. ('33) AIR 1933 Rang 271 (272) : 34 Cri L Jour 1185, *U Po Yone v. Emperor*.
 5. ('35) AIR 1935 Bom 76 (78) : 59 Bom 171 : 36 Cr. L. J. 483, *Morarji v. Emperor*.

Note 10

1. ('40) AIR 1940 Pat 97 (98) : 41 Cr. L. J. 349, *Mukti Narain v. Emperor*.
 ('87) 9 All 85 (87) : 1886 A W N 307, *Queen v. Puran*.
 (1900) 1900 All W N 187 (188), *Empress v. Tota Ram*.
 (1900) 1900 All W N 189 (189), *Queen-Empress v. Jeto Mal*.
 ('02) 1902 All W N 195 (195), *Empress v. Autla Duba*.
 ('87) 14 Cal 141 (146), *Baidyanath v. Muspratt*.
 ('02) 6 Cal W N 843 (844), *Mrinal v. Emperor*.
 ('29) AIR 1929 Cal 176 (177) : 30 Cr. L. J. 705, *Ajoy Krishna v. S. G. Bosc*. (Per Graham, J.)
 ('87) 1887 Pun Re No. 33 Cr, p. 70 (72), *Rallia v. Ahsan Shah*.
 ('28) AIR 1928 Lah 88 (89) : 29 Cr. L. J. 958, *Jagindar Singh v. Agha Safdar Ali*.
 ('97) 20 Mad 387 (387) : 2 Weir 240, *Queen-Empress v. Kannappa Pillai*.
 ('88) 2 Weir 244 (244), *Virabhadrayya v. Sooryanarayana*.
 ('18) AIR 1918 Pat 652 (653) : 19 Cr. L. J. 527, *Mushari Ram v. Raj Kishore*.
 ('26) AIR 1926 Pat 34 (35) : 26 Cr. L. J. 1394, *Ram Saran Singh v. Md. Jan Khan*.
 ('26) AIR 1926 Sind 194 (196) : 21 SLR 293 : 27 Cr. L. J. 711, *Crowder v. Morrison*.
 ('31) AIR 1931 Sind 113 (113, 114) : 32 Cr. L. J. 926, *Dharamdas Lilaram v. F. H. Pilcher*.
 ('10) 11 Cri L Jour 351 (351) : 6 I. C. 390 (All), *Chhedi Kandu v. Emperor*.
 ('11) 12 Cri L Jour 385 (385) : 1 U B R 73 : 11 I. C. 249, *Nga Tha Tu v. Emperor*.
 ('12) 13 Cri L Jour 749 (749) : 6 S L R 83 : 17 I. C. 61, *Gaji v. Jumanshah*.
 ('13) 14 Cri L Jour 493 (493, 494) : 20 I. C. 749 (All), *Ram Pershad v. Moti*.

Section 202
Note 11

11. "Postpone the issue of process." — An order under this section is one by virtue of which the Magistrate decides to postpone the issue of process for compelling the attendance of the accused person, where, for any reason that he thinks fit, he wishes to hold an inquiry or direct an inquiry or investigation into the complaint. He can do this, therefore, only *before process is issued*. Hence, a Magistrate, who, *after issue of process*,¹ or when the accused is brought under a warrant² or after taking evidence,³ holds an inquiry or directs an inquiry or investigation, acts in contravention of the section. After the issue of process he must proceed with the trial. This rule applies equally to the successor of a Magistrate who has issued the process⁴ as also to a Magistrate to whom the case is transferred after issue of process.⁵

Where a complaint is made against several persons jointly, the fact that the Magistrate has issued processes against some of them will not deprive him of his power to postpone the issue of process against the others and to make a preliminary inquiry in respect of the offences alleged against them.⁶

Under certain circumstances, however, a Magistrate may properly direct an inquiry under this section even after the issue of process. Where, after the Magistrate has issued processes against two accused, if one of them lays a cross-complaint, the Magistrate can properly *rescind the order to issue process* and send the cases to a subordinate Magistrate for inquiry and report.⁷

It has been held that where the Magistrate has before him two complaints connected with the same subject-matter, he has a discretion to postpone the issue of process in one case pending the result of the other case.⁸

When once the Magistrate postpones the issue of process under this section, he is required to inquire into the case himself or to direct an inquiry or investigation. The fact that there was already a police investigation does not affect his proceedings.⁹ Similarly, where the

(17) AIR 1917 Cal 462 (463) : 17 Cr. L. J. 396 (397), *Balailall v. Pasupati*.

(17) AIR 1917 All 91 (92) : 18 Cr. L. J. 765 (765), *Madho Gir v. Rashid Ahmed*.

Note 11

1. ('38) AIR 1938 Nag 433 (434) : 39 Cri L Jour 981, *Qamarali v. Mt. Tulsi*.

(12) 13 Cri L Jour 749 (749) : 17 I. C. 61 : 6 S L R 83, *Gaji v. Jumanshah*.

See Section 537 Note 17.

2. ('74) 21 Suth W R Cr 44 (45), *Ramkant Sirkar v. Jadub Chunder*.

('02) 2 Weir 241 (241, 242), *In re Rangachari*.

3. ('96) 1896 All W N 140 (141), *Empress v. Khurram Singh*.

(1900) 1900 All W N 187 (188), *Emperor v. Tota Ram*.

('86) 9 Mad 282 (282, 283) : 2 Weir 243, *Sadagopachariar v. Raghavachariyar*.

4. ('86) 9 Mad 282 (282, 283) : 2 Weir 243, *Sadagopachariar v. Raghavachariyar*.

5. ('38) AIR 1938 Nag 433 (434) : 39 Cri L Jour 981, *Qamarali v. Mt. Tulsi*.

6. ('40) AIR 1940 Nag 128 (128) : 41 Cr. L. J. 312, *Haroon Abdulla v. Gajadhar*.

7. ('23) AIR 1923 Cal 662 (662) : 25 Cr. L. J. 464, *Lalit Mohan v. Noni Lal*.

8. ('33) AIR 1933 Sind 254 (255) : 34 Cri L Jour 891, *Allahdino v. Emperor*.
(Interdependent cases of adultery and defamation—*Held*, latter should be stayed till decision of former.)

9. ('18) AIR 1918 Pat 350 (350, 351) : 19 Cr. L. J. 263, *Shconandan v. Emperor*.

Magistrate directs an inquiry under this section, he cannot issue process before he receives the report of the inquiry.¹⁰

Section 202
Notes 11-12

12. Position of the accused. — A person complained against does not become an accused until it has been decided to issue process against him, and he is not entitled to be represented by a pleader during the preliminary inquiry which may be held under this section.¹ If he chooses to attend the proceedings, he may, of course, do so like any other member of the public but he has no *locus standi* as a party, the purpose of the law being clearly to exclude him until sufficient ground for proceeding against him has been made out by the complainant.^{1a}

Proceedings under this section are not proceedings *inter partes* but they are instituted and conducted by the Magistrate in order that he may be able to satisfy himself whether there is or is not, any ground for issuing process and it is not until process is issued that the matter becomes a case.² Therefore, the practice of issuing a notice to the accused before the issue of process³ or of conducting the inquiry in his presence⁴ or of hearing arguments on behalf of the accused⁵ or of

10. ('25) AIR 1925 Cal 989 (990), *Krishna Bala Dasi v. Niroda Bala Dasi*.

Note 12

1. ('33) 37 Cal W N 709 (711), *Fanindra Kumar v. Rahat Bux Chowdhari*. (Magistrate should not permit the accused to be represented by lawyers and to argue that the complaint should be dismissed.)

1a. ('08) 8 Cri L Jour 20 (23); 4 Nag L R 81, *Sheikh Chand v. Mahomed Hanif*. ('11) 11 Ind Cas 311 (311, 312) : 38 Cal 880, *Golapjan v. Dholanath*.

('34) AIR 1934 Rang 167 (168) : 36 Cri L Jour 75, *S. D. Vardon v. Hearsay*.

2. ('26) AIR 1926 Sind 188 (189) : 20 S L R 43 : 27 Cr. L. J. 491, *Atmaram Udhowdas v. Topandas*.

('26) AIR 1926 Pat 31 (35) : 26 Cr. L. J. 1391, *Ram Saran v. Mohammad Jankhan*.

('33) AIR 1933 Cal 447 (448) : 60 Cal 1051 : 31 Cr. L. J. 604, *Fanindra Kumar v. Rahat Bux*.

3. ('15) AIR 1915 Mad 128 (129) : 21 Ind Cas 703 (704, 705) : 37 Mad 181, *Sheikh Meeran v. Ratnavelu Mudali*.

('27) AIR 1927 Mad 19 (20, 21) : 49 Mad 918 : 28 Cri L Jour 129 (FB), *Appa Rao Mudaliar v. Janaki Ammal*.

('27) AIR 1927 Mad 18 (18, 19) : 49 Mad 926 : 28 Cri L Jour 113, *Varadarajulu Naidu v. Kuppasami Naidu*.

('13) 14 Cr. L. J. 57 (58) : 40 Cal 444 : 18 I. C. 345, *Bhim Lal Shah v. Bisa Singh*.

('31) AIR 1931 Bom 524 (525) : 55 Bom 770 : 33 Cr. L. J. 72, *Emperor v. Finan*.

('23) AIR 1923 Cal 198 (198, 199) : 24 Cr. L. J. 333, *Chandi Charan v. Manindra*.

('28) AIR 1928 Lah 97 (97) : 29 Cr. L. J. 39, *Moti Lal v. Emperor*.

('30) AIR 1930 Rang 156 (158) : 8 Rang 1 : 31 Cr. L. J. 824, *Dhana Reddy v. Emperor*.

('26) AIR 1926 Sind 194 (196, 197) : 21 S L R 293 : 27 Cri L Jour 711, *M. H. Crowder v. L. A. Morrison*.

('12) 13 Cr. L. J. 484 (485) : 39 Cal 1041 : 15 I. C. 481, *Emperor v. Bhika Hossein*.

4. ('02) 6 Cal W N 843 (844), *Mrinal Kanti v. Emperor*.

('20) 25 Cal W N xii (xii), *Baul Pramanik v. Sub-Inspector of Raigunj*.

('11) 12 Cr. L. J. 385 (386) : 1 U B R 73 : 11 I. C. 249, *Nga Tha Tu v. Emperor*.

[But see ('13) 14 Cri L Jour 3 (4) : 18 Ind Cas 147 (Lah), *Abdul Gaffar Beg v. Emperor*. (Examination of complainant in presence of accused so as to enable him to cross-examine complainant held, necessary in the circumstances of the case.)]

5. ('25) AIR 1925 Cal 576 (577) : 26 Cr. L. J. 305, *Bachoo Mia v. Anwar Nabi*.

('12) 13 Cr. L. J. 125 (125) : 13 I. C. 781 (Cal), *Sandyal v. Kunjeshwar Misra*.

('18) AIR 1918 Pat 652 (652, 653) : 19 Cr. L. J. 527, *Mushari Ram v. Rajkishore Lal*.

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Notes 12-13

examining him⁶ is undesirable and quite irregular and contrary to the spirit of the section and to the general principles of the Code, though such a procedure is not prohibited by the strict letter of the section,⁷ or may make the inquiry more complete and sometimes satisfy the Magistrate that the case is false.⁸ However, if such a procedure is followed by the Magistrate, he is not thereby committing an illegality.⁹

13. May inquire into the case himself or direct an inquiry or investigation. — Under this section, as it stood before the amendment in 1923, a Magistrate had *himself* to conduct the inquiry and could not direct an *inquiry* to be made by any subordinate Magistrate or a police-officer or other person. These persons could only hold a local *investigation*.¹ But in *Amrit Majhi v. Emperor*,² a doubt was raised whether the language of the section did not seem consistent with the long existing practice of referring complaints to subordinate Magistrates for inquiry and report. The amendment of 1923 now

(17) AIR 1917 Cal 462 (463) : 17 Cr. L. J. 396 (397), *Balailall Mookerjee v. Pasupati Chatterjee*.

[See however ('11) 12 Cri L Jour 207 (208) : 10 Ind Cas 33 (Cal), *Sheikh Akbar v. Prance*. (Person complained against should be admitted to watch proceedings and his representative, if advocate or pleader, should be allowed to act as *amicus curiae*.)]

6. ('23) AIR 1923 Lah 663 (664) : 26 Cr. L. J. 167, *Waryam Singh v. Crown*.

(28) AIR 1928 Lah 88 (89) : 29 Cr. L. J. 958, *Jagindar Singh v. Agha Safdar Ali*. [See also ('06) 3 Cr. L. J. 138 (140) : 32 Cal 1085 : 10 C W N 51, *Sat Narain v. Emperor*. (Where it is implied.)]

[But see ('34) AIR 1934 Sind 143 (145) : 36 Cr. L. J. 94, *Rewatmal Udhomal v. Sajamal Mchrumal*. (Magistrate not to issue notice to accused to show cause against his prosecution—But it is open to Magistrate if he deems it desirable to hear what the accused has to say and even to accept any documentary evidence on his behalf.)]

7. ('27) AIR 1927 Mad 18 (18) : 49 Mad 926 : 28 Cri L Jour 113, *Varadarajulu Naidu v. Kuppusami Naidu*.

8. ('26) AIR 1926 Pat 34 (35) : 26 Cri L Jour 1394, *Ram Saran Singh v. Md. Jan Khan*.

(27) AIR 1927 Mad 19 (20) : 49 Mad 918 : 28 Cri L Jour 129 (FB), *Appa Rao Mudaliar v. Janaki Ammal*.

[See also ('11) 12 Cri L Jour 207 (208) : 10 I. C. 33 (Cal), *Sheikh Akbar v. Prance*.]

9. ('28) AIR 1928 Bom 290 (290, 291) : 52 Bom 448 : 29 Cri L Jour 975, *In re Virbhan Bhagaji*.

(04) 1 Cri L Jour 102 (103) : 6 Bom L R 91, *In re Tukaram Udaram*.

(31) AIR 1931 Pat 302 (303, 304) : 32 Cr. L. J. 1023, *Mahabir Baitha v. Emperor*.

(31) AIR 1931 Sind 113 (113, 114) : 32 Cr. L. J. 926, *Dharamdas Lilaram v. Pilcher*.

(34) AIR 1934 Oudh 372 (373) : 35 Cr. L. J. 1239, *Gobardan Das v. Girdhari Lal*.

[See however ('40) AIR 1940 Pat 97 (100) : 41 Cri L Jour 349, *Mukti Narain v. Emperor*. (Examination of accused before calling upon complainant to substantiate his allegations is illegal — A I R 1920 Pat 655, Followed.)]

Note 13

1. ('10) 11 Cr. L. J. 525 (526) : 38 Cal 68 : 7 I. C. 747, *Hari Charan v. Srish Chandra*. ('16) AIR 1916 Cal 867 (868, 869) : 17 Cri L Jour 146 (147) : 43 Cal 173, *Gangadhar Pradan v. Emperor*.

(22) AIR 1922 All 211 (212) : 44 All 550 : 23 Cr. L. J. 279, *Emperor v. Durga Prasad*.

(20) 24 Cal W N c (c), *Taranath De v. Emperor*.

(12) 13 Cri L Jour 482 (483) : 40 Cal 41 : 15 I. C. 482, *Maniruddin Sarkar v. Abdul Rauf*.

(12) 13 Cr. L. J. 484 (485) : 39 Cal 1041 : 15 I C 484, *Emperor v. Bhika Hoosein*.

(12) 13 Cri L Jour 704 (704, 705) : 16 I. C. 512 (All), *Baij Nath v. Raja Ram*.

(20) AIR 1920 Nag 64 (66) : 21 Cri L Jour 310, *Devidin v. Narayan Rao*.

(17) AIR 1917 Pat 15 (16, 17) : 1 Pat L J 553 : 18 Cri L Jour 52, *Baij Nath Singh v. Emperor*.

2. ('19) AIR 1919 Cal 59 (60) : 46 Cal 854 : 20 Cri L Jour 508.

expressly empowers a Magistrate to direct an inquiry under this section by a Magistrate subordinate to him or an investigation by a police-officer or such other person as he thinks fit, thus expressly adopting the view held in *Amrit Majhi's case*.³ A third class Magistrate, however, even under the amended section, must inquire into the case himself and has no power to direct any inquiry or investigation.

Under this section, a Magistrate has to choose one of the two alternatives, namely, either to inquire into the case himself or direct an inquiry or investigation. He cannot have recourse to *both*. Where, therefore, a Magistrate chose to inquire into the case himself, it was held that he could not direct a local investigation.⁴ Similarly, where he has ordered an investigation by another person, he cannot follow it up by an inquiry himself.⁵ But it has been held by the Calcutta High Court that a Magistrate, *if he is dissatisfied* with the result of an investigation directed by him, may hold an inquiry himself.⁶

An inquiry under the section can be directed only to a *subordinate Magistrate* and not to a superior Magistrate⁷ or a Magistrate of the same class.⁸

The subordinate Magistrate directed to inquire need not be competent to entertain the complaint he is asked to inquire into, provided the Magistrate, who directs the inquiry, is competent to entertain and dispose of the same.⁹

Once a Magistrate has directed an inquiry by a subordinate Magistrate under this section, he cannot recall the proceedings before the inquiry is completed.¹⁰ But it has been held that he can *stay* the proceedings.¹¹

It has been held that where a Magistrate has directed an inquiry or investigation by another under this section, he cannot, on receipt of the report of such inquiry or investigation, transfer the case for disposal to another Magistrate without deciding whether the case should be dismissed under S. 203 or proceeded with under S. 204.¹²

14. "Inquiry."—The inquiry contemplated by this section does not necessarily mean an inquiry by examining witnesses, or by holding

3. ('19) AIR 1919 Cal 59 (60) : 46 Cal 854 : 20 Cr. L. J. 508, *Amrit Majhi v. Emperor*.
4. ('22) AIR 1922 All 211 (212) : 44 All 550 : 23 Cri L Jour 279, *Emperor v. Durga Prasad*.

('28) AIR 1928 Lah 88 (89) : 29 Cr. L. J. 958, *Jagindar Singh v. Agha Safdar Ali*.
(17) AIR 1917 All 91 (92) : 18 Cr. L. J. 765 (765), *Madho Gir v. Rashid Ahmad*.

5. ('37) AIR 1937 Nag 389 (389) : 39 Cri L Jour 80, *Tyab Ali v. Husainali*.

('13) 14 Cri L Jour 493 (494) : 20 I. C. 749 (All), *Ram Pershad v. Moti*.

6. ('10) 11 Cr. L. J. 525 (526) : 38 Cal 68 : 7 IC 747, *Haricharan v. Srish Chandra*.

7. ('12) 13 Cr. L. J. 484 (485) : 39 Cal 1041 : 15 I C 484, *Emperor v. Bhika Hossein*.

8. ('11) 12 Cri L Jour 539 (541) : 1912 Pun Re No 2 Cr : 12 I. C. 515, *Ali Mohammad v. Emperor*.

9. ('02) 6 Cal W N 295 (296), *Surjya Hariani v. Emperor*.

10. ('33) AIR 1933 Nag 374 (376, 377) : 30 Nag L R 76 : 35 Cri L Jour 404, *Tulsidas v. Chetan Das*. (Inquiry is not complete till all the witnesses whom complainant wants to examine have been examined.)

11. ('34) AIR 1934 Sind 143 (144) : 36 Cri L Jour 94, *Rewatmal Udhamal v. Sajammal Mehrumal*.

See also S. 344 Note 11.

12. ('40) AIR 1940 Lah 61 (63) : 41 Cri L Jour 344, *Santokh Raj Singh v. Gahwar Khan*. (A I R 1925 Cal 742, Followed.)

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Notes 14-15

an investigation into the case or in any particular form. The Magistrate can do it in any way he thinks proper.¹ He is at perfect liberty to look into the police records and if he is satisfied that the complaint is groundless, he can dismiss the complaint.² But where he examines witnesses in such an inquiry, and evidence which is opposed to the complainant's allegations is brought before him, he should give an opportunity to the complainant to explain or to meet such evidence.³ It is in the discretion of the Magistrate to allow the complainant to be represented by a vakil or not in such an inquiry.⁴ Proceedings in an inquiry under this section should not be dilatory and protracted.⁵

15. Evidence in the inquiry — Sub-s. (2A).— The evidence, in an inquiry held under this section, need not be confined to the examination of the complainant alone. The section leaves it to the discretion of the Magistrate to examine such witnesses and make such inquiries as he thinks fit.¹ There is nothing to prohibit him from examining witnesses, whom he knows to be able to throw light on the matter, or from importing even his own personal knowledge into it.² The Magistrate is also entitled to thoroughly cross-examine the witnesses in order to get at the truth.^{2a}

Where a Magistrate inquiring into a case under this section examines witnesses, he may, under sub-s. (2A), if he thinks fit, take the evidence of such witnesses *on oath*. This provision was added by the amending Act of 1923 to put an end to the long-existing conflict of views as to whether such an inquiry is a *judicial proceeding* within the meaning of S. 476 so as to make the complainant liable to prosecution for making a false complaint or for perjury. The Calcutta³ and Patna⁴ High Courts held that such an inquiry was a *judicial proceeding*, while the Madras High Court held that it was not.⁵ The

Note 14

1. ('24) AIR 1924 Pat 797 (799) : 26 Cr. L. J. 129, *Ramanand Lal v. Ali Hassan*. [But see ('34) AIR 1934 Oudh 88 (89) : 35 Cr. L. J. 415, *Sarjoo Prasad v. Ram Lal*. (Dismissal of complaint after merely making some oral inquiries without examining any one on oath is illegal and irregular.)]
2. ('24) AIR 1924 Pat 797 (799) : 26 Cr. L. J. 129, *Ramanand Lal v. Ali Hassan*. ('69) 11 Suth W R Cr 54 (54, 55), *Queen v. Rusick Monee*. [But see ('12) 13 Cr. L. J. 125 (125) : 13 I. C. 781 (Cal), *Sandyal v. Kanjeshwar Misra*. (He must give complainant 'opportunity' to prove case — Dismissal of complaint merely on basis of statements of accused's lawyer or of papers filed by accused with police is improper.)]
3. ('28) AIR 1928 Mad 135 (136) : 29 Cri L Jour 48, *McCarthy v. Shannen*. ('12) 13 Cri L Jour 125 (125) : 13 I. C. 781 (Cal), *Sandyal v. Kanjeshwar Misra*.
4. ('71) 8 Bom H C R 202 (204), *Bindachari v. Dracup*.
5. ('39) AIR 1939 Cal 33 (34):40 Cr. L. J. 213, *Ajit Nath v. Satish Chandra*.

Note 15

1. ('93) 1893 Rat 669 (669), *In re Kankuchand*.
2. ('30) AIR 1930 Mad 443 (444) : 30 Cri L Jour 1160, *Nagi Reddy v. Emperor*.
- 2a. ('39) AIR 1939 Pesh 16 (17) : 1939 Pesh L J 24 : 40 Cr. L. J. 674, *Gulmahamed v. Habibullah Karimullah*.
3. ('09) 9 Cr. L. J. 295 (296) : 36 Cal 72 : 11 I. C. 203, *Kanchan Garhi v. Ram Kishun*. ('05) 2 Cal L Jour 65n (65n), *Ambica Roy v. Emperor*.
4. ('24) AIR 1924 Pat 138 (139) : 24 Cr. L. J. 862, *Banshidar Marwari v. Emperor*.
5. ('11) 12 Cr. L. J. 323 (324) : 10 I. C. 619 (Mad), *In Re Kachimudar Labbai*. (Per Sundara Aiyar, J.; Ayling, J., *contra* at p. 325.)
- ('16) AIR 1916 Mad 1110 (1114) : 13 Cr. L. J. 209 (212) : 39 Mad 750 (FB), *Bapu v. Bapu*. (Per Spencer, J.)

Lahore High Court doubted if it was a judicial proceeding.⁶ The present sub-s. (2A) gives effect to the Calcutta and Patna view and the Madras view is no longer correct. An inquiry under this section therefore is now a judicial proceeding.⁷

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Notes 15-17

16. Magistrate holding inquiry, if disqualified from trying. — There is nothing in the Code which disqualifies a Magistrate, who holds a preliminary inquiry under this section, from trying the case himself when there is nothing to indicate that he initiated or directed the proceedings or took any personal interest in the matter of the complaint presented before him.¹ The fact that a subordinate Magistrate expressed his opinion in submitting a report, in a case referred to him under this section, is no bar to his holding the trial on an order by the District Magistrate making over the case to him for the purpose.² See S. 556 Note 19.

17. Investigation. — A Magistrate may, if he thinks fit, direct an investigation by a police-officer or by any other person for the purpose of ascertaining the truth or falsehood of the complaint. Before the amendment of 1923, the Magistrate could direct a *local* investigation even by a subordinate Magistrate.

The words "local investigation" were not restricted to the investigation of the physical features only but meant an inquiry into the truth or falsity of the complaint. The word 'local' was used with a view to hold the investigation in the locality for the convenience of the parties but the investigation was not confined to the investigation of the locality itself.¹ This is also evident from the definition of the term in S. 4 (1) (l) of the Code where the investigation by way of *collection of evidence* is to be conducted by a police-officer or by any person other than a Magistrate. A local investigation, therefore, is merely a proceeding for the collection of evidence on the spot for the purpose of ascertaining if the complaint is true or false.² It can be ordered when there is a quarrel about boundaries or any matter of that kind.³

(1902) 2 Weir 167 (167, 168), *Velu Nair v. Gnana Prakasam Pillai*.
(1900) 23 Mad 223 (224, 225) : 1 Weir 152, *Queen-Empress v. Venkataramanna*.
[But see ('04) 1 Cr.L.J. 118 (119) (Mad), *Public Prosecutor v. Palliyathodi Rayan*.
6. ('19) AIR 1919 Lah 37 (38) : 20 Cri L Jour 815, *Magbul Ahmed v. Emperor*.
7. ('04) 1 Cri L Jour 118 (119) (Mad), *Public Prosecutor v. Palliyathodi Rayan*.
See also S. 4 (1) (m) Note 5.

Note 16

1. ('97) 24 Cal 167 (168, 169), *Ananda Chunder v. Basu Mudh*.
(1923) AIR 1923 Rang 65 (65) : 1 Bur L J 32 : 24 Cr. L. J. 744, *Mrs. May Boudville v. Emperor*.
(1908) 23 Cal 328 (334), *Sudhama Upadhyaya v. Empress*. (Magistrate held disqualified from trying the case.)
See also S. 556 Note 19.
2. (1900) 4 Cal W N 604 (605), *Bani Madhab v. Rosaraj Gossami*.

Note 17

1. ('18) AIR 1918 Pat 172 (172, 173) : 19 Cr. L. J. 126, *Munshi Mian v. Emperor*.
(1920) AIR 1920 Nag 64 (65) : 21 Cri L Jour 310, *Devi Din v. Narayana Rao*.
2. ('20) AIR 1920 Pat 563 (565) : 2 P L J 47 : 21 Cri L Jour 594, *Ram Barai v. Ram Pratap*.
3. ('12) 13 Cri L Jour 704 (705) : 16 I. C. 512 (All), *Baij Nath v. Raja Ram*.

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The word 'local' has been deleted by the amendment in 1923 indicating clearly that the investigation is not confined to mere inspection of the locality.

18. "Investigation by police."

- (1) *Trivial and non-cognizable cases.* — It is not advisable for Magistrates to make indiscriminate use of police agency for the purpose of ascertaining matters as to which they are bound to form their own opinion.¹ This is specially so in cases regarding offences not cognizable by the police.^{1a} Similarly, in trivial cases, except for special reasons, one or the other of the modes of inquiry permitted by the section should be adopted² as it is an abuse of the powers given by this section to refer such petty cases (*e. g.*, an assault of a petty character) to the police for inquiry, the proper course for Magistrates in such cases being to take action on the complaint at once.³
- (2) *Cognizable cases.* — A police investigation under this section is different from the investigation referred to in S. 156. A Magistrate in cognizable cases, after he has taken cognizance of an offence under S. 190 (1) (a) (*e. g.*, on complaint) can only order an investigation and report under this section, but cannot order an inquiry under S. 156, and direct the police to submit a charge-sheet. That means a Magistrate cannot proceed under chapter XIV after acting under chapter XVI.⁴ When a complaint is referred under this section by the Magistrate for investigation, the police need do no more than make a report.⁵ But this does not debar them from exercising their ordinary powers of arrest and investigation and from sending up the accused for trial under a charge-sheet.⁶ The Bombay High Court⁷ and the Sind Judicial Commissioner's Court⁸

Note 18

1. ('33) AIR 1933 Sind 339 (340) : 27 Sind L R 387 : 35 Cr. L. J. 24, *Mahliomai Dansing v. Gianchand Salamatrai*.
- 1a. G. R. and C. O. High Court of Patna (Cr.), Vol. I, Chap. IV, S. 12. Rules and Orders, Lahore High Court (1931), Vol. III, Chap. I-B, para. 4. See also Cri. Cir. Judicial Commissioner Central Provinces (1929), Circular No. 7, para. 5. Police Regulations, Bengal (1928), Vol. I, S. 42.
2. Rules and Orders, Lahore High Court (1931), Vol. III, Chap. I-B, para. 4.
3. ('94) 1894 Pun Re No. 19 Cr, p. 67 (67), *Ganesha v. Emprcss*. [See also ('88) 12 Bom 161 (163), *In re Jankidas*.]
4. ('28) AIR 1928 Cal 24 (25) : 54 Cal 303 : 28 Cr. L. J. 577, *Isaf Nasya v. Emperor*. ('28) AIR 1928 Pat 359 (361) : 29 Cri L Jour 374, *Ulfat Khan v. Emperor*. ('22) 67 I. C. 499 (499) : 23 Cri L Jour 403 (Pat), *Rampabitar v. Kasim Ali*. See also S. 156 Note 5.
5. ('31) AIR 1931 Mad 770 (770) : 54 Mad 598 : 32 Cr. L. J. 690, *Gopal Naick v. Alagirisami Naick*.
6. ('31) AIR 1931 Mad 770 (770) : 54 Mad 598 : 32 Cr. L. J. 690, *Gopal Naick v. Alagirisami Naick*.
- (32) AIR 1932 Lah 579 (580) : 33 Cr. L. J. 737 : 14 Lah 194, *Rashid Ahmad v. Emperor*. ('23) AIR 1923 Pat 547 (548, 549) : 2 Pat 379 : 24 Cr. L. J. 375, *Emperor v. Bhola Bhagat*. ('78) 2 Cal L R 374 (376), *Beputoola v. Nazim Sheikh*. See also S. 156 Note 5.
7. ('29) AIR 1929 Bom 72 (73, 74) : 53 Bom 339 : 30 Cr. L. J. 781, *Nur Mahomed Rajmahomed v. Emperor*.
8. ('38) AIR 1938 Sind 113 (116) : 1 L R (1939) Kar 85 : 39 Cri L Jour 681 (FB), *Emperor v. Bikha Moti*. (AIR 1933 Sind 136, Overruled; AIR 1934 Sind 20 is no

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Note 18

have, however, held that where an investigation by the police has been ordered under this section, the police have no power to send up the accused for trial under a charge-sheet.

- (3) *Where the accused is a police-officer.* — If the accused is himself a police-officer, it is not proper nor is it contemplated that the Magistrate should call for a report from the police-officer, who is himself the accused⁹ or from a superior or other police-officer.¹⁰ In such cases the Magistrate himself should hold the inquiry¹¹ or direct a local inquiry by a subordinate Magistrate.¹² Complaints against police-officers should be handled with the greatest care. In such cases, the complainant should be given every facility to prove his allegations.¹³

It is not desirable that a complaint against a person who is alleged to have acted in collusion with the police should be handed over to the police for investigation.¹⁴ It has, however, been held in the undermentioned case¹⁵ that it is not illegal to send a complaint, in which the *bona fides* of the police are impugned, for inquiry or investigation by a police-officer.

- (4) *Report.* — The report called for under this section should form part of the record and as such a copy thereof can be given to the accused.¹⁶ The report should be submitted to the same Magistrate who had ordered the investigation and not to another Magistrate.¹⁷ Such a report is absolutely privileged.¹⁸

longer good law after this Full Bench decision — Police are not prevented from arresting the accused under Section 54.)

9. ('87) 14 Cal 141 (146), *Baidyanath Singh v. Muspratt*.

(20) AIR 1920 Pat 655 (656) : 5 P L J 61 : 21 Cri L Jour 621, *Har Narain v. Kariman Akur*.

10. ('84) 1884 All W N 47 (47), *Jalaluddin v. Mohammad Khalil*. (Other police-officers.)

(20) AIR 1920 All 77 (78) : 21 Cri L Jour 343, *Harihar Prasad v. Emperor*. (Superior police-officers.)

(20) AIR 1920 All 91 (92) : 21 Cri L Jour 619, *Mt. Shama v. Ejaz Ahmad*. (Superintendent of Police.)

(20) AIR 1920 All 125 (125) : 21 Cr. L. J. 416, *Meera Lal v. Emperor*. (Another police-officer.)

(1900) 4 Cal W N cexxi (cexxii), *Sarat Chandra v. Aghore*. (Police.)

(28) AIR 1928 Lah 86 (89) : 29 Cri L Jour 958, *Jagindar v. Agha Sabdar Ali*. (Do.)

(19) AIR 1919 Oudh 395 (395) : 22 Oudh Cas 321 : 20 Cr. L. J. 728, *Mt. Mahadevi v. Ram Sahai*. (Do.)

(05) 2 Cr L J 51 (53) : 9 C W N 199 (Cal), *Haladar Bhumij v. Sub-Inspector of Police*. (District Superintendent of Police.)

11. ('97) 20 Mad 387 (388) : 2 Weir 240, *Empress v. Kanappa Pillai*.

See cases cited in foot-note 10.

12. ('19) AIR 1919 Pat 495 (495) : 20 Cri L Jour 396, *Narain Singh v. Emperor*.

13. ('26) AIR 1926 Mad 288 (288) : 27 Cr. L. J. 107, *Devasikamani Mudaliar v. Narayana Prasad*.

See also Section 203 Note 9.

14. ('33) AIR 1933 Sind 339 (340) : 27 Sind L R 387 : 35 Cr. L. J. 24, *Mahliomal Dansing v. Gianchand Salamatrai*.

15. ('40) AIR 1940 Lah 208 (209) : 41 Cr. L. J. 618, *Kaniya Ram v. Chanan Mal*.

16. ('87) 14 Cal 141 (144), *Baidyanath Singh v. Muspratt*.

(31) AIR 1931 Mad 429 (429) : 32 Cr. L. J. 689, *Muthu Kumara Pillai v. Emperor*.

See also Section 548 Note 4.

17. ('18) AIR 1918 Lah 123 (124) : 19 Cri L Jour 436, *Thakar Singh v. Kirpal*.

18. ('37) AIR 1937 All 90 (94, 96) : 1 L R (1937) All 390, *Veni Madho Prasad v. M. Wajid Ali*.

Section 202
Notes 19-20

19. "Such other person." — The Magistrate may direct an investigation by *such other person as he thinks fit*. 'Such other person' under this section includes a panchayat within the meaning of the U. P. Village Panchayat Act.¹ A master is not a *fit person* to be directed to investigate and make a report in a case of complaint against his servant.²

It is illegal for a Magistrate to call upon the accused himself to make a report and act upon it.³

20. Examination of the complainant — Proviso. — The proviso to sub-s. (1) makes it obligatory on the Magistrate to examine the complainant on oath, before directing an inquiry or investigation under this section, save in the case where the complaint is by a Court. Under this section, before it was amended in 1923, such an examination was a pre-requisite, whether the Magistrate intended to make a personal inquiry himself or whether he intended to give a direction for an inquiry or investigation. The present proviso requires such examination to be made only where a *direction* for inquiry is to be made and not where the Magistrate intends to make a personal inquiry himself.

A complaint, therefore, cannot be sent for inquiry or investigation unless the complainant has been examined on oath;¹ and if any report of such an enquiry or investigation is called for without such

Note 19

1. See Section 72 (1) (a), U. P. Village Panchayat Act.
[See also ('26) AIR 1926 All 193 (193) : 27 Cri L Jour 276, *Kadhori v. Emperor*.]
2. ('15) AIR 1915 Cal 733 (734); 16 Cr. L. J. 320 : 28 I. C. 656 (656), *Emperor v. Rabbi*. ('05) 10 Cal W N xxxviii (xxxix), *Neckchand v. Emperor*.
3. ('87) 14 Cal 141 (146), *Baidyanath v. Muspratt*. ('98) 1898 Rat 954 (954, 955), *In re Subba Rao Ramchandra*. ('99) 3 Cal W N 17 (18), *Satyacharan v. Chairman of Utterpara Municipality*. ('20) AIR 1920 Pat 655 (656) : 5 Pat L J 61 : 21 Cr. L. J. 621, *Harnarain Halwai v. Kariman Ahir*.
[See also ('40) AIR 1940 Pat 97 (100) : 47 Cr. L. J. 349, *Mukti Narain v. Emperor*.]
[But see ('06) 3 Cri L Jour 327 (328) : 28 All 421 : 1906 A W N 76. *In re Dukhhi Kewat*. (Where the order calling for a report was considered as an order to show cause and hence not illegal.)]

Note 20

1. ('24) AIR 1924 All 664 (664) : 26 Cr. L. J. 176, *Rekha Chamar v. Emperor*. ('84) 1884 All W N 47 (47), *Jalaluddin v. Md. Khalil*. (1900) 1900 All W N 189 (189), *Empress v. Jeto Mal*. ('02) 1902 All W N 195 (195), *Emperor v. Amta Dube*. ('86) 1886 Rat 368 (369), *In re Bai Kashi*. ('98) 1898 Rat 954 (954, 955), *In re Subbrao Ramchandra*. ('87) 12 Bom 161 (163), *In re Janki Das*. ('86) 13 Cal 334 (336), *Umer Ali v. Saffer Ali*. (1900) 27 Cal 798 (800), *Jhumuck v. Pathuk*. ('01) 28 Cal 652 (661) : 5 C W N 457 (FB), *Dwarkanath v. Beni Madhab*. ('02) 29 Cal 410 (412), *Kuldip v. Budhan*. ('79) 4 Cal L R 134 (135, 136), *In re Bijogi Bhagat*. ('29) AIR 1929 Pat 473 (475) : 9 Pat 707 : 30 Cr. L. J. 1056 (FB), *Bharat Kishore v. Judhistir*. ('14) AIR 1914 Sind 159 (159) : 8 S L R 21 : 15 Cr. L. J. 662, *Emperor v. Nathu Mehar*. ('06) 3 Cr. L. J. 471 (472, 473) : 10 C W N 773, *Ram Adhin Chowdhry v. Wahed Ali*. ('10) 11 Cri L Jour 351 (351) : 6 I. C. 390 (All), *Chedi Kandu v. Emperor*. ('11) 12 Cr. L. J. 385 (385) : 1 U B R 73 : 11 I. C. 249, *Nga Tha Tu v. Emperor*. ('88) 2 Weir 244 (244), *Virabhadrayya v. Vyricherla*. ('19) AIR 1919 Pat 319 (320) : 20 Cr. L. J. 413, *Iqbal Khan v. Emperor*. ('21) AIR 1921 Sind 84 (84) : 15 Sind L R 200 : 23 Cri L Jour 243, *Mulchand Pamanmal v. Kessomal Ramchand*.

examination, and is made, it is without jurisdiction and cannot form the basis of any further action and a complainant, who was not examined, cannot be prosecuted with regard to his complaint, dismissed on such a report.²

Section 202
Notes 20-23

21. Powers of the inquiring or investigating officer.

- (1) A *Magistrate* inquiring into a case can exercise all the powers of a Magistrate, including the power of taking evidence of witnesses on oath. But he has not the powers of a police-officer to keep an accused in custody for the purpose of an inquiry.¹
- (2) A *police-officer* making an investigation under this section has all the powers conferred on him under chapter XIV. He can make a full inquiry from the complainant and his witnesses and the defendant and his witnesses.²
- (3) *Any other person* directed to make an investigation has all the powers of an officer-in-charge of the police-station except the power of arrest without warrant,³ i. e., the powers conferred under ss. 55, 56, 94, 127, 128, 153, 156 and 157; the power to arrest without warrant remains with the Magistrate and a police-officer.⁴

22. Police in the towns of Calcutta and Bombay — Sub-section (3). — See Notes to Section 1.

23. Revision. — When a Magistrate does not act as he should under this section, the aggrieved party is entitled to apply in revision and the High Court has jurisdiction to interfere if necessary in the interests of justice.¹ If any irregularity in procedure under this section has not resulted in a miscarriage of justice, the High Court will not make any order in revision, which can result only in harassment to the parties and the waste of public time.² The following are instances of such irregularities where the High Court will not interfere unless there is a failure of justice —

- (1) the omission of the Magistrate to record reasons for postponing issue of process;³

2. ('11) 12 Cr.L.J. 539 (541); 12 I. C. 515 : 1912 Pun Re No. 2 Cr, *Ali Mohamad v. Emperor*.

(1900) 27 Cal 921 (924), *Mahadco v. Queen-Empress*.

('03) 30 Cal 923 (925, 926) : 7 C W N 525, *Lokenath v. Sanyasi*.

(1900) 4 Cal W N 305 (306), *Budhnath Mahato v. Empress*.

('35) AIR 1935 All 745 (745) : 36 Cr. L. J. 860 : 58 All 129, *Bhagwan Das v. Emperor*.

[But see ('34) AIR 1934 Pat 156 (157) : 35 Cr. L. J. 1309, *Raghunandan Lal v. Emperor*. (Failure to examine complainant held to be merely an irregularity.)]

Note 21

1. ('30) AIR 1930 All 259 (259, 260) : 52 All 457 : 31 Cr. L. J. 998, *Anand Behari Lal v. Emperor*.

See also S. 167 Note 3.

2. ('07) 5 Cri L Jour 83 (84) : 33 Cal 1282, *Debi Bux v. Jutmal Dungarwal*.

3. ('28) AIR 1928 Bom 290 (291) : 52 Bom 448 : 29 Cr. L. J. 975, *In re Vurbhan Bhagaji*.

4. ('32) AIR 1932 Pat 72 (78) : 33 Cr. L. J. 349, *Raghunath Puri v. Emperor*.

Note 23

1. ('38) AIR 1938 Mad 879 (879) : 39 Cr. L. J. 984, *In re Venkatasubba Pillai*.

2. ('18) AIR 1918 Pat 350 (351) : 19 Cr. L. J. 263, *Sheonandan Mahlon v. Emperor*.

3. ('17) AIR 1917 All 91 (92) : 18 Cr. L. J. 765 (765, 766), *Madhogir v. Rashid Ahmad*.

- ('31) AIR 1931 Bom 524 (525) : 55 Bom 770 : 33 Cr. L. J. 72, *Emperor v. Finan*.

- ('29) AIR 1929 Cal 176 (177) : 30 Cr. L. J. 705, *Ajoy Krishna v. S. G. Bosc*.

- ('01) 2 Weir 244 (245), *Venkatesulu Naidu v. Durvasa Rangayen*.

- ('02) 25 Mad 546 (548) : 2 Weir 245, *Emperor v. Alagiriswami*.

Section 202
Note 23

- (2) requiring the accused to attend at the inquiry or his examination thereat, and allowing of cross-examination and arguments *inter partes*;⁴
- (3) omission to examine the complainant under the proviso;⁵
- (4) mere inadequacy of the inquiry; the High Court will not interfere with the details of an inquiry or investigation;⁶
- (5) where the Magistrate has exercised his discretion under this section to postpone the issue of process,⁷ or where the Magistrate does not record the statements of witnesses examined before him, but relies on the statements made before the police.⁸

Where, however, in a case, where the inquiry is made by the police in a perfunctory manner and the report is considered by the Magistrate also in a perfunctory manner, the High Court will interfere and insist on the provisions of the section being strictly complied with, though, where the inquiry has been carefully made and considered, it will refuse to interfere.⁹

Section 203

203.* The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the

Dismissal of
complaint.

* Code of 1898, original S. 203.

203. The Magistrate before whom a complaint is made, or to whom it has been transferred, may dismiss the complaint if, after examining the complainant, and considering the result of the investigation (if any) made under S. 202, there is, in his judgment, no sufficient ground for proceeding. *In such case he shall briefly record his reasons for so doing.*

1882 : S. 203 same as original S. 203 of 1898 Code — Except the last sentence printed in italics.

1872 : S. 147 para. 1; 1861 : Ss. 67, 180.

(‘09) 10 Cr. L. J. 117 (118) : 2 I. C. 618 (Mad), *Rangammal v. Krishnamachari*.
(‘11) 12 Cr. L. J. 463 (464) : 11 I. C. 999 (Mad), *In re Arula Kotiah*.
(‘18) AIR 1918 Pat 652 (653) : 19 Cr.L.J. 527, *Mushari Ram v. Raj Kishore Lal*.
(‘26) AIR 1926 Pat 34 (35) : 26 Cr. L. J. 1394, *Ramsaran v. Md. Jan Khan*.
(‘31) AIR 1931 Sind 113 (113, 114):32 Cr.L.J. 926, *Dharamdas Lila Ram v. Pileher*.

4. (‘28) AIR 1928 Lah 97 (97) : 29 Cr. L. J. 39, *Motilal v. Emperor*.
(‘18) AIR 1918 Pat 652 (653) : 19 Cr.L.J. 527, *Mushari Ram v. Raj Kishore Lal*.
(‘31) AIR 1931 Pat 302 (303, 304) : 32 Cr. L. J. 1023, *Mahabir v. Emperor*.
(‘26) AIR 1926 Pat 34 (35) : 26 Cr. L. J. 1394, *Ram Saran v. Md. Jan Khan*.
(‘26) AIR 1926 Sind 188 (189) : 20 S L R 43 : 27 Cr.L.J. 494, *Atmaram v. Topandas*.
5. (‘35) AIR 1935 All 883 (884) : 36 Cr.L.J. 1035, *Ram Gir v. Ravi Saran Singh*.
(‘14) AIR 1914 Sind 159 (159):8 S L R 21:15 Cr.L.J. 662, *Emperor v. Nathu Mchar*.
(‘29) AIR 1929 Pat 473 (475, 476) : 9 Pat 707:30 Cr.L.J. 1056 (FB), *Bharat Kishore v. Judhistir*.

[But see (‘19) AIR 1919 Pat 319 (320) : 20 Cr. L. J. 413, *Egbal Khan v. Emperor*.
(An earlier case, not referred to in the Full Bench decision cited above, holding that it is an illegality.)]

6. (‘30) AIR 1930 Pat 30 (32):30 Cr.L.J. 554, *Parmanand Brahmachari v. Emperor*.
7. (‘23) AIR 1923 Lah 663 (664) : 26 Cr. L. J. 167, *Waryam Singh v. Crown*.
8. (‘25) AIR 1925 Pat 584 (584) : 26 Cr. L. J. 1346, *Tilakdhari Singh v. Misri Singh*.
9. (‘18) AIR 1918 Pat 350 (351) : 19 Cr.L.J. 263, *Sheonandan Mahton v. Emperor*.

complainant and the result of the investigation or inquiry (if any) under section 202, there is in his judgment no sufficient ground for proceeding. In such cases he shall briefly record his reasons for so doing.

Section 203
Note 1

The words "after considering under S. 202" were substituted for the words "after examining the complainant if any made under S. 202" by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

The words "the investigation" were substituted for the words "any investigation" and the words and brackets "(if any)" were inserted after the word "inquiry" by the Code of Criminal Procedure (Amendment) Act, II of 1926.

Synopsis

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|---|--|
| 1. Scope of the section. | 9. "And the result of the investigation or inquiry (if any) under S. 202." |
| 2. "May dismiss the complaint." | |
| 3. Magistrate. | 10. "Shall record his reasons for so doing." |
| 4. Orders on complaint not to be delayed. | 11. Second complaint. |
| 5. "Sufficient ground for proceeding." | 12. Further inquiry. |
| 6. Who can dismiss a complaint. | 13. Abatement. See Note 6 under Section 247. |
| 7. Effect of dismissal. | 14. Appeal. |
| 8. Dismissal without examining complainant. | |

Other Topics (miscellaneous)

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| Competency of Courts to dismiss complaints. See Note 6. | Examination of the complainant. See Note 8. |
| Duty of Magistrate before dismissing the complaint. See Notes 8 and 5. | Power to rehear the same or fresh complaint. See S. 403. |

1. **Scope of the section.** — This section gives large powers to a Magistrate to dismiss a complaint *without issuing a process*.¹ It does not apply where process *has been issued*: the proceedings in such cases fall under the next chapter.² Nor does it apply where the proceeding is not one which is initiated on a *complaint*,^{2a} e. g., proceeding under S. 107,³ S. 552⁴ or S. 145⁵ of the Code.

Section 203 — Note 1

1. ('87) 14 Cal 141 (144), *Baidyanath v. Muspratt*. ('71) 6 Mad H C R App xv (xv) : 2 Weir 154.
2. ('91) 1891 Rat 544 (545), *Queen-Empress v. Budhunbhai*. ('68) 10 Suth W R Cr 61 (61) : 2 Beng L R (S N) 15, *Beelash v. Makroo*. ('97) 20 Mad 388 (388) : 2 Weir 251, *Queen-Empress v. Sinnai Goundan*. ('86) Weir 3rd Edn. 879 (880), *In re Muttusella Muttirayan*. ('34) AIR 1934 All 51 (52) : 56 All 285:35 Cr.L.J. 418, *Bhagwan Das v. Emperor*. 2a. ('32) AIR 1932 Cal 287 (287) : 33 Cr. L. J. 406, *Abdullah v. Emperor*. (Application to have police investigation expedited is not complaint and this section does not apply to such application.) ('05) 2 Cri L Jour 421 (422) : 1905 Pun Re No. 29 Cr, *Sardaran v. Amir Khan*. (Application under S. 488—Section does not apply.)
3. ('24) AIR 1924 Lah 680 (630) : 25 Cri L Jour 89, *Shamsuddin v. Ram Dayal*. (Application under S. 107 is not a complaint.) ('31) AIR 1931 Lah 185 (185) : 32 Cr. L. J. 21, *Kirpa Ram v. Durga Das*. (Do.) ('28) AIR 1928 Lah 694 (694) : 29 Cr. L. J. 866, *Hari Singh v. Jagta*. (Do.—This case has been overruled in AIR 1938 Lah 861 on another point.) See also S. 107 Note 14.
4. ('02) 4 Bom L R 609 (611), *Thakore Das Munchharam v. Bhagwan Das Madhavdas*. (This section does not apply to S. 552 where no offence is alleged.)
5. ('39) AIR 1939 Oudh 15 (15) : 40 Cr. L. J. 33, *Emperor v. Subhan*.

Section 203
Notes 1-2

The materials on which the Magistrate is to act are expressly limited by the section to —

- (1) the statement on oath (if any) of the complainant, and
- (2) the result of any investigation or inquiry under S. 202;⁶ anything outside it must be discarded.⁷

Thus, the Court cannot take into consideration the statements of witnesses examined by the police,⁸ or the evidence adduced in a counter case,⁹ or the result of a police inquiry not ordered by the Magistrate,¹⁰ or the result of an inquiry on a previous petition,¹¹ or the result of investigation ordered under S. 202 but not held in compliance with its terms;¹² again, the Court cannot ordinarily permit the opposite party to appear and argue that process should not issue. Where, however, the complainant has obtained an order for the seizure of the opposite party's books and for restraining him from operating on his banking account, the opposite party can appear and ask that such orders should be vacated.¹³ As to whether the proper course when a complaint is presented without the sanction required by S. 197 is to dismiss it under this section, see Note 11 under S. 197.

This section does not apply to complaints under the Merchant Shipping Act (XXI of 1923), which cannot therefore be dismissed under this section.¹⁴

2. "May dismiss the complaint." — Where a complaint is made to a Magistrate he has either to dismiss it under this section or issue process under S. 204.¹ He cannot pass any other kind of order.

6. ('32) AIR 1932 Cal 697 (697):33 Cr.L.J. 636, *J. K. Sinha v. Hemanta Kumar*. ('89) 13 Bom 600 (603), *In re Ganesh Narayan*.

(1900) 27 Cal 921 (924), *Mahadeo Singh v. Empress*.

('67) 8 Suth W R Cr 12 (13), *Queen v. Harrak Chand*.

[See also ('26) AIR 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788, *Subal Chandra v. Ahadullah Sheikh*.]

7. ('07) 6 Cri L Jour 85 (85, 86) : 9 Bom L R 742, *Mustafa v. Motilal*. (In this case complaint was dismissed by District Magistrate on his personal knowledge.)

8. ('76) 25 Suth W R Cr 10 (10), *Syed Nissar v. Ramgolam*.

9. ('24) AIR 1924 Cal 813 (814) : 25 Cr. L. J. 941, *Garibulla v. Sadar Akanda*.

10. ('33) AIR 1933 Sind 395 (395) : 28 S L R 1 : 35 Cr. L. J. 222, *Manghummal Vishindas v. Emperor*. (Dismissal after merely seeing police papers without giving complainant opportunity to substantiate his charges is bad.)

('30) AIR 1930 Rang 226 (227) : 31 Cr. L. J. 1064, *Maung Ko v. Maung Set*.

('68) 9 Suth W R Cr 21 (21), *Baroda Kant v. Kali Bhattacharjee*.

11. ('13) 22 Ind Cas 165 (166) : 15 Cr. L. J. 21 (All), *Bakar v. Bansi*.

12. ('86) 9 All 85 (87) : 1886 A W N 307, *Queen-Empress v. Puran*.

(1900) 27 Cal 921 (924), *Mahadeo Singh v. Empress*.

('01) 4 Oudh Cas 127 (132), *Ram Sarup v. Emperor*.

('88) 2 Weir 244 (244), *Virbhadrappa v. Viricharla Sooryanarayana*.

('99) 4 Cal W N 305 (306), *Budhnath v. Empress*.

('20) AIR 1920 Pat 655 (656) : 5 Pat L J 61 : 21 Cr. L. J. 621, *Har Narain Halwai v. Kariman Ahmir*.

('11) 12 Cri L Jour 539 (541) : 1912 P R No. 2 Cr : 11 I. C. 515, *Ali Md. v. Emperor*.

('17) AIR 1917 Cal 462 (463) : 17 Cr. L. J. 396 : 35 I. C. 828, *Balai Lal v. Pashupati*.

13. ('32) AIR 1932 Cal 697 (697, 698) : 33 Cr. L. J. 636, *J. K. Sinha v. Hemanta*.

14. ('33) AIR 1933 Cal 647 (647) : 35 Cr. L. J. 25, *Jafar Ali v. James Finlay & Co*. (Such complaint has to be inquired into in accordance with the provisions of that Act.)

Note 2

1. ('86) 13 Cal 334 (336), *Umer Ali v. Safer Ali*.

('38) AIR 1938 Sind 192 (192) : 39 Cr.L.J. 966, *Pherumal Lilaram v. Emperor*.

Thus, he cannot direct the police to submit a charge-sheet to some other Magistrate,² or submit the complaint to the District Magistrate after disbelieving the complaint,³ or order the issue of a search warrant after holding that no criminal case would lie.^{3a}

Section 203
Note 2

Where a Magistrate dismisses a complaint under this section there must be a specific order to that effect.⁴ The order must be a judicial order.^{4a}

The following orders have been held to be dismissals of complaints under this section :

- (1) An order refusing to issue process on a complaint.⁵
- (2) An endorsement on a complaint, "Enter as false. No prosecution."⁶
- (3) An order staying proceedings against some accused while proceeding with the case against others; in this case there is dismissal of the complaint so far as the former persons are concerned.⁷
- (4) An order holding the complaint to be false and calling upon the complainant to show cause against his prosecution.⁸

The following orders have been held not to be dismissals of complaints under this section :

- (1) Where a charge is made to the police and is repeated in a complaint before the Magistrate and the Magistrate passes a departmental order to the police, "show as false" but no order is passed on the complaint itself.⁹
- (2) A direction to the police after a complaint was referred to them that the complaint may be struck off the police file.¹⁰

(27) AIR 1927 Mad 19 (20) : 49 Mad 918 : 28 Cri L Jour 129 (FB), *Appa Rao v. Janakiammal*. (The practice of summoning an accused person at the stage marked by S. 202 has much greater dangers than safeguards to the accused.)

(30) AIR 1930 Rang 226 (227) : 31 Cri L Jour 1064, *Maung Ko v. Maung Set*.

2. ('28) AIR 1928 Cal 24 (25) : 54 Cal 303 : 28 Cr. L. J. 577, *Isaf Nasya v. Emperor*.

3. ('02) 6 Cal W N 843 (844), *Mrinal v. Emperor*.

3a. ('36) 164 I. C. 521 (521, 522) : 37 Cr. L. J. 991 (Cal), *S. R. Bagnal v. Mrs. Dean*.

4. ('69) 12 Suth W R Cr 53 (54) : 3 Beng L R App 151, *Queen v. Mrs. Belilias*. (Case stated dismissed but no order on the record to that effect.)

(28) AIR 1928 Bom 290 (291) : 52 Bom 448 : 29 Cri L Jour 975, *In re Virbhan Bhagaji*. (Merely saying "notice is discharged" is not sufficient.)

4a. ('39) AIR 1939 Sind 208 (208) : 1 L R (1939) Kar 277 : 40 Cri L Jour 807, *Joomal Tikandas v. Emperor*. (Issue of "C" summary not enough.)

(38) AIR 1938 Sind 192 (192) : 39 Cri L Jour 966, *Pherumal Lilaram v. Emperor*. (Order granting a summary A, B or C is an administrative matter and is not a proper order of dismissal.)

5. ('02) 29 Cal 457 (459) : 6 Cal W Notes 638, *Girish Chundra v. Emperor*. (Complaint against several persons — Magistrate proceeded against one only — Complaint against others held dismissed.)

(23) AIR 1923 Cal 198 (199) : 24 Cri L Jour 333, *Chandi Charan v. Manindra*. (Where it was so assumed.)

[But see ('07) 11 Cal W N cccviii (cccix), *Akhoy Kumar v. Debnath*.

(1900) 27 Cal 658 (660), *Har Kishore v. Jugal Chunder*. (In this case the persons against whom process was refused were mentioned in the complaint.)]

6. ('18) AIR 1918 Pat 270 (271) : 3 Pat L J 346 : 19 Cr. L. J. 874, *Sadhu Charan v. Babi Swain*.

7. ('98) 2 Cal W N 290 (292), *Inderjit Singh v. Thakur Singh*.

8. ('17) AIR 1917 Pat 15 (16) : 1 Pat L J 553 : 18 Cr. L. J. 52 : 37 I. C. 36 (37), *Baijnath v. Emperor*.

9. ('79) 4 C L R 413 (416), *Nusibunnissa Bibi v. Erad Ali*.

(79) 4 C L R 534 (536, 537), *Erad Ali v. Nusibunnissa Bibi*.

10. ('11) 12 Cri L Jour 463 (464) : 11 I. C. 999 (Mad), *In re Arula Kotiah*.

Section 203
Notes 2-5

- (3) An order expunging a charge from the list of reported offences.¹¹
In this case there is no complaint at all to be dismissed.
- (4) An endorsement on the complaint "Notice is discharged."¹²
- (5) A refusal to take cognizance of an offence for want of sanction (now complaint) under S. 195.¹³
- (6) An order that the "accused is warned."¹⁴
- (7) An order of reference to arbitration, as it is not in the powers of a Magistrate to make such a reference.¹⁵
- (8) An order withdrawing a process once issued.¹⁶
- (9) An order for the issue of summary "C."¹⁷

3. Magistrate.—The word "Magistrate" must mean a Magistrate to whom the Code applies. The Code does not apply to proceedings before Village Magistrate (see section 1) and a dismissal by a Village Magistrate of such a proceeding is not dismissal of a complaint under this section.¹

4. Orders on complaint not to be delayed.—There is nothing in the Code to show that the Magistrate must, *at once*, consider the complaint.¹ He must, however, pass orders as expeditiously as possible; it will be improper to delay the passing of orders for months.² As to the disposal of counter-complaints, see the undermentioned case.³

5. "Sufficient ground for proceeding."—The question whether there is sufficient ground for proceeding must, as has been seen in Note 1 already, be based upon the materials referred to in the section, namely, the statement on oath of the complainant and the result of any investigation or inquiry under S. 202. Where the facts alleged in the complaint constitute an offence and there are no circumstances apparent in the examination of the complainant, such as contradictions, variations, or serious and unexplained delay in instituting proceedings, justifying the Court in concluding that the complaint is false, there would be a *prima facie* case for proceeding.¹ Where, on the other hand,

11. ('81) 5 Bom 405 (407), *Government of Bombay v. Shidapa*.

12. ('28) AIR 1928 Bom 290 (291) : 52 Bom 448 : 29 Cr.L.J. 975, *In re Virbhan Bhagaji*.

13. ('01) 24 Mad 337 (339) : 2 Weir 251, *Queen-Empress v. Kuniyil Raru*.

14. ('18) 23 Cal W N xlviii (xlviii), *Thomas v. Edmonds*.

15. ('66) 1 Agra H C R 45 (46), *Sheo Nund Roy v. Mahanand Ram*.

16. ('07) 6 Cri L Jour 367 (369) : 12 C W N 68, *Panchoo v. Khoosdel*.

17. ('39) AIR 1939 Sind 208 (208) : ILR (1939) Kar 277 : 40 Cri L Jour 807, *Jeeomal Tikamdas v. Emperor*. (Though Magistrate may have intended by this order to dismiss the complaint under S. 203, an express judicial order is necessary.)

('38) AIR 1938 Sind 192 (192) : 39 Cr. L. J. 966, *Pherumal Lilaram v. Emperor*. (Granting of a summary A, B or C is a mere administrative matter — S. 203 requires a judicial order.)

Note 3

1. ('27) AIR 1927 Mad 695(696) : 28 Cri L Jour 507, *Rama Naidu v. Venkataswami*.

Note 4

1. ('17) AIR 1917 Pat 141 (142) : 19 Cri L Jour 228, *Nawazi v. Jadu*.
2. ('17) AIR 1917 All 95 (95) : 18 Cri L Jour 271 : 37 I. C. 639 (639), *Sallimullah v. Birjhan Singh*.
3. ('22) AIR 1922 Pat 618 (618) : 24 Cr. L. J. 120, *Lalji Singh v. Naurangi Lal*. (Disposal of one may be postponed pending disposal of other.)

Note 5

1. ('08) 8 Cri L Jour 342 (343) : 11 Oudh Cas 261, *Muhammad Salamat-ul-lah v. Lala Sital Prasad*.

Section 203
Note 5

the allegations contained in the complaint and in the complainant's oral statement disclose no criminal offence,² or are self-contradictory so as to be self-destructive or are physically impossible or involve an extreme degree of improbability, and so forth, as well as in cases in which the allegations made, though nothing can be said *a priori* of their possibility or probability, are practically incapable of proof, there can be no sufficient ground for proceeding.³ Unreasonable delay in filing a complaint under S. 211, Penal Code, has been held to be a sufficiently good reason for refusing to proceed with the complaint.⁴

Where the complaint shows only a *civil dispute* as to title or as to other civil claims, a Magistrate ought not to deal with them but should dismiss the complaint.⁵ The dividing line between criminal and civil liability is sometimes indistinguishable and the Magistrate

{13} 21 I. C. 171 (171, 172) : 14 Cr. L. J. 571 (Cal), *Ram Charan v. Haji Meah*. (Loss of currency notes—Complaint filed more than seven months after—Accused not found in recent possession of property shown to be stolen — Magistrate was right in not issuing process.)

{16} AIR 1916 Mad 713 (713) : 31 I. C. 650 (650, 651) : 16 Cr. L. J. 794, *Basavana Gowd v. Krishna Rao Naidu*. (There was no material discrepancy nor such delay as would warrant a summary dismissal of complaint.)

{72} 16 Suth W R Cr 65 (66), *Mahomed Jan v. Khadr Sheikh*. (Magistrate did not act illegally in dismissing the cases.)

{71} 16 Suth W R Cr 39 (40), *Isser Chunder v. Prari*. (Where *prima facie* case is made out, Magistrate must proceed.)

{76} 25 Suth W R Cr 35 (35), *Queen v. Thakoor Ram*. (Complaint not to be dismissed merely because complaint is not explicit.)

2. {37} AIR 1937 Mad 480 (481) : 38 Cri L Jour 581, *Kannayya v. Venkatesam*. (Alleged trespass on vacant site when neither complainant nor any one on his behalf was in actual possession—Complainant not able to say on what date trespass took place—Accused *held* could not be convicted and complaint ought to have been dismissed under S. 203, Criminal P. C.)

{10} 11 Cri L Jour 205 (209) : 5 I. C. 714 (Lah), *Abdur Razak v. Gaurinath*.

{87} 14 Cal 141 (146), *Baidyanath v. Muspratt*.

{28} AIR 1928 Lah 945 (946) : 30 Cri L Jour 162, *Amarnath v. Emperor*.

{75} Weir 3rd Edn. 873 (874), *High Court Proceedings, 24th July 1875, No. 1552*.

{33} AIR 1933 Rang 297 (298) : 35 Cr. L. J. 52, *Maung Ba Yone v. Ma Hla Kin*.

3. {10} 11 Cri L Jour 205 (209) : 5 I. C. 714 (Lah), *Abdur Razak v. Gaurinath*. [See {30} AIR 1930 Lah 62 (63) : 31 Cri L Jour 48, *Suraj Bhan v. Emperor*. (Criminal Court not to go behind findings of Civil Court.)

{21} 63 I. C. 464 (464) : 22 Cri L Jour 672 (Lah), *Kapur Chand v. Ugar Sain*. (It is absurd to expect a Court to take any notice of a complaint of cheating except when it is put in by the person actually defrauded.)]

4. {35} AIR 1935 Rang 485 (487) : 37 Cr. L. J. 243, *Murugappa v. Raman*. (Delay of 18 months—Delay not explained at the time of filing complaint.)

5. {37} 1937 M W N 1238 (1239), *Murugappa Chettiar v. Morangamuthu Raja*. (Especially when the complaint is belated.)

{35} AIR 1935 All 883 (884) : 36 Cri L Jour 1035, *Ram Gir v. Ravi Saran Singh*. (Claim for damages.)

{70} 2 N W P H C R 202 (203), *Queen v. Kishen Pershad*.

{80} 3 All 283 (286), *Raunak v. Harbans*.

{23} AIR 1923 All 544 (544) : 24 Cri L Jour 693, *Hukum Chand v. Emperor*. (Tenant removing some earth from plots of a landlord without consent—Question of civil nature between landlord and his tenants.)

{1865} 1865 Rat 3 (3), *Reg v. Raghoo*. (Complaint really a prayer for compelling the opposite party to perform an agreement for sale of house by execution of conveyance or to return the purchase money—A case for Civil Court.)

{18} AIR 1918 Bom 186 (187) : 42 Bom 664 : 19 Cri L Jour 597, *In re Khima*. (Complainant could better have his rights ascertained in Civil Court.)

{18} AIR 1918 Bom 256 (256) : 19 Cri L Jour 351, *Bai Samrath v. Emperor*. (Wrongful restraint—Joint owner locking up shop leased out by co-owner without consent—No offence is committed—Dispute *held* of civil nature.)

Section 203
Note 5

- (21) AIR 1921 Bom 435 (437) : 45 Bom 110 : 21 Cr. L. J. 716, *Emperor v. Yellappa*. (1864) 1 Suth W R Cr 25 (25), *Queen v. Sheikh Meerun*.
 (74) 21 Suth W R Cr 41 (42), *Joy Kuran v. Man Patuck*. (Question whether a certain contract is binding on complainant or not is proper for Civil Court.)
 (78) 4 Cal 10 (13) : 3 C L R 81, *Empress v. Abdool*. (Dispute as to which of the relatives should dispose of a minor girl in marriage is really a civil one.)
 (78) 4 Cal 374 (375), *Lal Das v. Nekunjo*. (Father's right to the custody of the child cannot be determined in the Magistrate's Court.)
 (05) 9 Cal W N 974 (983) : 2 Cr. L. J. 836, *Hari v. Emperor*. (S. 379 has been in this case misapplied to matters proper for Civil Courts.)
 (07) 11 Cal W N 887 (889) : 6 Cri L Jour 151, *Surja Prasad v. Mohabir Prosad*. (*Bona fide* dispute as to right to use trade mark—A civil dispute.)
 (23) 38 C L J 7 (9) : 24 Cr. L. J. 714 : 73 I. C. 938, *Bhabani Prosad v. Hari Charan*.
 (19) AIR 1919 Cal 59 (61) : 46 Cal 554 : 20 Cr. L. J. 508, *Amrit Majhi v. Emperor*.
 (20) AIR 1920 Cal 624 (629) : 21 Cri L Jour 481, *Lucas v. Official Assignee of Bengal*. (It is undesirable to start criminal proceedings during pendency of civil suit over the same question.)
 (24) AIR 1924 Cal 908 (911) : 25 Cri L Jour 1053, *Harry Jones v. Emperor*. (Investigation into whether a transaction was benami or not should not be undertaken by Criminal Courts.)
 (33) AIR 1933 Cal 149 (150) : 34 Cr. L. J. 676, *Rama Iyer v. Das Gupta*. (Matter of alleged breach of contract.)
 (20) 24 Cal W N lxxx (lxxx), *Jagrup v. Emperor*. (Dispute as to whether the balance of account had been settled or not.)
 (21) AIR 1921 Lah 185 (186) : 22 Cr. L. J. 142, *Khusi Ram v. Emperor*. (Real dispute as to right to property.)
 (23) AIR 1923 Lah 329 (330) : 24 Cr. L. J. 369, *Karam Chand v. Mathra Das*. (Do.)
 (25) AIR 1925 Lah 289 (290) : 26 Cri L Jour 287, *Ladha Shah v. Zaman Ali*. (Complaint under S. 417 with regard to a mortgage transaction.)
 (25) AIR 1925 Lah 599 (600) : 27 Cri L Jour 231, *Tulsi v. Emperor*. (Question whether alleged mortgage was with or without possession.)
 (27) AIR 1927 Lah 145 (146) : 28 Cr. L. J. 158, *Ishar Das v. Emperor*. (Dispute about ownership of a plot of land.)
 (87) 1887 Pun Re No. 50 Cr. p. 131 (132), *Gulzar v. Empress*. (An act may be a mere civil wrong or a criminal offence—Persons should not go to Criminal Court unless they are fully prepared to prove that the act committed is criminal and not merely a civil wrong.)
 (16) AIR 1916 Lah 174 (175) : 17 Cri L Jour 7 (7, 8), *Pars Ram v. Jalal Din*. (Criminal action should be stayed pending the disposal of civil suit.)
 (1862) 1 Mad H C R Cr 66 (67, 68), *Ex parte P. Varadarajulu Naidu*. (Magistrate should better have adjourned criminal proceedings pending the civil suit.)
 (85) 8 Mad 140 (147), *In re Paul De Cruz*. (Proper course was to postpone the trial.)
 (24) AIR 1924 Mad 31 (31) : 25 Cr. L. J. 138, *Tiruvengadachariar v. Chokhalingam*. (Compoundable offence — Damages awarded in a civil suit — Criminal trial not justified.)
 (23) AIR 1923 Rang 157 (158) : 24 Cr. L. J. 929, *Maung Shwe Ku v. Emperor*.
 (05) 2 Cr. L. J. 47 (49) : 9 C W N 195, *Cassem v. Jonas Hadjee*.
 (05) 2 Cr. L. J. 326 (327) : 32 Cal 431, *Dowlat v. Emperor*. (*Bona fide* dispute as to whether complainant has any trade mark at all or whether accused is or is not entitled to use the mark—Clear case for a Civil Court.)
 (05) 2 Cr. L. J. 754 (755) : 28 Mad 304, *Algaraswami Tevan v. Emperor*. (It is the province of Civil Courts to decide questions of ownership of land between Government and private persons just as much as between private claimants.)
 (05) 2 Cr. L. J. 851 (854) : 9 C W N 1030, *Godai Shaha v. Emperor*. (Question as to legal guardianship.)
 (06) 3 Cr. L. J. 98 (102) (Kathiawar), *Maun Ghela Amarchand v. Jadeja Meruji*. (Trial Court dismissing complaint as dispute was of a civil nature — District Magistrate directing further enquiry—District Magistrate's order set aside.)
 (06) 4 Cri L Jour 227 (228) : 10 C W N 1099 : 4 C L J 558, *Hiranand v. Emperor*. (Question of benami transactions.)
 (11) 12 Cr. L. J. 50 (55) : 1910 P R No. 33 Cr : 8 I. C. 1161, *Emperor v. Bishen Das*. (*A* and *B* brought complaint of cheating and fraud with regard to sale of valuable securities against *C*—*C* brought a suit on securities against *A* and *B* and obtained decree on merits—Criminal Court framed charge—Held that Magistrate ought to have stayed proceedings.)

should thoroughly examine the complainant to see if any criminal offence is made out.⁶ If the allegations disclose a criminal offence, the complaint ought not to be dismissed even if a civil remedy is obtainable.⁷

Section 203
Note 5

A Magistrate cannot dismiss a case off-hand unless a *prima facie* case of any kind is not made out.⁸ Where a *prima facie* case is made out, the following are not sufficient grounds on which a complaint can be dismissed :

- (1) The fact that besides the complainant other persons could complain against an accused.⁹
- (2) The fact that a libellous publication complained of is a mere republication.¹⁰
- (3) The withdrawal of the complaint by the complainant in a warrant case which is non-compoundable.¹¹
- (4) The absence of personal injury to the complainant and the complainant being a mere tool of another person.¹²
- (5) The fact that the complainant had no personal knowledge of the facts of the complaint.¹³
- (6) The fact that the complainant is of low caste.¹⁴
- (7) The fact that the charge might be laid to the police in the first instance.¹⁵

(13) 18 Ind Cas 404 (406) : 40 Cal 281 : 14 Cr. L. J. 68, *Anathmath Dey v. Emperor*.
(13) 18 Ind Cas 688 (688) : 14 Cr. L. J. 128 (Lah), *Anant Singh v. Emperor*.
(13) 21 Ind Cas 899 (900) : 14 Cr. L. J. 659 (Lah), *Shib Das v. Emperor*. (Theft of grass—Possession of spot whence the grass was cut was in dispute—A case for Civil Court.)

(14) 23 I. C. 657 (660) : 15 Cr. L. J. 305 : 1914 A C 221 (PC), *Lonier v. The King*.
(17) AIR 1917 Mad 831 (832) : 35 I. C. 966 (967) : 17 Cr. L. J. 406, *In re Bakir Ali Khan*. (Question of civil rights between a landlord and his tenant.)

(22) 67 Ind Cas 499 (499) : 23 Cr. L. J. 403 (Pat), *Ramabitar Singh v. Kasim Ali Khan*. (Dispute over payment of consideration.)

(23) 71 I. C. 789 (791) : 24 Cr. L. J. 215 (Peshawar), *Khemchand v. Emperor*.
(26) 92 I. C. 163 (164) : 27 Cr. L. J. 211 (Lah), *Abdul v. Emperor*. (Dispute between municipality of Zira and petitioner with regard to a pond having trees around it.)

(92) 1 Weir 490 (490), *In re Jagannathan*. (Bona fide civil dispute regarding a wall.)

6. ('20) AIR 1920 All 274 (275) : 42 All 522 : 22 Cr. L. J. 84, *Mohan v. Emperor*.

(21) AIR 1921 Pat 85 (87) : 21 Cri L Jour 519, *Gowakaran Lal v. Sarjoo Saw*. (Complaint under S. 403, Penal Code—Allegations not necessarily involving adjustment of accounts—Case should not be dismissed as being of civil nature.)

7. ('68) 10 Suth W R Cr 40 (40), *Khosal Singh v. Toolsee Chowdhry*.

(11) 12 Cr. L. J. 123 (124) : 9 I. C. 726 (Mad), *Narayanaswami v. Vadivelu*.

(33) AIR 1933 All 42 (42) : 33 Cr. L. J. 881, *Lal Bahadur v. Emperor*.

(26) AIR 1926 Sind 194 (198) : 27 Cr. L. J. 711 : 21 SLR 293, *Crowder v. Morisson*.

[See ('68) 9 Suth W R Cr 22 (22), *Madhub Kyburto v. Keshub Singh*. (Civil proceeding no bar to criminal proceedings.)]

See also S. 1 Note 1, S. 190 Note 17, S. 200 Note 10 and S. 204 Note 5.

8. ('23) AIR 1923 Lah 663 (664) : 26 Cr. L. J. 167, *Waryam Singh v. Emperor*.

(24) AIR 1924 Pat 379 (380) : 24 Cr. L. J. 316, *Chhedi Upadhya v. Emperor*. (The Magistrate ought only to see whether the complainant has *prima facie* made out a true case.)

9. ('27) AIR 1927 All 69 (70) : 27 Cr. L. J. 1104, *Behari Lal v. Ganga Din*.

10. ('88) 12 Bom 167 (168), *In re Howard*. (S. 499, Penal Code, makes no exception in favour of second or third publication as compared with first.)

11. ('89) 13 Bom 600 (603), *In re Ganesh Narayan Sathe*.

12. ('89) 13 Bom 590 (598) (FB), *In re Ganesh Narayan*.

13. ('93) 1893 Rat 669 (669), *In re Kankuchand*.

14. (1865) 2 Suth W R Cr 35 (36), *Queen v. Nobin Dome*. (Case of defamation.)

15. ('70) 14 Suth W R Cr 36 (36), *Ameer Mahomed v. Brass*. (In this case High Court did not interfere with order of dismissal as no case was made out but accepted the principle stated above.)

Section 203
Note 5

- (8) The fact that the complaint was not preferred by a person more responsible than the one who preferred it.¹⁶
- (9) The fact that there is no possibility of a conviction.¹⁷
- (10) The fact that the person complained against has been exonerated in a previous departmental inquiry in which the complainant has no concern.¹⁸
- (11) The fact that the complaint is cognizable by another Magistrate.¹⁹
- (12) The fear that the entertainment of the complaint would encourage hundreds of such complainants and would stir up old religious feelings of animosity between communities.²⁰
- (13) Reasons arising out of the Magistrate's own personal knowledge of the affair, or conjecture, or out of knowledge acquired prior to the making of the complaint.²¹
- (14) The fact that the result of the proceeding would be undesirable or the motive or conduct of the complainant is discreditable or malicious.²²
- (15) The fact that a previous complaint has been dismissed under S. 259.²³
- (16) The fact that there was some possibility that the accused might have some defence to the complaint if true.^{23a}

A complainant has a right to an adjudication on the point whether there is a sufficient ground for proceeding before his complaint is dismissed.²⁴ The decision whether there is *sufficient ground* for dismissing a complaint must be reached by the exercise of discretion based on judicial considerations.²⁵

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- 16. ('72) 18 Suth W R Cr 55 (56), *Boodhoo Roy v. Ramdyal Singh*.
 - 17. ('26) AIR 1926 Cal 795 (796, 797) : 53 Cal 606 : 27 Cri L Jour 788, *Subal Chandra v. Ahadulla*. (If Magistrate were to dismiss complaint on such ground it would mean either that he was trying out merits of case at a preliminary stage in proceedings or was following a process of guess work and speculation which he is not permitted to do.)
 - (1902) 29 Cal 410 (411, 412), *Kuldip Sahai v. Budhan Mahlon*.
 - ('19) AIR 1919 Cal 78 (79) : 20 Cri L Jour 175, *Fazlar Rahaman v. Abedur Rahaman*. (Complaint of murder — Magistrate without examining complainant or witnesses, coming to conclusion that no jury would convict person complained against and refusing to summon accused—*Held* that case ought not to have been disposed of.)
 - 18. ('87) 1887 Pun Re No. 33 Cr, p. 70 (72, 73), *Rallia v. Ahsan Shah*.
 - 19. ('73) 7 Mad H C R App xxxi (xxxii).
 - 20. ('91) 1891 Rat 562 (562, 563), *Queen-Empress v. Ram Chandra*.
 - 21. ('07) 6 Cr L J 85 (85, 86) : 9 Bom L R 742, *Mustafa v. Motilal*.
 - 22. ('16) AIR 1916 Mad 303 (304) : 14 Cri L Jour 633 (634) : 38 Mad 512, *Gangu Reddy v. Samarapathy Mudali*.
 - (189) 13 Bom 600 (604), *In re Ganesh Narayan Sathe*.
 - (126) AIR 1926 Sind 194(198):27 Cr L J 711: 21 S L R 293, *Crowder v. Morisson*.
 - (191) 1891 Rat 549 (550), *Queen-Empress v. Manji*. (Malice.)
 - (189) 13 Bom 590 (598) (FB), *In re Ganesh Narayan Sathe*.
 - (134) AIR 1934 Nag 135(136):35 Cr.L.J.1215, *Chamru v. Bhaironprasad*. (Motive.)
 - 23. ('14) AIR 1914 Sind 44 (44) : 8 S L R 196 : 16 Cri L Jour 174, *Bulchan v. Ghandhoomal*.
 - 23a. ('40) AIR 1940 Pat 179 (180) : 41 Cr. L. J. 504, *Sheodeni v. Budheshwar*.
 - 24. ('71) 15 Suth W R Cr 53 (54) : 7 Beng L R 7, *Taki Md. v. Krishna Nath*.
 - (191) 16 Suth W R Cr 77 (77), *In the case of Bishoo Barik*.
 - (1900) 27 Cal 126 (130, 131) : 3 C W N 601, *Charoobala Dabce v. Barendra Nath*.
 - (116) AIR 1916 Mad 303 (303) : 14 Cr. L. J. 633 (634) : 38 Mad 512, *Gangu Reddy v. Samarapathy Mudali*.
 - 25. ('16) AIR 1916 Mad 303 (303) : 14 Cr. L. J. 633 (634) : 38 Mad 512, *Gangu Reddy v. Samarapathy Mudali*.

It is only in very rare cases that a Court will be justified in throwing out a complaint without giving an opportunity to the complainant to substantiate his allegations; but in certain cases it becomes the duty of the Court to protect the accused from unnecessary harassment and worry, and prevent an abuse of the process of the Court.²⁶

6. Who can dismiss a complaint. — Under this section a complaint may be dismissed by —

- (1) the Magistrate before whom a complaint is made,
- (2) the Magistrate to whom it has been transferred,¹
- (3) the successor of the Magistrate who recorded the complaint and ordered inquiry.²

Even if the complaint is transferred to a superior Magistrate solely for the purpose of transferring it to another, the Magistrate to whom it is sent for transfer can dismiss a complaint under this section.³

The Magistrate to whom the complaint is transferred cannot, however, dismiss the complaint without giving notice to the complainant of such transfer.⁴

If a complaint is transferred at the very outset to another Magistrate, he has power to take action under ss. 202 and 203. But when one Magistrate has examined witnesses under S. 202 and believed them, and thereupon transfers the case to another Magistrate, the latter has no power to examine the same witnesses again and proceed to dismiss the complaint under this section.⁵

Where a complaint is dismissed under this section and further inquiry is ordered under S. 436, the Magistrate before whom the complaint comes for such further inquiry can again dismiss it under this section.⁶

7. Effect of dismissal. — A dismissal of a complaint after hearing the complainant and after considering the result of an

(26) AIR 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788, *Subal Chandra v. Ahadullah Sheikh*.

(39) AIR 1939 Sind 208 (208) : ILR (1939) Kar 277 : 40 Cr. L. J. 807, *Joomal Tikamdas v. Emperor*. (Magistrate should exercise his own independent judgment on receipt of report of inquiry—He must not surrender his discretion to that of the police prosecutor.)

(38) AIR 1938 Sind 192 (192) : 39 Cr. L. J. 966, *Pherumal Lilaram v. Emperor*. (Magistrates should exercise his independent judgment in acting under this section.)

26. (39) AIR 1939 All 602 (605) : ILR (1939) All 851 : 40 Cr. L. J. 917, *G. A. George v. Umadutt Sharma*. (Complaint of criminal misappropriation on mere suspicion.)

Note 6

1. (36) AIR 1936 Sind 146 (147) : 30 S L R 217 : 37 Cri L Jour 1086, *Virumal Manghanmal v. Muhammad Khan*. (Magistrate to whom case is transferred can act on the evidence already recorded.)

(26) AIR 1926 Cal 470 (477) : 53 Cal 350 : 27 Cr. L. J. 385 (FB), *Emperor v. Mackay*.

2. (05) 2 Cal L Jour 65n (65n), *Ambika Roy v. Emperor*.

3. (24) AIR 1924 All 666 (666) : 25 Cri L Jour 555, *Gobind Prasad v. Ram Das*.

4. (94) 3 Cal W N cclxxxv (cclxxxv), *Kali Singh v. Jhari Lal*.

5. (37) AIR 1937 Oudh 81 (82) : 12 Luck 523 : 37 Cri L Jour 1128, *Sheo Balak Singh v. Sant Bux Singh*.

6. (38) AIR 1938 Mad 112 (112) : 39 Cri L Jour 281, *In re Arikatla Nagi Reddi*.

(36) AIR 1936 Sind 146 (147) : 30 S L R 217 : 37 Cri L Jour 1086, *Virumal Manghanmal v. Muhammad Khan*.

Section 203 Note 7

investigation under S. 202 amounts to a legal determination of the complaint¹ and the complainant can be prosecuted for making a false charge under S. 182 or S. 211, Penal Code.^{1a} But until a complaint is dismissed under this section or otherwise disposed of, no proceedings can be taken under S. 182 or S. 211, Penal Code.² This rule is not based on any statute but is only a precautionary rule of safety in respect of prosecutions under S. 182 or S. 211 of the Penal Code. So, while a prosecution under those sections might in certain circumstances be delayed or even set aside in accordance with the practice, this practice could *per se* be no ground for setting aside a conviction under S. 211 or S. 182 before the disposal of the case.³

A mere dismissal under this section does not afford a ground for proceeding under S. 211, Penal Code.⁴ The complainant must be afforded an opportunity to prove his case before being prosecuted under S. 211 or S. 182, Penal Code;⁵ but where he has had such an opportunity and the dismissal of the complaint is made only after hearing him and taking

Note 7

1. ('02) 6 Cal W N 295 (296), *Surjya Hariani v. Emperor*.
(78) 2 Cal L R 315 (316, 317), *In re Choolhaie Telce*.
- 1a. ('02) 6 Cal W N 295 (296), *Surjya Hariani v. Emperor*.
2. ('83) 5 All 387 (389) : 1883 A W N 71, *Empress v. Jamni*. (Section 182.)
(93) 15 All 336 (338) : 1893 A W N 111, *Empress v. Raghu Tiwari*. (Do.)
(99) 1899 All W N 90 (91), *In re Gajadhar*. (Ss. 182 and 211.)
(79) 4 C L R 413 (415), *Nusibunissa Bibee v. Sheikh Erad Ali*.
(99) 3 Cal W N 758 (759, 760), *Gunamony Sapui v. Empress*. (S. 211.)
(01) 5 Cal W N 254 (255), *In re Sahiram Agarwala*. (Do.)
(29) AIR 1929 Pat 92 (92) : 30 Cr. L. J. 545, *Jokhi v. Md. Dafadar*. (Do.)
(06) 4 Cri L Jour 68 (69) : 4 C L J 88, *Gati Mandal v. Emperor*. (Do.)
[See also ('28) AIR 1928 All 333 (333) : 30 Cr. L. J. 2, *Ram Das v. Ganga Ram*.
(26) AIR 1926 Bom 284 (285) : 27 Cr. L. J. 740, *In re Pampappa Ballalrao Desai*. (Section 211.)
(1900) 27 Cal 921 (925), *Mahadeo Singh v. Empress*. (Do.)
(79) 4 C L R 534 (537), *Sheikh Erad Ali v. Nusibunnissa*.
(05) 2 Cal L Jour 228 (230) : 33 Cal 1 : 2 Cr. L. J. 615 : 10 C W N 158, *Jogendra-nath v. Bahu Ballabh*. (Do.)
(99) 3 Cal W N 490 (491), *Sheikh Kutab Ali v. Empress*. (Do.)
(39) AIR 1939 Cal 340 (340) : ILR (1939) 1 Cal 322 : 40 Cri L Jour 647, *Kangali Molla v. Emperor*.
(32) AIR 1932 Cal 383 (383) : 33 Cr L J 514, *Lachmi Shaw v. Emperor*.
(32) AIR 1932 Cal 550 (551) : 33 Cri L Jour 724, *Charles Johns v. Emperor*.]
See also Note 6 under S. 195.
3. ('30) AIR 1930 Pat 622 (623) : 9 Pat 126 : 31 Cr. L. J. 934, *Suchit v. Emperor*.
[See also ('31) AIR 1931 Pat 302 (303) : 32 Cr. L. J. 1023, *Mahabir v. Emperor*.]
4. ('40) AIR 1940 Pat 97 (99) : 41 Cri L Jour 349, *Mukti Narain v. Emperor*.
(27) AIR 1927 All 107 (108) : 27 Cri L Jour 1345, *Din Mohammad v. Emperor*.
(It is not clear whether or not the complainant was examined.)
(87) 10 Mad 232 (236) : 2 Weir 181 (FB), *Empress v. Sheikh Beari*. (Complainant was not examined.)
[See Oudh S. C. No. 294, p. 680 (683), *Faghfur Mirza v. Maharaja Bhagowati Prasad*. (There was no evidence whatever against complainant of the groundlessness of the prosecution.)]
See also S. 476 Note 12.
5. ('86) 8 All 38 (39) : 1885 A W N 323, *Empress v. Ganga Ram*.
(20) AIR 1920 All 125 (125) : 21 Cri L Jour 416, *Mewa Lal v. Emperor*.
(26) AIR 1926 Bom 284 (285, 286) : 27 Cr. L. J. 740, *In re Pampappa Ballalrao*.
(70) 13 Suth W R Cr 37 (38), *Empress v. Heera Lal Ghose*.
(71) 16 Suth W R Cr 77 (77), *In re Bishoo Barik*.
(76) 25 Suth W R Cr 10 (10), *Syed Nissar Hussein v. Ram Golam Singh*.
(81) 6 Cal 496 (498) : 7 C L R 467 : 3 Shome L R Cr 48, *Government v. Karimdad*.
(81) 6 Cal 584 (585) : 8 C L R 265, *Empress v. Shibo Bihara*.



such steps as are prescribed by this Code, it cannot be said that he has not been given an opportunity of establishing the truth of his complaint.⁶

Section 203
Notes 7-8

Where the dismissal under this section is illegal for want of the examination of the complainant under S. 200, the complainant cannot be prosecuted for bringing a false charge.⁷

As to whether an order for compensation can be made against the complainant when a complaint under this section is dismissed, see Note 7 to S. 250, and as to a suit for malicious prosecution, see Notes to S. 204.

Where a complaint has been dismissed under this section, it cannot be said that it was ever on the file; a District Magistrate has, therefore, no power under S. 436 to order that the complaint 'should be restored to file'.⁸

8. Dismissal without examining complainant.—The "statement on oath" referred to is the examination of the complainant under S. 200.¹ Where the complainant is present but not examined under that section, the material on which the Court could say whether there is sufficient ground or not is not availed of by the Court, and consequently the Court cannot dismiss the complaint.² But when

- (81) 7 Cal 87 (88) : 8 C L R 387 : 4 Shome L R 70, *In re Sokhina Bibi*.
 (81) 7 Cal 208 (211) : 8 C L R 267 : 4 Shome L R 128, *Gyan Chunder v. Protap*.
 (87) 14 Cal 707 (720) (FB), *Queen-Empress v. Sham Lall*.
 (1900) 27 Cal 921 (925), *Mahadeo Singh v. Empress*.
 (79) 4 Cal L R 134 (136), *In re Biyogi Bhagut*.
 (80) 7 Cal L R 382 (384), *In re Russick Lall Mullick*.
 (79) 4 Cal L R 413 (415), *Nussibunnissa Bibi v. Sheikh Erad Ali*.
 (79) 4 Cal L R 534 (537), *Sheikh Erad Ali v. Nussibunnissa*.
 (05) 2 Calcutta L Jour 228 (230) : 33 Cal 1 : 2 Cri L Jour 615 : 10 Cal W N 158, *Jogendranath v. Bahu Ballabh*.
 (02) 6 Cal W N 295 (297), *Surjya Hariani v. Emperor*. (In this case complainant had full opportunity.)
 (07) 6 Cri L Jour 42 (42, 43) : 29 All 587 : 1907 A W N 195 : 4 A L J 471, *Emperor v. Tula*.
 (07) 6 Cri L Jour 340 (341) : 1907 A W N 268, *Emperor v. Sheo Ghulam*.
 (21) 59 I. C. 369 (370) : 22 Cri L Jour 81 (All), *Sheo Balak v. Emperor*.
 (33) AIR 1933 Pat 499 (500) : 34 Cri L Jour 1140, *Gopal Singh v. Raghunath*.
 See also S. 195 Note 18.
 [But see (98) 22 Bom 596 (603), *Imperatrix v. Jijibhai Govind*.]
 6. (02) 6 Cal W N 295 (297), *Surjya Hariani v. Emperor*.
 (19) AIR 1919 Pat 530 (531) : 20 Cri L Jour 389, *Emperor v. Makund Patel*.
 (07) 5 Cri L Jour 491 (492) : 1907 Pun Re No. 2 Cr, *Chiragh Din v. Emperor*.
 (10) 11 Cri L Jour 338 (338) : 5 I. C. 971 (Bom), *In re Rachappa Tippanna*.
 7. (24) AIR 1924 Bom 321 (321) : 48 Bom 360 : 25 Cr. L. J. 960, *In re Ningappa Rayappa*.
 (26) AIR 1926 Bom 284 (285, 286) : 27 Cr. L. J. 740, *In re Pampappa Ballalrao Desai*.
 (24) AIR 1924 All 664 (664) : 26 Cri L Jour 176, *Rekha Chamar v. Emperor*.
 (99) 4 Cal W N 305 (306), *Budhmata Mahto v. Empress*.
 (01) 4 Oudh Cas 127 (131, 132), *Ram Sarup v. Emperor*.
 See also S. 195 Note 9 and S. 200 Note 21.
 8. (38) AIR 1938 Mad 112 (112) : 39 Cr. L. J. 281, *In re Arikatla Nagi Reddi*.
 (Proper order is one for further inquiry.)

Note 8

1. (32) AIR 1932 Sind 58 (58, 59) : 25 S L R 468 : 33 Cri L Jour 330, *Hashim Moosa v. Mrs. G. Boodh*.
2. (24) AIR 1924 Bom 321 (321) : 48 Bom 360, *In re Ningappa Rayappa*.
- (03) 30 Cal 923 (925, 926) : 7 C W N 525, *Lokenath Patra v. Sanyasi Charan*.
- (71) 3 N W P H C R 272 (273), *In re Ram Churn*.

Section 203
Notes 8-9

the complainant is *absent* on the dates on which the matter comes up for examination of the complainant, it is clear that an order dismissing the complaint is justified.³

9. "And the result of the investigation or inquiry (if any) under S. 202." — Where an inquiry is ordered under S. 202 and in that inquiry the complainant says that he has witnesses to prove his case, he should be given an opportunity of proving his case before the complaint is dismissed on the basis of the result of such inquiry.¹ But where in such inquiry the complainant declines to prove his case

- (‘84) 1884 All W N 47 (47), *Jalaluddin v. Mahammad Khalil*.
 (‘88) 1888 Rat 365 (365), *In re Hari Purshottam Vaidya*.
 (‘88) 12 Bom 161 (163), *In re Jankidas*.
 (‘89) 13 Bom 590 (597) (FB), *In re Ganesh Narain*.
 (‘89) 13 Bom 600 (603), *In re Ganesh Narayan*.
 (‘70) 14 Suth W R Cr 36 (36), *Amcer Mahommed v. Brass*.
 (‘69) 3 Beng L R App Cr 53 (54), *Dulali Bewa v. Bhuban Shah*.
 (‘86) 13 Cal 334 (335, 336), *Umer Ali v. Safer Ali*.
 (‘86) 14 Cal 141 (144, 145), *Baidyanath Singh v. Muspratt*. (In this case the complainant was examined but order of dismissal was set aside on another irregularity.)
 (1900) 27 Cal 126 (130, 131) : 3 C W N 601, *Charoobala Dabee v. Barindra Nath*.
 (1900) 27 Cal 921 (923), *Mahadeo Singh v. Emperor*.
 (‘79) 4 Cal L R 134 (136), *In re Biyogi Bhagut*.
 (‘79) 4 Cal L R 534 (536, 537), *Sheikh Erad Ali v. Nusibunnissa*. (Complainant appearing four times and not examined.)
 (‘80) 7 Cal L R 382 (384), *In re Russick Lal Mallick*.
 (‘81) 8 Cal L R 289 (291), *In re Chukradar Potti*.
 (‘99) 3 Cal W N 17 (18), *Satya Charan v. Chairman of Utterparah Municipality*.
 (‘99) 3 Cal W N cclxxxv (cclxxxv), *Kali Singh v. Jhanlal*.
 (1900) 4 Cal W N 305 (306), *Budhnath Mahato v. Empress*.
 (‘02) 6 Cal W N 295 (296), *Surjya Hariani v. Emperor*. (Complainant duly examined under S. 200—Order of dismissal held valid.)
 (‘19) AIR 1919 Cal 78 (79) : 20 Cr.L.J. 175, *Fazlar Rahaman v. Abeda Rahaman*.
 (‘26) AIR 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788, *Subal v. Abdullah*.
 (‘68) 4 Mad H C R 162 (164), *Rangaswami Goundan v. Sabapathy Goundan*. (Complainant and his witnesses attended Court and remained in attendance all day but not examined.)
 (‘01) 4 Oudh Cas 127 (132), *Ram Sarup v. Emperor*.
 (‘21) AIR 1921 Pat 205 (205), *Kartick Pathak v. Emperor*.
 (‘23) AIR 1923 Pat 539 (540) : 24 Cr. L. J. 845, *Nand Kishore v. Kalika Missir*.
 (1900-02) 1 Low Bur Rul 125 (125, 126), *Crown v. Nga Yaung*.
 (‘92-96) 1 Upp Bur Rul 270 (270), *Queen-Empress v. Maung Shwe Bau*.
 (‘05) 2 Cri L Jour 51 (53) : 9 C W N 199, *Haladhar Bhumi v. Sub-Inspector of Police, Howrah*.
 (‘11) 12 Cr.L.J. 385 (385) : 11 I.C. 249 : (1910) 1 U B R 73, *Nga Tha Tu v. Emperor*.
 (‘11) 12 Cr.L.J. 539 (541) : 1912 P. R. No. 2 Cr : 12 I.C. 515, *Ali Md. v. Emperor*.
 (‘81) 1881 All W N 23 (23), *Empress v. Lallu*.
 (‘87) 1 Weir 188 (188), *In re Gubbala Rami Reddi*.
 (‘67) 8 Suth W R Cr 12 (13), *Queen v. Harrak Chand*.
 [But see (‘35) AIR 1935 All 883 (884) : 36 Cr. L. J. 1035 (1035), *Ram Gir v. Ravi Saran Singh*. (Dismissal of complaint without examining complainant was mere irregularity.)]
- 3. (‘28) AIR 1928 Cal 569 (570) : 29 Cr. L. J. 798, *Ramprosad Maitra v. Emperor*.**

Note 9

- 1. (‘25) AIR 1925 Cal 1031 (1031) : 26 Cr. L. J. 561, *Purushottam v. Ramdas*.**
 (‘16) AIR 1916 Mad 639 (639) : 16 Cr. L. J. 423 : 28 I. C. 999 (1000), *Solaimuthu Pillai v. Murungiah Moopan*.
 [See also (‘06) 4 Cr. L. J. 213 (214) : 10 C W N 1086, *Fani Bhushan v. F. E. Kemp*. (It is illegal for a Magistrate to dismiss a complaint sitting in his private room and without hearing the complainant.)]
 (‘29) AIR 1929 Cal 191 (192) : 55 Cal 1280 : 30 Cri L Jour 407, *Mahim Chandra Roy v. Watson*.]

ex parte, it cannot be said that the Magistrate is wrong in dismissing the complaint under this section.²

Section 203
Note 9

Where the inquiry ordered under S. 202 is found to have been insufficient, the Court of revision may set aside the dismissal of the complaint based on the result of such inquiry and may order a further inquiry.³ In complaints against police-officers and other Government officials it would be a proper exercise of discretion if the Magistrate orders an inquiry into the matter giving the complainant every opportunity to prove his allegations.⁴

The words "if any" clearly show that this section empowers the Magistrate to dismiss a complaint without any investigation or inquiry under S. 202, if after examining the complainant he considers there is no sufficient reason for proceeding.⁵

The words "if any" were omitted from the Code by the amending Act XVIII of 1923, but were restored to the section by the amending Act II of 1926. The reasons for re-insertion are given in the Statement of Objects and Reasons of the amending Act of 1926 as follows:

"The Calcutta High Court in a recent decision (in the case of *Srish Chandra Bose v. Modan Lal Surma*) has held that under S. 203, an investigation or an inquiry under S. 202 is necessary in all cases because the words 'if any' have been omitted from S. 203 after the words 'investigation or inquiry.' No such change was intended by the amendment made by Act XVIII of 1923 and the proposed addition is made to clear this matter."

Where on further inquiry being ordered into a complaint dismissed under this section, the case is sent to another Magistrate for disposal, he is entitled to act on the result of the inquiry or investigation ordered by the Magistrate who originally disposed of the case.⁶

2. ('72) 17 Suth W R Cr 3 (3), *Shibu Manjee v. Noshee Mukerji*.

3. ('21) AIR 1921 Cal 552 (553) : 25 Cr. L. J. 167, *Devendra v. Bhagirathi*.

('28) AIR 1928 Lah 119 (120) : 29 Cri L Jour 267, *Mousa Neki v. Mt. Mam Kaur*.

('27) AIR 1927 Bom 436 (436, 437) : 28 Cr. L. J. 575, *Dhondu Bapu v. Emperor*.

('19) AIR 1919 Cal 725 (725) : 20 Cri L Jour 794, *Purna Chandra v. Ambica Charan*. (Complaint dismissed on report of local panchayat.)

[See also ('20) AIR 1920 All 77 (78) : 21 Cr. L. J. 343, *Harihar Prasad v. Emperor*.]

4. ('26) AIR 1926 Mad 288 (288) : 27 Cri L Jour 107, *Devasikamani Mudaliar v. Narayana Prasad*. (Police-officer.)

('20) AIR 1920 All 77 (78) : 21 Cr. L. J. 343, *Harihar v. Emperor*. (Do.)

('24) AIR 1924 Oudh 174 (174) : 24 Cr. L. J. 814, *Balda v. Nasir Ali*. (Do.)

('98) 1898 Rat 954 (955), *In re Subrao Ramachandra*. (A Government officer.)

('20) AIR 1920 All 303 (304) : 22 Cri L Jour 81 : 59 I. C. 369 (370), *Sheo Balak v. Emperor*. (Do.)

See also S. 202 Note 18.

5. ('25) AIR 1925 Pat 704 (705) : 26 Cr. L. J. 921, *Dukhiram Raut v. Jamuna Kuer*.

('17) AIR 1917 Pat 141 (142) : 19 Cr. L. J. 228, *Nawasi Singh v. Jadhu Dhanuk*.

('18) AIR 1918 Pat 350 (350, 351) : 19 Cri L Jour 263, *Sheonandan v. Emperor*.

('68) 10 Suth W R Cr 49 (49, 50) : 2 Beng L R (SN) 6, *In re Foktu Shah*. (Case under Code of 1861.)

('68) 10 Suth W R Cr 50 (50), *Batool Nushyo v. Bhugloo Chowkidar*. (Magistrate had discretion under S. 67 to dismiss complaint at once—There was no obligation upon him to go further.)

('81) 7 Cal 208 (211) : 8 C L R 267 : 4 Shome L R 128, *Gyan v. Protap*.

('71) 16 Suth W R Cr 44 (44) : 8 Beng L R App 11, *Queen v. Gour Mohan*.

[See also ('69) 11 Suth W R Cr 54 (54, 55), *Queen v. Russick Monee*.]

6. ('36) AIR 1936 Sind 146 (147) : 30 S L R 217 : 37 Cri L Jour 1086, *Virumal Manghanmal v. Muhammad Khan*.

Section 203
Notes 10-14

10. "Shall record his reasons for so doing." — A Magistrate should record his reasons for dismissing a complaint under this section.¹ The object of this requirement is to enable the High Court to consider whether the discretion vested in the Magistrate has been properly exercised or not.² This is an imperative provision of law and where no reasons are recorded the order of dismissal is without jurisdiction.³ It has, however, been held that where on a complaint filed against several persons, the lower Court has declined to issue process against some of them and it appears to the High Court from the records that there are no sufficient grounds for issuing process against them, the High Court will not interfere in revision merely because the Magistrate has failed to give reasons for not issuing process; but that when it appears that the Magistrate had not good grounds for declining to issue process, the High Court will interfere in revision.⁴

It has been held that reasons stated in a police-report on the basis of which an order of dismissal is made are sufficient if the report itself is part of the order.⁵

11. Second complaint. — A dismissal under this section is a dismissal without trial. As to whether such a dismissal is a bar to the re-hearing of the complaint or to the entertainment of a second complaint, see S. 403 and Notes thereunder.

12. Further inquiry. — As to ordering of a "further inquiry" into a complaint dismissed under this section, see Note 9 above and S. 436 and Notes thereto.

13. Abatement. — See Note 6 under S. 247.

14. Appeal. — Under S. 404, no appeal will lie from any order, unless specifically provided for by the Code and no appeal is provided from an order of dismissal under this section. Further inquiry alone is provided for in S. 436.

Note 10

1. ('38) AIR 1938 Mad 879 (880) : 39 Cri L Jour 984, *In re Venkatasubba Pillai*. ('87) 14 Cal 141 (145, 146), *Baidyanath Singh v. Muspratt*.
- ('12) 13 Cri L Jour 482 (483) : 40 Cal 41 : 15 I. C. 482, *Maniruddin Sarkar v. Abdul Rouf*.
- ('24) AIR 1924 Pat 436 (437) : 24 Cr. L. J. 823, *Chaudhury Mandar v. Emperor*.
- ('26) AIR 1926 Pat 57 (57) : 26 Cr. L. J. 1502, *Harnandandas v. Atul Kumar Prasad*. (Merely referring to report of Honorary Magistrate is not sufficient.)
- ('12) 11 Cri L Jour 331 (331) : 5 I. C. 926 (Mad), *Ahmed Bee v. Ameena Bee*.
- ('13) 14 Cri L Jour 493 (494) : 20 I. C. 749 (All), *Ram Prasad v. Moti*.
- ('09) 13 Cal W N cexviii (cexviii), *Bhairab Chandra v. Prasanna*.
2. ('40) AIR 1940 Pat 97 (98) : 41 Cri L Jour 349, *Mukti Narain v. Emperor*.
- ('87) 14 Cal 141 (146), *Baidyanath Singh v. Muspratt*. (Revision under S. 437 by High Court.)
3. ('12) 13 Cri L Jour 482 (483) : 40 Cal 41 : 15 I. C. 482, *Maniruddin v. Abdul*.
- ('26) AIR 1926 Pat 57 (57, 58) : 26 Cri L Jour 1502, *Harnandan v. Atul*.
4. ('38) AIR 1938 Mad 879 (879) : (1938) 2 M L J 372 (373, 374) : 39 Cr. L. J. 984, *In re Venkatasubba Pillai*.
5. ('10) 11 Cri L Jour 331 (331) : 5 I. C. 926 (Mad), *Ahmed Bee v. Ameena Bee*.

OF THE COMMENCEMENT OF PROCEEDINGS
BEFORE MAGISTRATES.

204.* (1) If in the opinion of a Magistrate

Section 204

Issue of process. taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

Synopsis

- | | |
|---|---|
| 1. Legislative changes. | 10. Order directing summons, if a judgment. |
| 2. Scope of the section. | 11. Order directing summons, if can be recalled. |
| 3. Magistrate taking cognizance only can issue process. | 12. "If he has not jurisdiction himself." |
| 4. The Magistrate must have taken cognizance of an offence. | 13. "Some other Magistrate having jurisdiction." |
| 5. "Sufficient ground for proceeding." | 14. "Provisions of S. 90" — Sub-section (2). See Notes under S. 90. |
| 6. "In the opinion of a Magistrate." | 15. Process-fee. |
| 7. Issue of process. | 16. Revision. |
| 8. Omission to issue process. | 17. Process under special or local Acts. |
| 9. Notice, if a 'process'. | |

Other Topics (miscellaneous)

- | | |
|---|---|
| Caution and discretion must be used in issuing process. See Note 5. | Power to cancel warrant issued and issue summons. See S. 75 Note 9. |
| Duty of the Magistrate before issuing the process. See Note 4. | Process must issue if complaint is believed. See Note 7. |
| "He shall issue his summons." See Note 7. | Superior officer cannot order process to issue. See Note 8. |

* 1882 : S. 204; 1872 : S. 147 para. 3, Ss. 148, 149;
1861 : Ss. 67, 248, 257.

Section 204
Notes 1-3

1. Legislative changes.

- (1) The words "if he has not jurisdiction himself" in sub-section (1) are new.
- (2) Sub-section (3) is new.

2. Scope of the section.— Where the Magistrate does not dismiss the complaint under S. 203 but is of opinion that there is sufficient ground for proceeding, he has to commence proceedings against the accused by compelling his attendance before the Court. This section relates to the procedure for effecting such attendance.¹

This is the only section authorizing a Magistrate to issue process to an accused, whether he takes cognizance on a private complaint or on a police-report² or any information or knowledge other than a complaint or police-report.³ This section applies not only where the Magistrate takes cognizance of an offence under the Indian Penal Code but also where he takes cognizance of an offence under any other law.⁴

For form of summons, see S. 68 and Sch. V, Form No. I.

For form of warrant, see S. 75 and Sch. V, Form No. II.

3. Magistrate taking cognizance only can issue process. —

Section 190 mentions the ordinary ways in which a Magistrate takes cognizance of an offence. Unless he 'takes cognizance' as specified therein, a process cannot be issued under this section.¹ A 'Magistrate taking cognizance' on a complaint is the officer who has heard the complaint made. He is the proper officer to issue a process because it is he who can best exercise a discretion with regard to the *prima facie* merits of the complaint.² Therefore, a District or superior Magistrate cannot order process to issue when a joint or subordinate Magistrate to whom a case has been made over for disposal³ or who has taken cognizance of the complaint,⁴ has failed or refused to issue process. If he wants to do so, he must remove the case to his own file and then issue process.

Section 204 — Note 2

1. ('67) 8 Suth W R Cr 65 (65), *Queen v. Nubas Mukton*.
2. ('32) AIR 1932 Pat 72 (76, 77, 78) : 33 Cr.L.J. 349, *Raghunath Puri v. Emperor*.
3. ('69) 11 Suth W R Cr 1 (1), *Bisseshur Roy v. Hurpershad Singh*.
4. ('72-92) 1872-1892 L B R 486, *Queen-Empress v. Nga Son Gaung*. (Offence under the Gambling Act, XVI of 1867.)

('76) 25 Suth W R Cr 20 (21), *Queen v. Golam*. (Offence under Police Act, V of 1861.)

Note 3

1. ('71) 8 Bom H C R Cr 113 (115), *Reg. v. Jafar Ali*.
- ('02) 6 Cal W N 926 (926, 927), *Bhaman Singh v. Haluman Mandal*.
2. ('73) 19 Suth W R Cr 28 (28) : 10 Beng L R App 26, *In re Raghoo Parirah*.
- ('28) AIR 1928 Cal 24 (25) : 54 Cal 303 : 28 Cr. L. J. 577, *Isaf Nasya v. Emperor*.
(In directing police investigation under S. 202, Magistrate cannot direct police to submit charge-sheet to another Magistrate.)
3. ('03) 30 Cal 449 (451, 452), *Radhabullav Roy v. Benode Behari*. (Against some of the accused.)
- ('05) 2 Cr. L. J. 524 (530, 532) : 32 Cal 783, *Ajablal v. Emperor*. (Do.)
[See ('06) 4 Cri L Jour 213 (214) : 10 C W N 1086, *Fani Bhusan v. F. E. Kemp*.]
4. (1900) 27 Cal 658 (660), *Hari Kishore Das v. Jugal Chunder*.
- (1900) 27 Cal 798 (800), *Jhumuk Jha v. Pathuk Mandal*.
- (1900) 27 Cal 979 (980, 981) : 4 C W N 827, *Golapdey v. Queen-Empress*.
- ('02) 6 Cal W N 843 (844), *Mrinal Kanti Ghose v. Emperor*.

Under this section a Magistrate to whom a case has been transferred under S. 192 after the examination of the complainant can issue process though he has not himself examined the complainant.⁵

Although it is only the Magistrate who has taken cognizance of the offence who may *direct issue* of a process, a Magistrate who is the "presiding officer" within the meaning of Ss. 68 and 75, may *sign* the process, even if he may not have taken cognizance of the offence and directed issue of the process.⁶

4. The Magistrate must have taken cognizance of an offence. — It is only a Magistrate taking cognizance of an *offence* that can issue a process under this section. Where, therefore, no offence has been committed but the Magistrate gets information as to the possibility of an offence being committed, the matter is only one for the interference of the police, and not one for the Magistrate to issue process.¹

If, on a complaint, it should appear to the Court that the act imputed amounted to an offence under the Indian Penal Code or any other penal law in force, it is the duty of the Court to proceed with the matter.² But where the acts as alleged do not disclose any *offence*, it will be an abuse of the process of the Court to allow criminal proceedings to proceed.³

An application for maintenance under S. 488 is not a complaint in respect of any *offence* and, therefore, a Magistrate dealing with it cannot dismiss it under sub-s. (3) of this section.⁴

Even where an offence is disclosed there must be definite evidence of an offence within the local jurisdiction of the Magistrate receiving the complaint.⁵ The Court is not limited to the sections or offences mentioned in the complaint. The fact that the complainant did not specifically and in terms accuse any one under any section of the Penal Code, does not matter, if the facts stated in the complaint and his sworn statement, constitute an offence, triable by the Magistrate who receives the complaint.⁶

5. "Sufficient ground for proceeding." — A Magistrate taking cognizance of an offence is bound to issue process under this section

(199) 4 Cal W N 242 (244), *Moul Singh v. Mahabir Singh*.

(1908) 7 Cr. L. J. 202 (204) : 1908 Pun ReNo. 4 Cr, *Shivnath v. Emperor*.

5. (199) 3 Cal W N cclxxxv (cclxxxv), *Kali Singh v. Jhari*.

6. (1932) AIR 1932 Pat 175 (176) : 34 Cr. L. J. 297, *Kartick Chandra v. Emperor*. (Issue of warrant.)

(1932) AIR 1932 Pat 171 (175) : 33 Cr.L.J. 706, *Kartick Chandra v. Emperor*. (Per Scroope, J.—Dhavlé, J., dissenting.)

See also S. 75 Note 3 and S. 559 Note 1.

Note 4

1. (175) 1875 Rat 90 (91), *In re Fate Ali*.

2. (167) 8 Suth W R Cr 65 (65), *Empress v. Nubas Muhlon*. (Even if a civil suit would afford the more convenient or appropriate remedy.)

(1926) AIR 1926 Cal 795 (797) : 53 Cal 606 : 27 Cr. L. J. 788, *Subal v. Ahadullah*.

3. (1928) AIR 1928 Lah 945 (946) : 30 Cr. L. J. 162, *Amarnath v. Emperor*.

4. (1993) 16 Mad 234 (234) : 2 Weir 252, *In re Ponnammal*.

5. (1908) 7 Cr. L.J. 394 (395) : 1908 All W N 115:5 A L J 333, *Babu v. Ghansham*.

6. (199) 26 Cal 786 (789) : 3 C W N 491, *Jagat Chandra v. Queen-Empress*.

See also S. 190 Notes 9 and 19.

Section 204
Note 5

only if, in his opinion, there is *sufficient ground for proceeding*.¹ The stage at which the sufficiency of the ground for proceeding is to be considered is, in the case of a complaint, after the examination of the complainant under S. 200.² If the facts alleged in the complaint and the complainant's statement show a sufficient ground for proceeding, process should issue,³ otherwise not.⁴ It is not necessary in all cases that before issuing process the Magistrate should have held any inquiry.⁵

A *prima facie* case means that there is sufficient ground for proceeding.⁶ Where therefore a *prima facie* case is made out, the Magistrate should issue process⁷ even if he considers that a civil remedy is more appropriate.⁸ It was, however, held in the under-

Note 5

1. (1900) 27 Cal 985 (988) : 5 C W N 131, *Durga Das v. Umesh Chandra*. (Allegations not disclosing any offence—Case not to be proceeded with.)
(1864) 1864 Suth W R Gap No. Cr 33 (34), *In re Huronath Roy*.
(1900.02) 1 Low Bur Rul 286 (287), *Mokun Maistry v. Valoo Maistry*.
See cases in foot-note (7).
2. ('71) 3 N W P H C R 272 (273), *In re Ramchurn*.
(17) AIR 1917 Pat 611 (612) : 2 Pat L J 657 : 18 Cr. L. J. 890 (891), *Jhuna Lal Sahu v. Emperor*.
(06) 3 Cr. L. J. 81 (83) : 2 C L J 612, *Saroda Charan v. Emperor*.
(02) 2 Weir 241 (242), *In re Rangachari*.
(1864) 1864 Suth W R Gap No. Cr 33 (34), *In re Huronath Roy*.
(98) 1898 Rat 954 (955), *In re Subrao Ramchandra*.
(88) 1888 Rat 368 (369), *In re Bai Kashi*.
(1864) 1864 Suth W R Gap No. Cr 37 (37), *Rujeeb Mundle v. Lochun Mundle*.
(70) 14 Suth W R Cr 36 (36), *Ameer Mahomed v. G. Brass*.
(68) 4 Mad H C R 162 (164), *Rangaswami v. Sabapathi*.
(14) AIR 1914 Cal 479 (480) : 42 Cal 19, *Abhayeshwari v. Kishori Mohan Banerji*.
See also Notes 13 to 16 to S. 200 and the decisions noted thereunder.
3. ('12) 13 Cr. L. J. 609 (611, 612) : 16 I.C. 257 (Cal), *Pulin Behari v. Emperor*.
4. ('17) AIR 1917 Cal 671 (671) : 18 Cr. L. J. 626 (626), *Jogesh Chandra v. Abdul Gani*. (Allegations in complaint not substantiated by examination on oath.)
(1864) 1864 Suth W R Gap No. Cr 33 (34), *In re Huronath Roy*.
[See also ('10) 11 Cr.L.J. 525 (527) : 7 I.C. 747 : 38 Cal 68, *Hari v. Srish Chandra*.]
5. ('20) AIR 1920 Pat 270 (270, 271) : 21 Cr.L.J. 220, *Abdul Khalique v. Surja Singh*.
[See ('35) AIR 1935 Rang 485 (486) : 37 Cr. L. J. 243, *Murugappa Chettyar v. Raman Chettyar*. (Held, in the circumstances of the case that Magistrate would have exercised a wise discretion if he had held an inquiry.)]
6. ('31) AIR 1931 Cal 607 (611, 615) : 33 Cri L Jour 3 : 59 Cal 275, *Sher Singh v. Jitendranath Sen*.
7. ('38) AIR 1938 Mad 879 (880) : 39 Cri L Jour 984, *In re Venkatasubba Pillai*. (Where serious allegations of tyranny are made, High Court and complainant should be satisfied that the Magistrate has considered and decided whether there is a case made out or not—If case is made out, process must issue.)
(26) AIR 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788, *Subal Chandra v. Ahadullah Sheikh*.
(14) 22 Ind Cas 165 (166) : 15 Cri L Jour 21 (All), *Baqar v. Bansi*.
(13) 14 Cri L Jour 571 (571) : 21 Ind Cas 171 (Cal), *Ramcharan v. Haji Meah*.
(26) AIR 1926 Sind 194 (196) : 27 Cr.L.J. 711 : 21 SLR 293, *Crowder v. Morrison*.
(30) AIR 1930 Pat 30 (32) : 30 Cri L Jour 554, *Parmanand v. Emperor*.
(89) 13 Bom 590 (598) (FB), *In re Ganesh Narayan*.
(10) 12 Cr. L. J. 385 (385) : 11 I. C. 249 : 1 U B R 73, *Nga Tha Tu v. Emperor*.
(17) AIR 1917 L B 30 (31) : 18 Cri L Jour 321 (322), *Maung Kala v. Nga Kin Mya*. (Complaint under S. 497, Penal Code, should not be dismissed simply because it appears that complainant and his wife have been living apart for more than a year previous to the complaint.)
[See ('01) 28 Cal 652 (661) : 5 C W N 457 (FB), *Dwarkanath v. Beni Madhab*.]
8. ('11) 12 Cr.L.J. 123 (124) : 9 I. C. 726 (Mad), *Narayanaswami v. Vadivelu Chetty*.
(68) 10 Suth W R Cr 40 (40), *Kosal Singh v. Toolsee Chowdhry*. (Charge of taking bullocks and injuring one of them worth forty rupees.)

mentioned case^{8a} that even if there was a *prima facie* case, the Magistrate may in his discretion refuse to issue process.

Section 204
Note 5

There cannot be said to be sufficient grounds in the following cases for issue of process:

- (1) Where the complaint is made on information and not on personal knowledge.⁹ In such cases the Court should satisfy itself on inquiry that there is a case for the issue of process.¹⁰
- (2) Where the allegations made in the complaint are not substantiated by the statement on oath.¹¹
- (3) Where the allegations disclose a dispute purely of a civil nature.¹²

The following are not sufficient grounds for refusing issue of process:

- (a) Where a *prima facie* case is made out but in the Magistrate's opinion there is no chance of conviction and no useful purpose will be served by the enquiry.¹³
- (b) Avoidance of religious ill-feeling.¹⁴
- (c) The fact that the offence is cognizable by the police in the first instance.¹⁵
- (d) The fact that the Magistrate thinks that it is unlikely that the proceedings will result in a conviction, though the fact that another person accused upon the same facts for the same offence has been acquitted may properly be taken into consideration in determining whether upon the materials before the Magistrate there is sufficient ground for proceeding.¹⁶

(⁶⁷) 8 Suth W R Cr 65 (65), *Queen v. Nubas*. (Case of trespass and damages.)

(⁷²) 4 N W P H C R 23 (25), *Queen v. Harpersbad*.

(²⁶) AIR 1926 Sind 194 (198) : 27 Cri L Jour 711 : 21 Sind L R 293, *Crowder v. Morrison*. (Dispute between partners about accounts.)

See also S. 1 Note 1, S. 190 Note 17, S. 200 Note 10 and S. 203 Note 5.

8a. (³¹) AIR 1931 Cal 607 (615) : 33 Cri L Jour 3 : 59 Cal 275, *Sher Singh v. Jitendranath Sen*. (Where AIR 1926 Cal 759 is dissented from by Lord-Williams, J.)

9. (⁰⁶) 4 Cr. L. J. 217 (218) : 10 C W N 1090, *Thakur Prosad Singh v. Emperor*.

10. (⁰⁶) 4 Cr. L. J. 217 (218) : 10 C W N 1090, *Thakur Prosad Singh v. Emperor*.

11. (¹⁷) AIR 1917 Cal 671 (671) : 18 Cr. L. J. 626 (626), *Jogesh Chandra v. Abdul Gani*.

12. (²³) AIR 1923 All 544 (544) : 24 Cr. L. J. 693, *Hukum Chand v. King-Emperor*. (Removing of some earth from the land of zamindar.)

(²³) AIR 1923 Lah 329 (330) : 24 Cri L Jour 369, *Karam Chand v. Mathra Das*. (Dispute between members of joint Hindu family as to possession of property.)

(²⁷) AIR 1927 Lah 145 (146) : 28 Cri L Jour 158, *Ishar Das v. Emperor*.

(²⁴) 84 I. C. 351 (351) : 26 Cri L Jour 287 (Lah), *Ladha Shah v. Zaman Ali*.

(²³) AIR 1923 Rang 157 (157, 158) : 24 Cri L Jour 929, *Maung Shwe Ku v. Emperor*. (Entry by person having right to enter is not criminal trespass.)

(⁸⁷) 1887 Pun Re No. 50 Cr, p. 131 (132), *Gulzar v. Empress*. (Civil remedy is proper in cases involving doubt whether act done is criminal offence or civil wrong.)

(⁰⁷) 5 Cri L Jour 13 (14) : 11 C W N 170, *Chamru Sahu v. Emperor*.

[See (²³) 24 Cri L Jour 714 (715) (Cal), *Bhatbani v. Haricharran*.

(²²) 67 I. C. 499 (499) : 23 Cri L Jour 403 (Pat), *Rampabitar Singh v. Kasim Ali Khan*. (Process not to be issued merely because in Magistrate's opinion it may be desirable to ascertain the truth.)]

13. (⁰²) 29 Cal 410 (411, 412), *Kuldip v. Budhan*.

(²⁶) AIR 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788, *Subal Chandra v. Ahadullah Sheikh*.

14. (⁹¹) 1891 Rat 562 (563), *Queen-Empress v. Ramchandra*.

15. (⁷⁰) 14 Suth W R Cr 36 (36), *Ameer Mohamed v. G. Brass*.

16. (²⁶) AIR 1926 Cal 795 (797, 798) : 53 Cal 606 : 27 Cri L Jour 788, *Subal Chandra v. Ahadullah Sheikh*.

Section 204
Notes 5-7

(e) The fact that one of the accused was a member of the highest service in the land who was sworn to do justice.¹⁷

Stay of proceedings — See Note 11 to S. 344.

6. "In the opinion of a Magistrate." — In deciding on the sufficiency of the ground for proceeding, the Magistrate must be guided by his own independent opinion and not by that of others such as a police-officer.¹

7. Issue of process. — This section provides that when a Magistrate who receives a complaint neither dismisses it under S. 203 nor postpones issue of process under S. 202, process for the attendance of the accused *shall issue*.¹ The fourth column in the second schedule indicates whether a summons or warrant should issue in the first instance in each case. But there are two exceptions to this rule. Firstly, in the cases in which a summons should issue in the first instance according to the second schedule, the Magistrate can, under S. 90, issue a warrant in lieu of or in addition to a summons in the circumstances specified in that section. Secondly, in cases in which a warrant should issue in the first instance according to the second schedule, this section enables the Magistrate to issue a summons instead, if he thinks fit to do so.² This discretion should be so used as not to subject accused persons to the indignity of arrest unless there is real need for it.³

If the Magistrate issues a warrant in a case in which he ought to have issued summons, the error is not a ground for setting aside the proceedings.⁴ The Magistrate in such cases can cancel the warrant and issue a summons.⁵

Process should ordinarily issue against all the accused who are *prima facie* shown to have committed an offence.⁶ But the Magistrate is not bound, when the police-report discloses one offender only, to issue process against any witnesses who may afterwards be found, during trial, to be accomplices.⁷ Nor is it imperative on him to proceed against a person who has been removed from the array of accused

[See ('33) AIR 1933 Cal 552 (553) : 34 Cri L Jour 1063, *Makhan Lal v. Sakhi*. (The fact that the matter has been compounded with other co-accused is no ground for refusing process.)

See also S. 403 Note 12.

17. ('40) AIR 1940 Pat 97 (98) : 41 Cri L Jour 349, *Mukti Narain v. Emperor*.

Note 6

1. ('68-69) 4 Mad H C R 162 (165), *Rangaswamy v. Sabapathi*. (Until he has at least examined the complainant, he is not in a position to exercise his own independent opinion.)

('68) 9 Suth W R Cr 21 (21), *Borodakant Mookerjee v. Kali Bhattacharjee*.

Note 7

1. ('38) AIR 1938 Sind 192 (192) : 39 Cr.L.J. 966, *Pherumal Lilaram v. Emperor*. (1900) 27 Cal 798 (800), *Jhumuck Jha v. Pathuk Mandal*.

(1900) 27 Cal 921 (924), *Mahdeo Singh v. Queen-Empress*.

('22) 23 Cr. L. J. 403 (403) : 67 I. C. 499 (Pat), *Rampabitar Singh v. Kasim Ali*.

('13) 14 Cri L Jour 493 (493) : 20 Ind Cas 749 (All), *Ramprasad v. Moti*.

2. ('93) 21 Cal 588 (589), *Basumoti v. Budram*.

3. ('92-96) 1 Upp Bur Rul 31 (31).

4. (1864) 1 Suth W R Cr 16 (16), *Aneef Putney v. Ramsunder Chuckerbutty*.

5. ('08) 8 Cr. L. J. 187 (187) : 1 S L R 69, *Imperator v. Mt. Janat*.

('13) 14 Cr. L. J. 604 (605) : 7 S L R 40 : 21 I. C. 476, *Orwon v. Zali Khan*.

6. (1900) 4 Cal W N 560 (562), *Bishendoyal v. Chedi Khan*.

7. ('25) AIR 1925 Rang 122 (126) : 3 Rang 11 : 26 Cr.L.J. 492, *A. V. Joseph v. Emperor*.

persons and is produced as a witness in the Court, his failure to do so not being sufficient to invalidate the trial in respect of the other accused.^{7a}

Section 204
Note 7

It has been held that in proper cases there is nothing irregular or improper in a Magistrate first issuing process for one accused person and then changing his mind and issuing process for all the accused.⁸

When once the Magistrate issues process under this section, proceedings commence and it should go on in due course unless something occurs to show that the Magistrate has, for some cause or other, made a wrong exercise of his discretion.⁹ The question of commencement of proceedings becomes relevant in suits for damages for malicious prosecution or for prosecution for making false complaint, etc. Prosecution commences when proceedings commence under this section and proceedings commence when process is issued against the accused. So unless process is issued, there is no cause of action in either of the proceedings referred to above.¹⁰ The view that a prosecution commences even when a complaint is made¹¹ is, it is submitted, not well founded and is not an accepted one.

Where *A* and *B* are jointly accused of an offence but the Magistrate issues process only against *A*, *B* is competent to give evidence as a witness at the trial of *A*.¹²

- 7a. ('37) AIR 1937 Nag 17 (23) : I L R (1937) Nag 315 : 38 Cri L Jour 237 (FB), *Amdu Mian Gulzar v. Emperor*. (Overruling AIR 1920 Nag 255.)
8. ('28) AIR 1928 Lah 541 (542) : 29 Cr. L. J. 293, *Alam v. Emperor*.
9. ('73) 19 Suth W R Cr 28 (28) : 10 Beng L R App 26, *In re Raghuo Parirah*. ('74) 21 Suth W R Cr 44 (45), *Ramkant Sirkar v. Jadub Chunder*.
10. ('20) AIR 1920 All 208 (209) : 42 All 305, *Azmat Ali v. Qurban Ahmad*. ('32) AIR 1932 All 386 (389), *Basant Rai v. Ganga Ram*. ('91) 1891 Rat 514 (515), *Empress v. Budhunbhai*. ('10) 6 Ind Cas 877 (877, 878) : 37 Cal 358, *De Rozario v. Gulab Chand Anundjee*. (5 Bom L R 940 dissented from.)
- ('11) 11 Ind Cas 311 (312) : 38 Cal 880, *Golap Jan v. Bhola Nath*. (Approving *Fates v. The Queen*, L R 14 Q B D 618.)
- ('15) AIR 1915 Mad 128 (129) : 21 Ind Cas 703 (705) : 37 Mad 181, *Meeran Saib v. Ratnavelu Mudali*.
- ('26) AIR 1926 Mad 521 (524) : 49 Mad 315, *Sanjivi Reddi v. Kondagari Koneri*. ('26) 97 I. C. 351 (352) (Mad), *Arunachala Mudaliar v. Chinna Munuswami Chetty*. (1897) 1 Q B 159 (162) : 66 L J Q B 248 : 45 W R (Eng) 223 : 60 J P 821, *Thorpe v. Priestnall*. (Approved in 6 Ind Cas 877.)
- ('31) AIR 1931 All 665 (665) : 53 All 771, *Ali Mohamed v. Zakir Ali*.
- ('29) AIR 1929 Pat 271 (271, 272) : 8 Pat 285, *Subhag Chamar v. Nandlal Sahu*. (Mere fact that plaintiff (accused) was present at enquiry does not alter position.)
- ('10) 7 Ind Cas 255 (256) (Cal), *Golap Jan v. Bhola Nath*.
- ('14) AIR 1914 Lah 531 (533) : 1915 Pun Re No. 1 : 28 I. C. 273 (276), *Godharam v. Devidas*. (But this does not conclude the matter — Held in circumstances of the case plaintiff was entitled to damages.)
- [See also ('33) AIR 1933 Pat 292 (292, 293) : 12 Pat 292, *Zahiruddin Mahomed v. Budhu Bibi*. (Where it was held that proceedings commenced even by the mere order for the issue of process, though it was not issued.)]
11. ('77-78) 2 Bom 481 (487), *Imperatrix v. Lakshman Saktharam*.
- ('03) 5 Bom L R 940 (945) : 28 Bom 226, *Ahmedbhai Habibhai v. Framji Edulji*. (1834) 6 C & P 423, *Clarke v. Postan*. (Distinguished as a mere dictum in 6 I. C. 877. Referred to and not approved in 11 I. C. 311.)
12. ('82) 10 Cal L R 553 (554), *Mohesh Chander Kopali v. Mohesh Chunder Dass*. [See also ('37) AIR 1937 Nag 17 (23) : ILR (1937) Nag 315 : 38 Cr. L. J. 237 (FB), *Amdu Mian Gulzar v. Emperor*. (Police refraining from prosecuting person against whom there is sufficient evidence—He is a competent witness in the trial of another accused.)]

Section 204
Notes 7-11

It has been held by the Patna High Court in the case cited below¹³ that an order by a Magistrate to the police to charge-sheet a person may be treated as a warrant under this section. See also S. 190 Note 22.

8. Omission to issue process. — Where a Magistrate without issuing any process at all to the accused convicts him, the conviction is illegal.¹ But where the accused appears in Court of his own accord without a summons, he is entitled to require that the case be proceeded with and the mere omission to issue summons becomes immaterial in such a case.²

9. Notice, if a "process." — A mere notice to the person complained against that a preliminary enquiry will be held does not amount to a summons. The issue of such a notice is neither contemplated by the Code nor included in the forms in schedule V.¹

10. Order directing summons, if a judgment. — An order directing issue of summons under this section is not a judgment. So where a Magistrate issued summons to an accused and the accused appeared and filed a cross-complaint, it was held that it was open to the Magistrate to rescind the order as to summons and send the complaints for enquiry under S. 202.¹

11. Order directing summons, if can be recalled. — An order issuing summons under this section, not being a judgment within the provisions of S. 369, there is nothing in the Code which forbids the Magistrate to reconsider such order on sufficient ground and recall the summons.¹

(35) AIR 1935 Bom 186 (188):59 Bom 355:36 Cr. L. J. 937, *Keshav v. Emperor*.
(25) AIR 1925 Rang 122 (125) : 3 Rang 11 : 26 Cri L Jour 492, *A. V. Joseph v. Emperor*. (Accused person when not being tried with a co-accused is a competent witness for or against him.)]

See also S. 540 Note 8.

13. (32) AIR 1932 Pat 72 (77) : 33 Cri L Jour 349, *Raghunathpuri v. Emperor*.
Note 8

1. (91) 15 Mad 83 (87) : 2 Weir 326, *Empress v. Erugadu*.

2. (02) 26 Bom 552 (557) : 4 Bom L R 276, *In the matter of Lakshman Govind*. (Summons is merely a means of procuring attendance.)

(68) 1868 Rat 8 (9), *Reg. v. Sudasivapa*. (Following *Turner v. Post-Master General*, 34 L J M C 10.)

(19) AIR 1919 Lah 389 (390) : 1919 Pun Re No. 5 Cr : 20 Cri L Jour 3, *Emperor v. Mt. Ruri*.

Note 9

1. (15) AIR 1915 Mad 128 (129) : 21 I. C. 703 (704) : 37 Mad 181, *Sheikh Meeran Saib v. Ratnavelu Mudali*. (Notice is a mere intimation of the action the Magistrate intends to take.)

(27) AIR 1927 Mad 18 (18) : 49 Mad 926 : 28 Cr. L. J. 113, *Varadarajulu Naidu v. Kuppuswamy*. (Issuing notice to the accused to appear and show cause against the issue of process.)

(27) AIR 1927 Mad 19 (20, 21) : 49 Mad 918 : 28 Cri L Jour 129 (FB), *Appa Rao Mudaliar v. Janakiammal*. (Notice to appear in an enquiry under S. 202.)

(23) AIR 1923 Cal 198 (199) : 24 Cr. L. J. 333, *Chandi Charan v. Manindra Chandra*.

(28) AIR 1928 Mad 1198 (1198) : 29 Cri L Jour 1059, *Ramabhadra Odayar v. Emperor*. (Accused persons have no *locus standi* in enquiries under Chap. XVI.)

(18) AIR 1918 Pat 652 (653) : 19 Cr. L. J. 527, *Mushari v. Raj Kishore* (Do).

Note 10

1. (23) AIR 1923 Cal 662 (662) : 25 Cr. L. J. 464, *Lalit Mohan v. Noni Lal Sarkar*.

Note 11

1. (23) AIR 1923 Cal 662 (662) : 25 Cri L Jour 464, *Lalit Mohan v. Noni Lal*.

12. "If he has not jurisdiction himself." — A process is for attendance of the accused before the Magistrate issuing it; but there are cases where the Magistrate issuing process has no jurisdiction to try the case, as for example under S. 29A, in cases of complaint against an European British subject. Provision is made here for the attendance of the accused, in such cases, before another Magistrate having jurisdiction.

13. "Some other Magistrate having jurisdiction." — This expression means "some other Magistrate" having jurisdiction to enquire into and try the case, the power to take cognizance being distinct from jurisdiction.

14. "Provisions of Section 90"—Sub-section (2). — See Notes under Section 90.

15. Process-fee.—Sub-section (3) is new and enables a Magistrate to dismiss a case for default of payment of such fees for process as are payable and ordered, within a reasonable time. Even before this provision was inserted there existed the practice of dismissing the complaint for non-payment of process-fees, as for default of prosecution¹ though such a dismissal was held to be illegal in warrant cases.² The Legislature has given effect to that practice by the addition of this sub-section.

Where a complaint is against two persons, but the complainant has paid process fees for summons against one only, the other must be discharged under this sub-section, if no summons is taken against him.³

The process-fees referred to in this sub-section are only for the attendance of the accused at the commencement of proceedings and not for the presence of the accused on the date of judgment and a dismissal of the complaint under this sub-section for non-payment of process-fees for such summons is not legal.⁴

The section applies to Magistrates taking cognizance of offences and this rule as to payment of process-fees refers, therefore, only to cases when an 'offence' is disclosed. An application for maintenance under S. 488 should not be dismissed under this sub-section for failure to pay process-fees, as an order for maintenance is not a conviction for an offence.⁵

[But see ('07) 6 Cr. L. J. 367 (369) : 12 CWN 68, *Panchu Ghosh v. Khosla Sarkar*.
(Withdrawal of processes without taking evidence held improper.)]
See also S. 369 Note 2.

Note 15

1. ('89)-1889 Rat 491 (491), *Queen-Empress v. Bhika*.
(('86) 2 Weir 252 (252) : 16 Mad 234, *In re Ponnammal*.)
2. ('93) 2 Weir 323 (323), *In re Palannagari*.
[See ('72) 1872 Pun Re No. 21 Cr, p. 29 (29), *Kahn Singh v. Hukum Singh*.
(Charge of cheating—Complaint not to be dismissed for failure to deposit expenses of producing accused after warrant has been issued.)]
3. ('02) 4 Bom L R 276 (277) : 26 Bom 552, *In re Lakshman Govind*. (Complaint of criminal breach of trust—Process fee not to be asked for.)
4. ('02) 26 Bom 552 (557) : 4 Bom L R 276, *In re Lakshman Govind*.
4. ('25) AIR 1925 All 392 (393) : 26 Cr. L. J. 963, *Bhimmi v. Pershadi*.
[See ('39) 1939 N L J 201 (201), *Emperor v. Nirpatsingh*. (S. 204 (3) appears to apply only to issue of process to the accused at the first instance.)]
5. ('93) 16 Mad 234 (234) : 2 Weir 252, *In re Ponnammal*.

Section 204
Notes 15-16

Where a complaint was dismissed under this sub-section in a *de novo* trial after charges had already been framed, it was held that it amounted merely to a discharge and not an acquittal, and that a second trial on the same facts would not be barred.⁶ See for further discussion, section 403.

Where a complaint is dismissed under this sub-section, the High Court, Sessions Judge or District Magistrate may, under S. 436, direct a further enquiry⁷ and in such a case notice to show cause why a further enquiry should not be ordered is neither desirable nor necessary.⁸

As to the fees payable, see S. 20 of the Court-fees Act, VII of 1870, and rules framed by the High Courts thereunder.

See also the undermentioned case.⁹

As to the applicability of this sub-section to processes to witnesses, see Notes to S. 544.

16. Revision. — The High Court has ample revisional powers to interfere with the proceedings under this section and can exercise its powers at any stage of the proceedings and quash the same, though it will interfere only in cases of an exceptional nature as where neither the complaint nor the prosecution disclosed a case against the accused, but process has been issued under this section.¹

Where a Magistrate, having followed the procedure laid down, has exercised a discretion judicially in issuing a process² or where the error, omission, or irregularity in the issue of process is one which is curable under S. 537,³ the High Court will not interfere. Similarly,

6. ('31) AIR 1931 Nag 39(40): 27 Nag L R 13: 32 Cr. L. J. 603, *Sheorai Sai v. Dani*. [But see ('15) AIR 1915 Mad 23 (24): 38 Mad 585 (588): 25 Ind Cas 1001 (1002, 1003): 15 Cr. L. J. 673, *Sriramulu v. Krishna Rao*. (Where it was held that after a charge is framed, there can be no discharge but only an acquittal and a second complaint on the same facts would be barred by S. 403.)
7. ('38) AIR 1938 Sind 192 (192): 39 Cr. L. J. 966, *Pherumal Lilaram v. Emperor*. [See also ('39) A I R 1939 Sind 38 (39): 1 I L R (1939) Kar 228: 40 Cr. L. J. 287, *Chellomal v. Kevalmal Jeyramdas*.]
8. ('22) AIR 1922 Pat 54 (54): 4 Pat L J 456: 20 Cr. L. J. 843, *Sheonarain Singh v. Rampertab Rai*.
9. ('92-96) 1 U B R 131 (131), *Queen-Empress v. Balo To*. (Processes issued on the complaint of a municipal officer are not exempt from the payment of court-fees.)

Note 16

1. ('99) 1899 All W N 212 (213), *Empress v. Clifton*.
('96) 20 Bom 543 (545), *Queen-Empress v. Nageshappa*.
('73) 20 Suth W R Cr 23 (30): 11 Beng L R App 8, *Abdool v. Magistrate of Purneah*.
('94) 22 Cal 131 (139), *Chandi Parshad v. Abdur Rahman*.
('97) 25 Cal 233 (235), *Choa Lal Das v. Anant Pershad*.
('99) 26 Cal 786 (790, 791): 3 C W N 191, *Jagat Chandra v. Queen-Empress*.
('10) 11 Cr. L. J. 525 (527): 38 Cal 68: 7 I. C. 747, *Haricharan v. Srish Chandra*.
('16) AIR 1916 Mad 408 (409): 16 Cr. L. J. 477 (477, 478): 39 Mad 561, *In re Kuppuswamy Iyer*.
('32) AIR 1932 Pat 72 (78): 33 Cr. L. J. 349, *Raghunath Puri v. Emperor*.
See also S. 439 Note 26.
2. ('26) AIR 1926 Cal 795 (797): 53 Cal 606: 27 Cr. L. J. 788, *Subal v. Ahadullah*. [See ('69) 11 Suth W R Cr 54 (54, 55), *Queen v. Russick Monce*.]
3. ('07) 6 Cr. L. J. 240 (251): 31 Bom 611: 9 Bom L R 967, *Emperor v. A. M. Jeevanjee*. (Summons disclosing no offence—Fresh summons issued without fresh or supplemental information.)
('75) 23 Suth W R Cr 63 (64), *Eastern Bengal Railway v. Kalidas Dutt*. (Omission to examine the complainant before issuing summons.)

where the record does not disclose sufficient grounds for issuing process, the High Court will not interfere merely because the Magistrate, taking cognizance of the matter, has failed to record reasons for not issuing process.⁴

Section 204
Notes 16-17

17. Process under special or local Acts. — See the undermentioned case.¹

205.* (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

Section 205

Magistrate may dispense with personal attendance of accused.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

Synopsis

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|--|---|
| 1. Legislative changes. | 7. "Permit him to appear by his pleader." |
| 2. Scope. | 8. "Pleader." |
| 3. "Whenever a Magistrate issues a summons." | 9. Applicability to security proceedings. |
| 4. "Dispense with." | 10. "At any stage of the proceedings." |
| 5. Bond from the accused. | 11. Revision. |
| 6. Pardanashin lady. | |

Other Topics (miscellaneous)

Dispensation with attendance of accused when incapable of remaining before the Court. See S. 540A.

No exemption when warrant is issued. See Note 3.

Record of reasons for refusing leave under the section. See Note 4.

1. Legislative changes.

Changes introduced in 1872 —

Under the Code of 1861, it was doubtful whether the Court could dispense with the personal attendance of the accused in cases in

* 1882 : S. 205; 1872 : S. 151; 1861 : S. 261.

(16) AIR 1916 Pat 129 (130) : 18 Cr. L. J. 366 (367) : 1 Pat L J 592, *Phagu Sahu v. Emperor*. (Issue of process without examination of the complainant.) See also Note 16 to S. 200.

(12) 13 Cr. L. J. 609 (611) : 16 I. C. 257 (Cal), *Pulin Behary Das v. Emperor*. (Issue of process on insufficient materials.)

(64) 1 Sath W R Cr 16 (16), *Aneef Putney v. Ramsoonder Chukerbutty*. (Issue of warrant instead of summons in the first instance.)

(29) AIR 1929 Lah 867 (867) : 30 Cr. L. J. 702, *Muhammad Sadiq v. Delhi Electric Supply & Traction Co.* (Mention of wrong section in summons but accused informed of correct section on his appearance.)

4. (38) AIR 1938 Mad 879 (879) : 39 Cr. L. J. 984, *In re Venkatasubba Pillai*.

Note 17

1. (08) 8 Cr. L. J. 185 (186) : 1 Sind L R 67, *Imperator v. Paman*. (Gambling Act, IV of 1887.)

Section 205
Notes 1-3

which a *warrant* was ordinarily issuable on complaint. Section 151 of the Code of 1872 made it clear that the Court could do so "in cases, of whatever nature, in which the Magistrate thinks fit to issue a summons."

Changes introduced in 1882 —

- (1) The words "in cases of whatever nature" of the Code of 1872 were substituted by the words "whenever issue a summons."
- (2) The words "by his pleader" were substituted for the words "by an agent duly authorized." This is consequent on the definition of "pleader" newly added to the Code of 1882 in section 4 (1) (n). That definition included any person duly authorized.
- (3) The words "and if necessary provided" were newly added.

Code of 1898 — The section remains unchanged since 1882.

2. Scope. — The general principle of the Code is that an accused person cannot be proceeded against *ex parte*.¹ This section provides an exception to this general rule by enacting that the Magistrate may dispense with the *personal* attendance of the accused in a particular class of cases, namely those in which he issues a *summons*. At any stage of the proceedings, however, the Magistrate enquiring into, or trying the case can direct the personal attendance of the accused if his presence is found necessary.

This section applies only to *Magistrates* and not to Courts of Session or the High Court. But s. 353 shows that the latter Courts have got similar power to dispense with the personal attendance of the accused.² The High Court can also under its inherent powers recognized by s. 561A, dispense with such attendance.³ See also s. 116 and s. 540A.

3. "Whenever a Magistrate issues a summons." — This section does not apply where a *warrant* has been issued¹ or the accused has been arrested without a warrant.² Where, however, a *summons* has been issued in the first instance and thereafter the accused is brought in under a warrant of arrest, the section would apply.³ A summons

Section 205 — Note 2

1. ('75) 24 Suth W R Cr 25 (26), *Tarincy Churn v. Municipal Commissioners, Serampore*.
2. ('22) AIR 1922 Mad 79 (79) : 45 Mad 359 : 23 Cr. L. J. 266, *Kandamani Devi v. Emperor*. (Court of Session.)
- ('12) 13 Cr.L.J. 464 (464):15 I.C. 96 (Bom), *Emperor v. C.W. King*. (High Court.)
- ('13) 23 I. C. 489 (491) : 15 Cr. L. J. 281 (Cal), *Raj Rajeswari Debi v. Emperor*. (Magistrate refused to dispense with personal appearance of pardahnashin ladies — On petition High Court allowed them to appear by pleader.)
- [See also ('67) 7 Suth W R Cr 78 (78), *In re Nistarinee*. (Application for dispensing with personal attendance held inadmissible apparently on the ground that there was no good reason to do so.)]
3. ('30) AIR 1930 Nag 61 (62) : 26 N L R 50 : 31 Cr.L.J. 284, *Mt. Saji v. Mt. Bhimi*.

Note 3

1. ('09) 13 Cal W N cl, *Sashi v. Ashutosh*.
- ('17) AIR 1917 Lah 292 (293) : 18 Cr. L. J. 975 (976) : 1917 Pun Re No. 36 Cr, *Emperor v. Sardar*.
- ('80) 1880 Pun Re No. 18 Cr, p. 31 (31), *Jiwan Beg v. Empress*.
2. ('24) AIR 1924 Pat 46 (47) : 2 Pat 793 : 24 Cr.L.J. 872, *Abdul Hamid v. Emperor*.
3. ('30) AIR 1930 Nag 61 (62) : 26 N L R 50 : 31 Cr.L.J. 284, *Mt. Saji v. Mt. Bhimi*.

can under S. 204 be issued even in cases in which a warrant is ordinarily issuable; this section will apply even to such cases if a summons has been issued.⁴ Even where a warrant has been issued, the Magistrate may cancel the warrant and issue a summons,⁵ or the accused having appeared before him, it may not be necessary for him to issue a summons for the appearance of the accused.⁶ In both these cases also this section will apply. All that is required under this section is that the Magistrate should consider that a summons is sufficient for the appearance of the accused in the case and if he is of that opinion he may then permit the accused to appear by pleader.⁷

4. "Dispense with." — The words "may, if he sees reason so to do" show that the Magistrate has a *discretion* to dispense with the personal attendance of the accused or not as he thinks fit. The discretion will, however, be used liberally especially in trivial cases such as a prosecution for a municipal offence,¹ or where the accused is a pardanashin lady,² or where the accused is too ill to attend Court.³ In such cases if the permission is refused, reasons for such refusal should be recorded.⁴

In considering the propriety of an order under this section, the Magistrate should always take into account whether there is any material before him to indicate that an offence has been committed by the accused and whether there is anything in the nature of a *prima facie* case.⁵

A Magistrate can dispense with the personal attendance of the accused as often as he pleases.⁶

It is not necessary that there should be an *express order* dispensing with the personal attendance. But it is advisable that the fact should be noted in the records and not be left for implication, although omission to do so would only be an irregularity which will not justify

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4. ('94) 21 Cal 588 (589, 590), *Basumoti Adhikarini v. Budram Kalita*.
 5. ('40) AIR 1940 All 178 (180) : 41 Cr. L. J. 500, *Jagdish Narain v. Emperor*.
 ('08) 8 Cr. L. J. 454 (454): 1908 P W R No. 20 Cr, p. 51, *Prem Kuar v. Sham Nath*.
 6. ('40) AIR 1940 All 178 (180) : 41 Cr. L. J. 500, *Jagdish Narain v. Emperor*.
 7. ('40) AIR 1940 All 178 (180) : 41 Cr. L. J. 500, *Jagdish Narain v. Emperor*.
 (In this case it was observed that the stage at which order under S. 205 (1) is to be passed is before the beginning of the trial.)

Note 4

1. ('14) 18 Cal W N xxxi (xxxi), *In re Surendranath*.
 2. ('83) 6 All 59 (60) : 1883 A W N 207, *In re Rahim Bibi*.
 ('27) AIR 1927 All 149 (149, 150) : 23 Cr. L. J. 94, *Mt. Tirbeni v. Mt. Bhagwati*.
 (Magistrate refusing to excuse personal attendance—High Court can interfere in proper cases.)
 ('94) 21 Cal 588 (589), *Basumoti Adhikarini v. Budram Kalita*.
 ('10) 11 Cr. L. J. 197 (198) : 3 S L R 167 : 4 Ind Cas 1152, *Emperor v. Mahomed*.
 (Mere impression that the woman is not pardahnashin is not sufficient to refuse the benefit of the section.)
 ('14) 23 Ind Cas 489 (491) : 15 Cr. L. J. 281 (Cal), *Raj Rajeswari Devi v. Emperor*.
 3. ('02) 6 Cal W N lix (lix), *In re Kiran Chandra*.
 ('12) 13 Cr. L. J. 464 (464) : 15 Ind Cas 96 (Bom), *Emperor v. King*. (High Court dispensing with the attendance.)
 4. ('83) 6 All 59 (60) : 1883 A W N 207, *In re Rahim Bibi*.
 5. ('40) AIR 1940 All 178 (180, 181) : 41 Cr. L. J. 500, *Jagdish Narain v. Emperor*.
 6. ('10) 14 Cal W N cxxxi (cxxxi), *Devendra Nath v. Narendra Nath*.
 ('17) 21 C W N clxviii (clxviii), *In re Sukhlata*.

Section 205
Notes 4-6

interference in revision.⁷

5. Bond from the accused.—Where the personal attendance of an accused is dispensed with, a recognizance bond may be taken from him binding him to appear either in person or by pleader, and if the pleader neglects to attend when the case is called on, the bond may be forfeited and the accused made liable for the payment of the penalty. The bond cannot be taken from his pleader nor can his pleader be bound by such a bond to attend.¹

6. Pardanashin lady. — Where a Magistrate issues a summons to a *pardanashin* woman who is accused of an offence, he should, as a general rule, dispense with her personal attendance and permit her to appear by pleader at least until such time as he has before him some legal and satisfactory evidence indicative of her having committed a breach of the law.¹ Such an order should not be refused merely because —

- (1) the Magistrate thinks that she is not *pardanashin*,² or
- (2) other women belonging to the same class that observed *pardah* had appeared in Court,³ or
- (3) she is the daughter of a prostitute, if she is married to a respectable husband in whose family women observe *pardah*.⁴

The Court will extend the privilege of *pardah* to women who, though not strictly observing *pardah*, are yet not accustomed generally to appear before the public.⁵ This section is one which should be freely utilised in Sind where so much prejudice exists against the appearance of females generally in public.⁶

As to the right of a *pardanashin* woman to be exempted from personal attendance —

- (1) where she is a complainant, see S. 200 Note 12,
- (2) where she is a witness, see Ss. 503 and 506.

7. ('26) AIR 1926 Bom 218 (221):50 Bom 250:27 Cr.L.J. 440, *Dorabshah v. Emperor*.

Note 5

1. ('68) 5 B H C R Cr 64 (65), *Reg. v. Lallubhai Jassubhai*.

Note 6

1. ('83) 6 All 59 (60) : 1883 A W N 207, *In the matter of the petition of Rahim Bibi*. ('22) AIR 1922 Mad 79(79):45 Mad 359:23 Cr.L.J.266, *Kandamanidevi v. Emperor*. ('08) 8 Cr. L. J. 454 (455) : 1908 P W R No. 20 Cr, *Prem Kaur v. Sham Nath*. ('14) AIR 1914 Sind 51 (51) : 7 S L R 161 : 15 Cr. L. J. 539, *Mt. Bachal v. Emperor*. (Complaint vague and identification not difficult—Sufficient ground for exemption.) ('27) AIR 1927 All 149 (150) : 28 Cr. L. J. 94, *Mt. Tirbeni v. Mt. Bhagwati*. ('14) 23 Ind Cas 489 (491) : 15 Cr. L. J. 281 (Cal), *Rajrajeswaridevi v. Emperor*. ('17) 21 Cal W N clxviii (clxviii), *In re Sukhlata*. (Attendance dispensed with till the conclusion of the case.) ('31) AIR 1931 Sind 37 (38) : 32 Cr. L. J. 665, *Mt. Asu v. Emperor*. ('09) 9 Cr. L. J. 158 (159, 160) : 1 I C 101 (Lah), *Mt. Habbo v. Emperor*. (Until the case has reached the stage at which personal attendance is clearly and legally required in the interests of justice.) ('10) 11 Cr. L. J. 197 (198) : 3 S L R 167 : 4 I C 1152, *Emperor v. Mahomed*. (Until it becomes necessary.) 2. ('10) 11 Cr. L. J. 197 (198) : 3 S L R 167 : 4 I C 1152, *Emperor v. Mahomed*. 3. ('27) AIR 1927 All 149 (149, 150) : 28 Cr. L. J. 94, *Mt. Tirbeni v. Mt. Bhagwati*. 4. ('13) 14 Cr. L. J. 3 (4) : 18 I C 147 (Lah), *Abdul Gaffar Beg v. Emperor*. See also S. 503 Note 6. 5. 2 Hyde 88 (88), *Kistomohun Mookerjee v. Adermoney Dabee*. 6. ('31) A I R 1931 Sind 37 (38) : 32 Cr. L. J. 665, *Mt. Asu v. Emperor*.

7. "Permit him to appear by his pleader." — Although the personal attendance of the accused may be dispensed with under this section, it is essential that he should be *represented* by his pleader. The reason is that it is necessary that some one should be present at the trial to look after the interests of the accused, and the law considers that such interest will be completely safeguarded if his pleader is in attendance.¹

The words "appear by pleader" in their ordinary acceptance mean "represented by pleader," that is, having a pleader to act and to plead.²

The appearance by a pleader involves the performance of all acts that devolve upon the accused in the course of the trial³ such as the following —

- (1) pleading guilty or not guilty under S. 255 and in cases falling under ss. 242 and 243,⁴
- (2) filing a written statement embodying the plea of the accused,⁵
- (3) making the necessary answers to an examination under S. 342,⁶
- (4) hearing a deposition of a witness read over, under S. 360 (1),⁷
- (5) hearing of a judgment, the sentence being one of fine only or the accused being acquitted under S. 366 (2).⁸

Form No. 1 of schedule V of the Code shows that the summons to an accused person may itself direct whether the accused is to appear in person or by pleader. In other words, the Magistrate may, even at the time of issuing summons, dispense with the personal attendance of the accused and permit him to appear by pleader.⁹ When a summons is sent as in Form No. 1 of schedule V, containing the words "you are hereby required to appear in person or by pleader" and the accused sends his pleader who requests for permission to dispense with the personal attendance of the accused, the Magistrate cannot proceed against the accused for disobedience of the summons, even though he

('10) 11 Cr. L. J. 197 (198) : 3 S L R 167 : 4 I C 1152, *Crown v. Mahomed*.

('13) 14 Cr. L. J. 272 (272) : 6 S L R 206 : 19 I C 544, *Emperor v. Jamal Khatun*.

('13) 14 Cr. L. J. 604 (604) : 7 S L R 40 : 21 I C 476, *Emperor v. Zali Khan*.

Note 7

1. ('28) AIR 1928 Cal 27 (32) : 29 Cri L Jour 49, *Hari Narayan v. Emperor*.

2. ('28) AIR 1928 Cal 27 (32) : 29 Cri L Jour 49, *Hari Narayan v. Emperor*.

3. ('26) AIR 1926 Bom 218(219): 50 Bom 250:27 Cr L J 440, *Dorabshah v. Emperor*.

('13) 14 Cr.L.J. 272 (272) : 6 S L R 206 : 19 I. C. 544, *Emperor v. Jamal Khatun*.

4. ('26) AIR 1926 Bom 218 (220) : 50 Bom 250 : 27 Cri L Jour 440, *Dorabshah v. Emperor*. (Following *Rex v. Thompson*, (1909) 2 K B 614, *Vessel v. Wilson*, (1853) 22 L J Q B 221, *Reg. v. Aves*, (1871) 24 L T 64; distinguishing (1904) 6 Bom L R 861.)

(1909) 2 K B 614 (617, 618), *Rex v. Thompson*. (Cited with approval in AIR 1926 Bom 218.)

See also the following cases. (The facts in these cases are not clear):

('25) AIR 1925 Oudh 305 (306), *Municipal Board v. Thulasi Ram*.

('90) 1890 Pun Re No. 2 Cr, p. 3 (5), *Shib Ram v. Simla Municipal Committee*.

('71) 15 Suth W R Cr 42 (42) : 6 Beng L R App 148, *Queen v. Roopa Gowalla*.

(Accused should plead by his own mouth—Case under the Code of 1861.)

5. ('17) 21 C W N clxviii (clxviii), *Re Sukhlata*.

6. See Note 17 to S. 342.

7. ('28) AIR 1928 Cal 27 (32) : 29 Cr.L.J. 49, *Harinarayan Chandra v. Emperor*.

8. ('26) AIR 1926 Bom 218(219):50 Bom 250:27 Cr.L.J. 440, *Dorabshah v. Emperor*.

9. ('26) AIR 1926 Bom 218(219):50 Bom 250:27 Cr.L.J. 440, *Dorabshah v. Emperor*.

[See ('40) AIR 1940 All 178 (180) : 41 Cr. L. J. 500, *Jagdish Narain v. Emperor*.]

Section 205
Notes 7-8

refuses to grant the permission. If he wants his personal attendance, an order directing such attendance should be made.¹⁰

The power to dispense with the personal attendance of the accused can be exercised by the Magistrate only so far as his *own Court* is concerned. He cannot, for instance, grant or refuse permission to appear through a pleader in the Sessions Court to which he commits the accused.¹¹

8. "Pleader." — Under the Codes of 1861 and 1872, the Court could, when dispensing with the personal attendance of the accused, permit him to appear by an *agent duly authorized*.¹ Under the present Code, the Court can permit him to appear only by his *pleader*. But the definition of the word "*pleader*" as now given in S. 4 (1) (r), is very wide and includes *any person appointed by the accused with the permission of the Court* to act in the proceedings against him.² In order that a person, other than a pleader authorized by law to practise in the Court, should be a "*pleader*" within the meaning of S. 4 (1) (r), it is necessary that —

- (1) he should have been appointed by the accused to act for him, and
- (2) the Court should permit him to so act.

The appointment and the permission need not, however, be express but may be implied from the circumstances of the case.^{2a} Thus, where the father-in-law of the accused who was unwell appeared in Court on her behalf and the trying Magistrate thereupon proceeded with the case, it was assumed that the Magistrate must have given the necessary permission.³

It is, however, generally advisable that something should be noted on the record to show that the person who represents the accused has been duly appointed by him and the Court has given the requisite permission for his appearance in place of the accused.⁴

In the absence of an *appointment* by the accused of any person to represent him, the mere permission of the Magistrate will not entitle any person to act as a pleader for the accused, and the Magistrate would have no jurisdiction to proceed with the case in the absence of the accused.⁵

Illustrations

- (1) X, the estate agent of the accused appeared in Court and was permitted by the Magistrate to represent the accused. It was, however, not clear that he was appointed by the accused to act for him in the proceeding. It was held that the

10. (1900) 27 Cal 985 (988, 989) : 5 C W N 131, *Durga Das v. Umesh Chandra*.

11. (1865) 2 Suth W R Cr 50 (50), *Queen v. Hurnath Roy*.

Note 8

1. (1862) 1862 Rat 1 (2), *Reg. v. Ramachandra*.

2. ('26) AIR 1926 Bom 218(222):50 Bom 250:27 Cr.L.J. 440, *Dorabshah v. Emperor*.

2a. See ('26) AIR 1926 Bom 218 (221) : 50 Bom 250 : 27 Cr.L.J. 440, *Dorabshah v. Emperor*.

3. ('84) 1884 Rat 206 (207), *Queen-Empress v. Chandrabhaga*.

4. ('26) AIR 1926 Bom 218(223):50 Bom 250:27 Cr.L.J. 440, *Dorabshah v. Emperor*.

5. ('24) AIR 1924 Pat 46 (47) : 2 Pat 793 : 24 Cr.L.J. 872, *Abdul Hamid v. Emperor*.

('30) AIR 1930 Nag 61 (63) : 26 N L R 50 : 31 Cr.L.J. 284, *Mt. Sarji v. Mt. Bhimi*.

[See ('24) AIR 1924 Rang 383 (383) : 26 Cr.L.J. 845, *Ma Kin v. Emperor*. (Accused absent throughout the proceeding and a co-accused allowed to represent him.)]

- accused could not be convicted on the plea of "guilty" made by the agent.⁶
- (2) The accused, a woman, was absent from her village and apparently without her knowledge, her mother-in-law appeared in Court on her behalf and was permitted to act for the accused. It was held that the conviction was not sustainable.⁷

Section 205
Notes 8-11

9. Applicability to security proceedings.—This section applies to proceedings under S.106 in chapter VIII Division A for the reason that the person against whom the proceedings are taken is an accused person. But it does not apply to proceedings under Ss.107 to 110, in chapter VIII Division B,¹ inasmuch as in such proceedings the persons proceeded against are not accused persons. But independently of this section, S.116 provides for dispensing with the personal attendance of the persons proceeded against in such cases.

10. "At any stage of the proceedings." — Where the Court has allowed the accused to appear by pleader, but thinks it necessary or desirable that the accused should be present in person for any particular purpose, such as for examination by the Court under S.342 or for pleading to a charge under S.255, he may order the personal appearance of the accused.¹ Where the accused is convicted and the sentence is not one of fine only, the Magistrate must, under S.366, sub-s.(2), direct the personal attendance of the accused for hearing the judgment.² Though at any time the Magistrate can revoke the permission given to the accused to appear by a pleader, yet he should not do so in a trivial case such as an income-tax prosecution and on a trivial ground such as that the accused objects to the case being tried by that Magistrate and wants a transfer of his case to some other Magistrate.³

11. Revision. — Where the Magistrate has refused to excuse the personal attendance of an accused person, the High Court will in proper cases interfere in revision and will dispense with his presence.¹

6. ('26) AIR1926Bom218(222,223):50Bom250:27Cr.L.J.440, *Dorabshah v. Emperor*.
7. ('84) 1884 Rat 205 (206), *Queen-Empress v. Vithi*.

Note 9

1. ('03) 2 Weir 54 (55), *In re Vasudevan Tirunambu*.

Note 10

1. ('26) AIR 1926 Bom 218(219):50 Bom 250:27 Cr.L.J. 440, *Dorabshah v. Emperor*.
(18) AIR 1918 Pat 152 (153) : 19 Cr. L. J. 119 : 43 Ind Cas 407 (407), *Jewraj Ramjidas v. Dullavji*.
(84) AIR 1934 All 693 (694) : 35 Cr. L. J. 879, *Ishwar Das v. Bhagwan Das*.
[See ('37) 1937 Mad W N 182 (183), *Nagoji v. Vecramma*.
(34) AIR 1934 Bom 212 (212) : 35 Cr.L.J. 1035, *Emperor v. Jaffar Cassum Moosa*.
(Magistrate not bound to require personal attendance of accused for examination under S. 342.)]
2. ('27) AIR 1927 Rang 73(73) : 4 Rang 506 : 28 Cr.L.J. 226, *Maung Po v. Haka*.
(13) 14 Cr. L. J. 272 (272) : 6 S L R 206 : 19 I C 544, *Emperor v. Jamal Khatun*.
[See ('22) AIR 1922 Mad 79 (79) : 45 Mad 359 : 23 Cr. L. J. 266, *Kandamani Devi v. Emperor*.
(14) 23 Ind Cas 489 (491) : 15 Cr.L.J. 281 (Cal), *Raj Rajeswari Devi v. Emperor*.]
3. ('23) 24 Cr. L. J. 902 (903) : 75 I C 150 (Cal), *Dwijendra Narain v. Emperor*.

Note 11

1. ('84) 6 All 59 (60) : 1883 A W N 207, *In re Rahim Bibi*. (Pardanashin lady.)
(27) AIR 1927 All 149 (150) : 28 Cr. L. J. 94, *Mt. Tirbeni v. Mt. Bhagwati*. (Do.)
(14) 23 Ind Cas 489 (491) : 15 Cr.L.J. 281 (Cal), *Raj Rajeswari v. Emperor*. (Do.)
(02) 6 Cal W N lix (lix), *In re Kiranchandra Roy*. (Extreme illness and distance of Court from house.)

Section 205
Note 11

The High Court will not, however, interfere where the irregularity alleged is the mere omission of the Magistrate to make a record that he has given permission to the accused to appear by his pleader,² or where the case itself is an extremely trivial one.³

But where there is a complete absence of jurisdiction as where the Magistrate dispenses with the presence of the accused in a case in which a *warrant* has been issued, the High Court will set aside the order giving such permission.⁴

A sub-divisional Magistrate cannot, in revision, cancel the order of a Bench Court dispensing with the personal attendance of the accused. He can only forward the record to the District Magistrate who should, under S. 438 of the Code, refer the matter to the High Court.⁵

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

Section 206

206.* (1) Any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, or any Magistrate (not being a Magistrate of the third class) empowered in this behalf by the *Provincial Government*,^a may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

a. Substituted by A. O. for "Local Government."

Synopsis

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|---|--|
| <ol style="list-style-type: none"> 1. Chapter XVIII — General. 2. Legislative changes. 3. "Magistrates empowered in this behalf." 4. Effect of committal by Magistrate having no power of committal. See S. 532. 5. "May commit." 6. "Triable by such Court"—Not only exclusively but also from the nature of the case. | <ol style="list-style-type: none"> 7. Discretion in the matter of committing or discharging the accused. See S. 213. 8. District Magistrate's interference with the discretion. 9. Committal to Sessions Court having no local jurisdiction over the case. 10. Quashing committal. See S. 215. 11. Sub-section (2). |
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* 1882 : S. 206; 1872 : S. 143; 1861 : Ss. 37, 38.

2. ('26) AIR 1926 Bom 218(221):50 Bom 250;27 Cr.L.J. 440, *Dorabshah v. Emperor*.

3. ('84) 1884 Rat 206(206), *Queen-Empress v. Chandrabhaga*.

4. ('24) AIR 1924 Pat 46(47): 2 Pat 793: 24 Cr.L.J. 872, *Abdul Hamid v. Emperor*.

5. ('37) 1937 M W N 182 (183), *Nagoji v. Veeramma*. (Proper procedure for a complainant aggrieved by order dispensing with presence of accused was to have requested the Magistrate to direct the personal attendance of the accused.)

Other Topics (miscellaneous)

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|---|---|
| Committal without evidence. See S. 208 Notes 6, 8 and 11. | Delegation instead of committal not permissible. See S. 209 Note 11. |
| Committal without jurisdiction. See S. 531, also S. 213 Note 2. | Objects of preliminary inquiry. See Note 1. |
| Coroner's inquiry—Effect. See Note 3. | Procedure when offence triable by two Courts of different grades. See Note 5. |

**Section 206
Notes 1-2**

1. Chapter XVIII — General. — Section 193 provides that a Sessions Court can take cognizance of a case in the exercise of its original jurisdiction only when the accused has been *committed* to it for trial. Section 194 provides that the High Court may take cognizance of offences upon commitment made to it. This chapter specifies the Magistrate who may pass orders of committal, and prescribes the procedure to be followed by him for the purpose.

The inquiry prescribed by the chapter is called a *preliminary inquiry*; and before a Magistrate commits a case for trial to a Sessions Court, he must hold such a preliminary inquiry into the facts alleged against the accused¹ and satisfy himself that there is a real case for trial.²

The object of such an inquiry is two-fold: firstly, in order to prevent the committal of cases in which there is no reasonable ground for conviction, so as, on the one hand, to save the accused from the prolonged anxiety of undergoing a trial for offences that cannot be brought home to him, and, on the other, to save the time of the Court being wasted over cases in which the evidence would obviously not justify a conviction.³ Secondly, in order to provide that no person shall be committed for trial without being previously made acquainted with the facts and circumstances of the offence imputed to him and without being given a fair opportunity of meeting them.⁴

2. Legislative changes.

- (1) The words "subject to the provisions of S. 443" which originally occurred in the section have been omitted by the Criminal Law

Section 206 — Note 1

1. ('15) AIR 1915 Bom 195 (196) : 31 Ind Cas 347 (349, 350) : 16 Cr. L. J. 747, *Emperor v. Bai Mahalakshmi*.
2. ('05) 2 Cr. L. J. 534 (541) : 9 C W N 829, *Sheobux Ram v. Emperor*.
3. ('82) 5 All 161 (162), *Lachman v. Juala*.
- (('99) 1899 All W N 135 (136), *Empress v. Dukes*. (Magistrate should take all the evidence in support of the prosecution and on behalf of the accused.)
- (('22) AIR 1922 Mad 43 (44) : 23 Cr. L. J. 209, *Ponniiah Thirumali v. Emperor*.
- (('12) 13 Cr. L. J. 778 (780) : 36 Mad 321 : 17 IC 410, *Sessions Judge of Coimbatore v. Kumara Kangaya*.
- (('70) 14 Suth W R Cr 16 (17), *Queen v. Kisto Doba*.
- (('95) 1895 Rat 746 (746), *Queen-Empress v. Vaja Raiji*.
- [See also ('39) AIR 1939 Sind 222 (224) : 1 L R (1940) Kar 95 : 40 Cr. L. J. 818, *Jashanmal J. Gulrajani v. Emperor*. (The purpose of committal proceedings is not merely to place on record the case for the prosecution but to commit to the Court of Session for trial an offence which, after having heard the evidence for the prosecution and for the defence, the Magistrate thinks has been committed.)]
4. ('81) 4 Mad 227 (228) : 2 Weir 584, *Queen v. Chinna Vedagiri*.
- (('12) 13 Cr. L. J. 877 (884) : 6 L B R 129 (FB), *Emperor v. Channing Arnold*.
- (('73) 19 Suth W R Cr 30 (31) : 10 Beng L R 285, *Queen-Empress v. Taruck Nath*.
- (('74) 22 Suth W R Cr 14 (16) : 14 Beng L R 54, *Queen v. Mt. Itwarya*. (So that the enquiry and committal must be for the offence with which the accused is charged and not for any other offence in respect of which no inquiry was held.)

Section 206
Notes 2-5

Amendment Act, XII of 1923, in view of the amendment of S. 443 effected by the said amending Act.

- (2) The words "(not being a Magistrate of the third class)" were newly introduced into the section by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

3. "Magistrates empowered in this behalf." — As the section now stands, the following Magistrates have powers of committal —

Presidency Magistrates; District Magistrates; Sub-divisional Magistrates; Magistrates of the first class; and Magistrates of the second class, if they are specially empowered by the Provincial Government in this behalf.¹

Before the Code of Criminal Procedure (Amendment) Act, XVIII of 1923, even Magistrates of the third class could be empowered to commit and in Madras all Magistrates had been so empowered to commit² except Tahsildar Magistrates of Taluqs, where there were Stationary Sub-Magistrates.³ The introduction of the words "not being a Magistrate of the third class" shows that third class Magistrates cannot now be so empowered.

The British Consul at Zanzibar is a Magistrate empowered to commit accused for trial to the High Court of Bombay.⁴

A District or sub-divisional Magistrate to whom a sub-Magistrate has submitted the case under S. 349 has got the power to commit the case to the Court of Session;⁵ but he has no power to send the case back to the sub-Magistrate with directions to commit it.⁶ See also Notes 14 and 16 under S. 349.

A Magistrate having power to commit does not lose the power merely because he has been specially appointed to *try* the accused.⁷

A Presidency Magistrate's jurisdiction to commit a case is not ousted by the fact that the coroner has held an inquiry and has drawn up an inquisition under Act IV of 1871.⁸

4. Effect of committal by Magistrate having no power of committal.
— See Section 532.

5. "May commit." — The procedure laid down in chapter XVIII is not confined to cases exclusively triable by a Court of Session but is

('81) 3 Mad 351 (353) : 2 Weir 269, *Rama Varma Raja v. Queen*. (Court of Session cannot add a charge of distinct offence not supported by evidence before Magistrate.)

Note 3

1. Calcutta Gazette, 1873, Pt. 1, p. 67. Calcutta Gazette, 1891, Pt. 1, p. 1000. Punjab Gazette, 1873, p. 75. Punjab Gazette, March 9, 1883.

2. Fort St. George Gazette, 1873, p. 717.

3. Fort St. George Gazette, 1893, Pt. 1, p. 579.

4. ('79) 3 Bom 334 (339), *Empress v. Dossaji Gulam Hussein*.

5. ('80) 4 Bom 240 (246), *Imperatrix v. Abdulla*.

6. ('86) 10 Bom 196 (197), *Queen-Empress v. Havia Tellapa*.

7. ('31) AIR 1931 Bom 517 (519) : 33 Cr. L. J. 68, *K. R. Bhat v. Emperor*.

8. ('92) 16 Bom 159 (161), *Queen-Empress v. Md. Rajudin*.

('04) 1 Cr. L. J. 13 (18, 19, 20) : 31 Cal 1 : 7 C W N 889, *Emperor v. Jogeshwar*.

('91) 1891 Rat 540 (541), *Queen-Empress v. John Paul*.

also applicable to cases which, in the opinion of the Magistrate, ought to be tried by such Court.¹ In other words:

Section 206
Note 5

(1) If the case is one exclusively triable by a Court of Session, the Magistrate *must* proceed under this chapter and cannot *try* the case himself.² And when the facts *prima facie* disclose such an offence the Magistrate should commit the case and will not be justified in trying the case for deciding whether it constitutes a lesser offence.³

(2) Conversely, if the offence is not of a nature triable by a Court of Session at all, this chapter will not apply and the Magistrate *must* try the case himself.⁴

Note 5

1. ('84) 6 All 477 (479) : 1884 A W N 205, *Ramsundar v. Nirodam*.
2. ('98) 1898 Rat 953 (953), *Queen-Empress v. Bhikhi*. (Offence of making false charge under S. 376, Penal Code.)
- ('10) 11 Cri L Jour 196 (197) : 4 Ind Cas 1134 (Mad), *In re Arumugam*. (Attempt to commit murder.)
- ('22) AIR 1922 All 345 (346) : 23 Cri L Jour 456, *Hasan Raza v. Emperor*. (In an appeal from a conviction by a Magistrate if the Sessions Judge is of opinion that the charge was triable by a Sessions Court, the proper course for him is to direct the accused to be committed for trial.)
- ('14) AIR 1914 Oudh 361 (363) : 15 Cri L Jour 502, *Kesrimal v. Emperor*. (Where a person is charged with two offences one of which is triable by a Court of Session and the Magistrate passed an aggregate sentence without specifying the sentences for each of the offences, the High Court, on a verbal objection before it for the first time as to the legality of the sentence, set aside the conviction and sentences in respect of the offence exclusively triable by a Court of Session after apportioning the sentence between the two offences.)
- ('68) 9 Suth W R Cr 5 (5), *Puran v. Bhutto*. (Offence under S. 459, Penal Code.)
- ('89) 1889 Rat 476 (477), *Queen-Empress v. Jobania*. (Magistrate not to ignore aggravating circumstances and try case himself.)
- ('66) 6 Suth W R Cr 2 (2), *Queen v. Sohoy Dome*. (Case of abduction of child for purposes of stealing its ornaments.)
- ('66) 6 Suth W R Cr 49 (49), *Shambo Roy v. Ajail Aheer*. (Dacoity.)
- ('87) 12 Mad 54 (55) : 2 Weir 22, *In re Madurai*.
- ('92-96) 1 U B R 231 (231), *Empress v. Nyan Nyein*. (Magistrates ought not to give themselves jurisdiction by trying cases under S. 354, Penal Code, which properly come under Ss. 376 and 511, Penal Code.)
- ('11) 12 Cri L Jour 20 (20) : 8 Ind Cas 1103 (Mad), *Jamal Mohamed v. Moideensa*. (Aggravating circumstances not to be ignored.)
- [See ('72) 18 Suth W R Cr 8 (9), *In re Tarince Prosad Banerjee*.
- ('97-01) 1 U B R 84 (84), *Queen-Empress v. Nga Lu*. (Practice of minimising seriousness of offences in order to assume jurisdiction condemned.)
- ('30) AIR 1930 All 280 (280) : 31 Cri L Jour 563, *Balkishen v. Emperor*. (It is not the duty of the Court to go out of the way to find that a case exclusively triable by a Court of Session might arise from facts before him.)]
- [See also ('71) Weir 3rd Edn. 701 (702).
- ('10) 11 Cri L Jour 639 (640) : 8 Ind Cas 389 : 1910 Pun Re No. 31 Cr, *Lekhara v. Crown*. (Fact that offence exclusively triable by Sessions Court involves minor offence triable by Magistrate does not empower him to try the case.)
- ('72-92) 1872-92 Low Bur Rul 158 (160), *Queen-Empress v. Nga Than Bo*. (Do.))
- See also S. 347 Note 4.
3. ('92) 5 C P L R Cr 38, *Empress v. Atmaram Hajam*.
- ('92) 5 C P L R 48 (49), *Empress v. Sonhar*.
4. ('97) 19 All 465 (466) : 1897 A W N 115, *Queen-Empress v. Schade*. (Offence under the Opium Act, I of 1878.)
- ('06) 3 Cr. L. J. 94 (95) : 3 ALJ 14 : 1906 A W N 28, *Emperor v. Dharam Singh*. (To commit summons cases to the sessions is illegal.)
- ('64) 1 Suth W R Cr L 14 (14), *In re Mado Muchi*. (Commitment in cases under Chapter VIII is illegal.)
- ('64) 1 Suth W R Cr 5 (5), *In re Indrobeer Thaba*. (Section 29 of the Police Act, 1861, makes offence triable only by Magistrate.)

Section 206
Notes 5-7

(3) If the offence is one triable both by a Court of Session and by himself, the Magistrate has a discretion to decide whether to try the case himself or to proceed under this chapter.⁵ As to the proper exercise of discretion in such cases, see Note 4 to S. 317. Even in cases not triable by the Magistrate but triable by a Court of Session or by some other Magistrate, he has a discretion to decide whether to proceed under this chapter or to send the case for trial by the proper Magistrate.⁶

If at the time a Magistrate is asked to take cognizance of a case, he is *ab initio* convinced that the case ought to be tried by a Court of Session, he must commence proceedings under this chapter. But there is nothing to prevent a Magistrate who started with the *trial* of a case from subsequently deciding to commit it for trial by a Sessions Court.⁷ In such cases the proceedings need not be started afresh but the Magistrate may proceed from where he left and continue the enquiry under this chapter.⁸

6. "Triable by such Court"—Not only exclusively but also from the nature of the case. — It has been seen in Note 5 that in cases exclusively triable by a Court of Session, the procedure prescribed by this chapter must be adopted and that in cases not so exclusively triable, the Magistrate has a discretion to decide whether to proceed under this chapter or to try the case himself. In the latter class of cases, the Magistrate must proceed under this chapter if in his opinion, the case *ought* to be tried by a Court of Session.¹ As to the principles on which this discretion ought to be exercised, see Note 4 to section 317.

7. Discretion in the matter of committing or discharging the accused.

— See Section 213.

(170) 5 Mad HCR 277 (279), *Reg. v. Dhonoghue*. (Offence under S. 30 of the Madras Act I of 1866.)

5. (25) AIR 1925 Pat 755 (759) : 27 Cr. L. J. 313, *B. N. Ry. v. Shaikh Makbul*. (1900-02) 1 Low Bur Rul 158 (159, 160), *Crown v. Hoogson*. (The power to try the case or to commit it to a Sessions Court is not taken away from Magistrate by the provisions of S. 8 (1) (a) and (b) of the Lower Burma Courts Act, 1900.)

(18) AIR 1918 Nag 141 (142) : 20 Cri L Jour 97, *Emperor v. Hanuman*. (The committal of a case triable exclusively by the Court of Session is not illegal merely because the committing-Magistrate is himself empowered under S. 30 to try the case.)

[See (30) AIR 1930 All 280 (280) : 31 Cri L Jour 563, *Balkishen v. Emperor*. (It is not incumbent upon a Magistrate to go out of his way to find that a case exclusively triable by a Court of Session might arise from facts before him, if they were proved.)]

6. (84) 6 All 477 (479) : 1884 A W N 205, *Ramsundar v. Nirotam*. (Magistrate, second class, invested with powers described in S. 206 inquiring an offence under S. 392, Penal Code, and discharging the accused—Discharge held valid.)

7. (12) 13 Cri L Jour 877 (882, 884, 885, 888) : 6 L B R 129 : 17 Ind Cas 813 (FB), *Emperor v. Channing Arnold*.

(14) AIR 1914 Mad 643 (644) : 15 Cr. L. J. 366, *In re Chinnavan*. (He must then stop proceeding with the case as a trial and instead commit the case under the provisions of Chapter XVIII.)

8. (80) 2 All 910 (912), *Empress of India v. Ilahi Baksh*.

(30) AIR 1930 Cal 666 (668) : 32 Cr. L. J. 243, *Panchanan Sarkar v. Emperor*.

(21) AIR 1921 All 148 (148) : 22 Cri L Jour 496, *Damarcha v. Emperor*.

See also S. 317 Note 5.

Note 6

1. (84) 6 All 477 (479), *Ramsundar v. Nirotam*.

8. District Magistrate's interference with the discretion.— When the inquiry is pending before a subordinate Magistrate, the District Magistrate has no power to order committal or otherwise interfere with the discretion of the former. See section 435 Note 13. But when a sub-Magistrate has discharged the accused, the District Magistrate, if satisfied that the discharge was improper, may interfere under S. 436 and order committal. See Notes under S. 436 and S. 437.

Section 206
Notes 8-11

9. Committal to Sessions Court having no local jurisdiction over the case.— As to the validity of a committal to a Sessions Court having no local jurisdiction in the place where the offence was committed, see S. 531 Note 2.

When a native Indian subject who is charged with having committed an offence in a Native State is brought to the British territory, he will be considered to have been "found" at the place to which he is brought and the Sessions Court having jurisdiction in that place will be competent to try the offence.¹

10. Quashing committal.— See Section 215.

11. Sub-section (2).— Though this sub-section prohibits committal to the High Court of cases triable by a Court of Session, there is nothing to prevent the High Court from trying cases committed to it by a mofussil Court, by exercising the power given to the High Court by S. 526 sub-s.(1).¹

See also the undermentioned cases.²

207.* The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.

Section 207

Procedure in inquiries preparatory to commitment.

* 1882 : S. 207; 1872 : S. 189; 1861 : S. 179.

Note 9

1. ('82) 6 Bom 622 (625), *Empress v. Magan Lall*.

Note 11

1. ('20) AIR 1920 Mad 824 (825) : 42 Mad 791 : 20 Cr. L.J. 484, *In re Ganapathy Chetti*. (High Court in original criminal jurisdiction can try cases committed to it instead of local Sessions Judge—Commitment is not void.)
2. ('82) 5 Mad 33 (53):1 Weir 7, *Ward v. Queen*. (Inasmuch as the High Court of Madras has been duly constituted a Court of original criminal jurisdiction to take cognizance of offences committed by European British subjects being Christians, it may be that, in the absence of any special direction, a commitment to the High Court of such person charged with an offence not punishable with death or transportation for life, committed in Mysore province, would be a good commitment.)
3. ('64) 5 Suth W R Cr Cir 1. (When a European British subject and a Native subject are together charged with an offence requiring the commitment of the former to the High Court for trial, the latter should not be committed to the High Court, also, but should, in the ordinary manner, be committed in the Sessions Court competent to try the offence.)

Section 207
Notes 1-4

Synopsis

1. Scope and applicability of the section.
2. Object of preliminary enquiry in sessions cases. See S. 206 Note 1.
3. "Ought to be tried." See Note 4 to S. 347.
4. Procedure where there are two or more offences one of which is triable only by a Court of Session.
5. Joint inquiry — Legality of.

Other Topics (miscellaneous)

Grounds for committal — Connection with another case. See S. 215.

Procedure on direction by High Court to commit. See Note 1.

Separate trial on joint commitment. See Note 5.

1. Scope and applicability of the section. — This section contemplates a commitment to the Court of Session or High Court in two cases, (a) where the offence is exclusively triable by a Court of Session or High Court and (b) where the offence is triable by a Court of Session or High Court as well as by a Magistrate but the Magistrate is of the opinion that it ought to be tried by a Court of Session or High Court. Where an offence though triable by a Court of Session or High Court is neither exclusively triable by such Court nor one which in the opinion of the Magistrate ought to be tried by such Court, the Magistrate cannot commit it to the Sessions Court.¹ Where an offence is not triable at all by a Court of Session it cannot be committed to the Sessions: *vide* S. 206.

A preliminary inquiry as prescribed by this chapter is not necessary where a case is committed to the Court of Session in obedience to the lawful orders of a superior Court.²

2. Object of preliminary inquiry in sessions cases. — See S. 206 Note 1.

3. "Ought to be tried." — See Note 4 to S. 347.

4. Procedure where there are two or more offences one of which is triable only by a Court of Session. — Where an accused is charged with two or more offences one of which is exclusively triable or ought to be tried by a Court of Session, the procedure under this chapter should be followed and the proper course is to commit him for trial for *all* the offences.¹ So also, where several persons are jointly charged in respect of one transaction and it appears from the facts implicating the whole of them that one has committed an aggravated

Section 207 — Note 1

1. ('28) AIR 1928 Pat 551 (552); 29 Cr.L.J. 612, *Emperor v. Deo Narain Mullick*. (Such opinion must be supported by reasons.)

See also Section 347 Note 4.

2. ('80) 2 All 910 (912), *Empress of India v. Ilahi Baksh*. (Appellate Court while setting aside conviction directed the accused to be committed to sessions.)

('25) AIR 1925 Rang 82 (83); 2 Rang 447; 26 Cr.L.J. 1106, *Nga Myaing v. Emperor*. (Do.)

[See ('12) 13 Cri L Jour 742 (743); 1912 Pun Re No. 7 Cr : 17 Ind Cas 54, *Wadhawa Singh v. Emperor*.]

[But see ('32) AIR 1932 Cal 683 (684, 685); 33 Cri L Jour 770, *Nagendranath v. Emperor*. (Appellate Court discharging accused, but saying that if the Magistrate wishes to proceed further in the matter he may commit the accused to the Court of Session — Preliminary enquiry under Chapter XVIII necessary before accused can be committed.)]

Note 4

1. ('21) 61 Ind Cas 1008 (1008); 22 Cri L Jour 480 (Cal), *Probodh v. Mohim*.

offence, which must or should be tried by a Court of Session, the Magistrate should commit all the accused for trial.²

Section 207
Notes 4-5

5. Joint inquiry — Legality of.— There is no provision in the Code requiring a separate inquiry in respect of each person prior to commitment. The sections relating to joinder of charges, *viz.*, S. 233 to S. 239 refer to trials only. Hence, there is no objection to hold a preliminary enquiry against a person jointly with others but the trial on commitment should be separate.¹ See also S. 233, Note 6 and S. 239, Note 1.

208.* (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of

Section 208

Taking of evidence
produced.

* Code of 1882 : S. 208 — See Note 1.

Code of 1872 : Ss. 190, 191 and 357, para. 1.

190. When the accused person appears or is brought before the Magistrate, or if his personal attendance is dispensed with, when the Magistrate thinks fit, the Magistrate shall take the evidence of the complainant, and of such persons as are stated to have any knowledge of the facts which form the subject-matter of the accused and the attendant circumstances.

191. The complainant and the witnesses for the prosecution shall be examined in the presence of the accused person, or of his agent when his personal attendance is dispensed with and he appears by agent.

357. In inquiries preliminary to commitment to a Court of Session or High Court, the Magistrate shall procure the attendance of the witnesses for the prosecution as in cases usually tried upon warrant; and it shall be in his discretion to summon any witness offered on behalf of the accused person to answer or disprove the evidence against him. If the Magistrate refuses to summon a witness so offered, he shall record his reasons for such refusal.

(‘83) 1883 All W N 199 (199), *Empress v. Ramanand*. (Although there is no absolute prohibition in the Code as to his trying the accused for offences triable by him and committing him for other offences.)

(‘33) AIR 1933 Lah 500 (501) : 34 Cri L Jour 314, *Emperor v. Ujagar Singh*. (Four cases in which evidence was same committed to sessions — Magistrate competent to try two—*Held*, commitment order was proper.)

(‘97) 2 All 398 (400, 405), *Empress of India v. Lachman Singh*.

[See (‘18) AIR 1918 All 126 (126) : 40 All 615 : 19 Cr.L.J. 706, *Hait Ram v. Ganga*.]

2. (‘81) 1881 All W N 64 (64), *Empress v. Khiali*. (On the ground of convenience.)

(‘99) 2 Weir 258 (258), *In re Kathu Chenchugadu*.

(‘68) 1 Weir 448 (449).

Note 5

1. (‘05) 7 Bom L R 457 (458) : 2 Cri L Jour 432, *Emperor v. Sita*.

(‘02) 26 Mad 592 (594) : 2 Weir 262, *In the matter of Govindu*.

(1900) 1900 All W N 206 (206), *Queen-Empress v. Salamatullah Khan*.

[See (‘97) 1897 Rat 915 (915), *Queen-Empress v. Raghu Hari*. (Magistrate charging the accused together and sending them for joint trial in one commitment—Such commitment is not illegal.)]

[But see (‘97) 1897 Rat 925 (926), *Queen-Empress v. Daulata Dhondi*.

(‘68) 9 Suth W R Cr 33 (35), *Queen v. Durzoola*. (Commitment should be separate.)

(‘67) 8 Suth W R Cr 47 (52) : Beng L R Sup Vol. 750 Cr (FB), *Queen v. Sheikh Bazu*. (Failure to make separate commitment—Mere irregularity.)]

Section 208

the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Object of the section. 3. "When the accused appears or is brought before him." 4. "Shall proceed to hear." 5. "Hear the complainant (if any)." 6. Take all such evidence. 7. Evidence for the prosecution. 8. Evidence for the accused. 9. "In manner hereinafter provided." 10. Sub-section (2) — Right of cross-examination. 11. Sub-section (3) — Summoning of witnesses. | <ol style="list-style-type: none"> 12. Officer conducting prosecution. See S. 495. 13. Procedure where after commencing case as a trial of a warrant or summons case, the Magistrate considers the case to be one which ought to be committed to the sessions. See S. 347 and Notes thereunder. 14. Commitment by Civil or Revenue Courts in respect of offences committed before or brought under notice of such Court, in course of judicial proceeding. See S. 478 and Notes thereunder. |
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Other Topics (miscellaneous)

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| <p>Committal without evidence. See Notes 6, 8 and 11.</p> <p>Duty of prosecution. See Note 7.</p> <p>Evidence called for by Magistrate. See Note 7.</p> | <p>Record of reasons. See Note 11.</p> <p>Right of reserving cross-examination. See Note 10.</p> <p>Valid reasons. See Note 11.</p> |
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Code of 1861 : Ss. 186, 193, 194 and 207.

186. The Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case and who are likely to give evidence for the prosecution, and shall issue his summons to such persons, requiring them to appear at a time and place mentioned in the summons before such Magistrate to testify what they know concerning the complaint made against the accused person.

193. The Magistrate shall take the evidence of the complainant, and of such persons as are stated to have any knowledge of the facts which form the subject-matter of the accusation and the attendant circumstances.

194. * * * * *
The accused person or his agent shall be permitted to examine and re-examine his own witnesses, and to cross-examine the complainant and his witnesses.

Discretionary with the Magistrate to take evidence for the defence. 207. It shall be at the discretion of the Magistrate to summon any witness who may be offered in behalf of the accused person to answer or disprove the evidence against him.

1. Legislative changes.—The Code of 1882 did not contain any provision corresponding to sub-s.(2), though the prior Codes contained such a provision. The sub-section was inserted in the Code of 1898. See Note 10, below.

2. Object of the section. — This section is intended for the benefit of the accused. Its object is that the accused should be made aware of all the evidence that he will have to meet on his trial and also that he should have a full opportunity of convincing the Magistrate that there are not sufficient grounds for committing him for trial.¹

3. "When the accused appears or is brought before him."— It is necessary for a preliminary inquiry under this chapter that there must be an *accused* person. Where an inquiry was held in which a certain person was not put in the situation of an accused person at all but was himself examined on solemn affirmation like other witnesses, and was not given any opportunity of cross-examining the other witnesses, and then was committed to the Court of Session on a charge which was the result of the inquiry, it was held that the commitment was illegal.¹

The "appearance" of the accused under this section may be voluntary and need not be under any process issued against him under S. 204.²

4. "Shall proceed to hear."— Under S. 344, the Magistrate can *postpone* the commencement of the enquiry for any reasonable cause.

5. "Hear the complainant (if any)." — The section requires that the complainant shall be *heard*, not necessarily examined.¹

6. Take all such evidence.—In an inquiry under this chapter the Magistrate is bound, before he draws up a charge, to take all such evidence as may be produced (1) in support of the prosecution, (2) on behalf of the accused or (3) as may be called for by the Magistrate,¹ unless the evidence is irrelevant or unnecessary to prove the point in issue.² It is the duty of the Magistrate to record the evidence fully in order that the accused may have ample notice of the matter with which

Section 208 — Note 2

1. ('12) 13 Cr. L. J. 877 (882, 883) : 6 L B R 129 : 17 I. C. 813 (FB), *Emperor v. Channing Arnold*.

[See ('39) AIR 1939 Sind 222 (224) : 1 L R (1940) Kar 95 : 40 Cri L Jour 818, *Jashanmal v. Emperor*.]

[See also ('81) 4 Mad 227 (227, 228) : 2 Weir 584, *Queen v. Chinna Vedagiri*.]

Note 3

1. ('68) 9 Suth W R Cr 54 (56, 57), *Queen v. Kali Churn*.

2. ('19) AIR 1919 Lah 389 (390) : 20 Cr. L. J. 3 : 1919 P R No. 5 Cr, *Emperor v. Mt. Ruri*.

Note 5

1. ('29) AIR 1929 Cal 229 (230) : 30 Cr. L. J. 942, *Santiram Mandal v. Emperor*.

Note 6

1. ('72-92) 1872-92 Low Bur Rul 538 (539), *Nga Po Se v. Queen*.

('02) 1 L B R 348 (348), *Crown v. Po Nyan*.

('12) 13 Cr. L. J. 443 (444) : 15 I. C. 75 (All), *Durga Dutt v. Emperor*.

[See ('39) AIR 1939 Sind 222 (224) : 1 L R (1940) Kar 95 : 40 Cri L Jour 818, *Jashanmal v. Emperor*.]

2. ('12) 13 Cr. L. J. 443 (444) : 15 I. C. 75 (All), *Durga Dutt v. Emperor*.

Section 208
Notes 6-7

he is charged, and of the evidence by which the prosecutor seeks to prove the case.³ He is not absolved from recording all the evidence produced under this section, even in cases where the accused has confessed his guilt inasmuch as such confessions are often retracted later on.⁴ It ought to be the endeavour of the Magistrate in the inquiry under this section to ascertain the fact of a *particular offence* and collect evidence thereof before commitment and not to expect convictions at the Court of Session on a vague and multifarious evidence causing suspicion of several offences but yielding proof of none.⁵ As to whether the inquiry should be directed to ascertaining the guilt or innocence of the accused definitely or only to find out if there are *prima facie* grounds for believing the accused to be guilty, see Note 5 under S. 209.

7. Evidence for the prosecution.—The object of the prosecution is not to secure a conviction at any cost but to see that justice is done. Hence it is the duty of the prosecution to call as witnesses all persons who have been eyewitnesses or otherwise connected with the transaction although the evidence of any of them may be favourable to the accused, and an adverse inference can be drawn from the failure to call any material witness.¹ But the prosecution is not under any duty to call witnesses whom it regards as false or unnecessary.² If the prosecution has not sent up any material witness, it is the duty of the Magistrate to call such witness and examine him himself.³ The examination of the investigating police-officer is necessary in all important cases, especially of murder and dacoity.⁴

(‘33) AIR 1933 All 690 (695) : 55 All 1040 : 34 Cr. L. J. 967, *S. H. Jhabwala v. Emperor*. (Superfluous evidence is unnecessary.)

3. (‘38) AIR 1938 Pat 579 (582) : 40 Cr. L. J. 147, *Yusuf Mia v. Emperor*.

4. (‘96) 1896 Rat 842 (842), *Queen v. Mahadu Vithoba*.

5. (‘90) 15 Bom 491 (504), *Queen-Empress v. Fakirapa*.

Note 7

1. (‘37) AIR 1937 All 182 (186, 187) : 38 Cri L Jour 401, *Francis Hector v. Emperor*. (The mere fact that the evidence of some witnesses is expected to be inconsistent with that of the complainant in some respects is no justification for refusing to examine them as witnesses.)

(‘84) 10 Cal 1070 (1072), *Queen-Empress v. Ram Sahai Lall*.

(‘82) 8 Cal 121 (124, 125) : 10 C L R 151, *In the matter of Dhunnokazi*.

(‘21) AIR 1921 Cal 257 (257) : 22 Cri L Jour 475, *Tenaram Mondal v. Emperor*.

(‘15) AIR 1915 Cal 545 (546, 547) : 16 Cr.L.J. 170: 42 Cal 422, *Ram v. Emperor*.

(‘16) AIR 1916 Lah 408 (409) : 17 Cr.L.J. 267: 1916 PR No. 12 Cr, *Kaimi v. Emperor*.

(‘32) AIR 1932 Lah 500 (501) : 33 Cri L Jour 497, *Lachminarain v. Emperor*.

(‘29) AIR 1929 Pat 343 (346) : 8 Pat 625 : 30 Cri L Jour 1136, *Mathura Tewary v. Emperor*. (Prosecution has no option to choose witnesses.)

(‘31) 1931 Mad W N 727 (728), *Nagaratna Thevan v. Emperor*.

[See also (‘38) AIR 1938 Pat 579 (582) : 40 Cr.L.J. 147, *Yusuf Mia v. Emperor*. (Evidence to be recorded fully.)]

2. (‘27) AIR 1927 Mad 475 (476) : 28 Cr. L. J. 307, *Muthaya Thevan v. Emperor*.

(‘28) AIR 1928 Pat 46 (48) : 28 Cr. L. J. 868, *Parbhu v. Emperor*. (Unnecessary.)

(‘32) AIR 1932 Bom 279 (282) : 56 Bom 434:33 Cr.L.J. 613, *Vasudeo v. Emperor*.

[See (‘36) AIR 1936 Lah 533 (535) : 17 Lah 176 : 37 Cri L Jour 742 (FB), *Mt. Niamat v. Emperor*. (There is nothing in S. 208 (1) or (3) which at any rate makes the production of all evidence necessary in the Magistrate's Court.)]

(‘23) AIR 1923 Oudh 217 (224) : 24 Cri L Jour 770, *Emperor v. Narotam*.]

See also S. 252 Note 5 and S. 286 Note 6.

3. (‘26) AIR 1926 Pat 5 (8) : 26 Cri L Jour 1589, *Pershad Tewari v. Emperor*.

4. (‘81) 1881 Rat 173 (173), *Queen-Empress v. Rampuri*.

See also S. 495 Note 6 and S. 540 Note 9.

As to the right of the prosecution to abstain from examining some witnesses before the committing Magistrate and produce at the sessions trial evidence not produced in the committing Magistrate's Court, see Notes under S. 236.

Section 208
Notes 7-10

See also the observations in the undermentioned case⁵ regarding the precautions to be taken as regards chemical examiner's reports and in proving *post mortem* examinations.

8. Evidence for the accused. — Under this section it is the duty of the Magistrate to take all the evidence produced by the accused before framing a charge. A commitment order passed without taking the evidence produced for the defence is illegal and liable to be quashed.¹ It has been held in the undermentioned case² that the rule laid down in this section is limited to examination of witnesses produced by the defence and should not be enlarged to include witnesses whom the accused might be prepared to produce.

9. "In manner hereinafter provided." — These words refer to chapter XXV.¹

10. Sub-section (2) — Right of cross-examination. — Section 194 of the Code of 1861 and S. 191 of the Code of 1872 expressly declared the right of the accused to cross-examine the prosecution witnesses before commitment.¹ The 1882 Code omitted this provision as a redundancy, since even under S. 138 of the Evidence Act, 1872, which provides that the opposite party has the right to cross-examine the witnesses examined by a party, the accused can cross-examine the prosecution witnesses. But this omission gave room for doubts² to remove which sub-s. (2) was inserted in 1898. The accused is now, of right, entitled to cross-examine the witnesses for the prosecution during the preliminary enquiry before the charge is framed.³ The

5. ('72-92) 1872-92 L B R 634 (635), *Nga Pya v. Empress*. (When committing cases, Magistrate to take care to send up evidence to prove that a body sent to the hospital for *post mortem* examination is really the body of the person referred to in the case under trial, or, that an article analysed by the chemical examiner was actually the article sent to him for analysis in the case under trial.)

Note 8

1. ('98) 20 All 264 (265) : 1898 A W N 52, *Queen-Empress v. Ahmadi*.
(24) AIR 1924 All 317 (318) : 46 All 137 : 25 Cr. L. J. 624, *Jaswant Singh v. Emperor*.
(04) 26 All 177 (178) : 1903 A W N 215, *Emperor v. Muhammad Hadi*.
(28) AIR 1928 Rang 299 (299) : 6 Rang 531 : 30 Cr. L. J. 1, *Emperor v. Nga Khaing*.
(34) AIR 1934 Lah 610 (610) : 36 Cri L Jour 410, *Jhana v. Emperor*. (Whether or not the examination of the accused's witnesses by the Magistrate will help him, he is entitled to have the witnesses examined.)
[See ('39) AIR 1939 Sind 222 (224, 225) : ILR (1940) Kar 95 : 40 Cri L Jour 818, *Jashanmal v. Emperor*. (Accused is entitled to adduce all material evidence in his defence—Every proper opportunity must be given to him to meet the charge.)]
2. ('16) AIR 1916 Cal 106 (106) : 42 Cal 608 : 16 Cri L Jour 415, *Emperor v. Surath*. (Magistrate refusing application for calling further witnesses, on day on which order of commitment is passed—*Held*, this does not show that S. 208 is not complied with—Commitment cannot be quashed.)

Note 9

1. ('26) AIR 1926 Pat 58 (59) : 26 Cr. L. J. 1475, *Emperor v. Phagunia Bhuian*.

Note 10

1. ('68) 10 Suth W R Cr 25 (25), *Queen v. Shama Sunkar*.
2. ('94) 21 Cal 642 (662, 663), *Queen-Empress v. Sagal Samba Sajao*.
3. ('24) AIR 1924 Cal 780 (780) : 51 Cal 442 : 26 Cr. L. J. 63, *Jyotsna v. Emperor*.

Section 208
Note 10

refusal or omission of the Magistrate to give the accused an opportunity to cross-examine the witnesses for the prosecution is a legal flaw and will render the order of commitment liable to be set aside⁴ unless the *accused* has reserved the cross-examination to the Sessions Court.⁵

The proper time to exercise the right of cross-examination is after the examination-in-chief of each witness. The accused has no *right* to reserve his cross-examination till the examination-in-chief of all the prosecution witnesses is over.⁶ But the Magistrate has a discretion in the exercise of his inherent power in suitable circumstances to allow the accused to reserve his cross-examination.⁷

If the Magistrate, in the exercise of his discretion, permits the reservation of cross-examination, he cannot then refuse to recall the prosecution witnesses.⁸ Thus, where the accused applies for copies of statements made by prosecution witnesses to the police during the investigation with a view to cross-examine the witnesses and the Magistrate has ordered such copies to be furnished under S. 162, he is bound to postpone the cross-examination of the prosecution witnesses till such copies are obtained and then allow cross-examination with reference to such statements.⁹

A Magistrate has no power to curtail the cross-examination of witnesses, by directing the counsel for the accused not to put more than six to eight questions to each witness.¹⁰ The cross-examination of the prosecution witnesses under this section need not be confined to matters elicited in examination-in-chief.¹¹ This sub-section speaks of the right of the *accused* to cross-examine the prosecution witnesses. But the *Magistrate* himself can cross-examine them if he thinks it necessary to do so for ascertaining the truth of the prosecution story.¹² (*vide* S. 165, Evidence Act.)

(198) 20 All 529 (531) : 1898 A W N 152, *Queen-Empress v. Brij Narainman*.

(1900-01) 5 Cal W N 110 (112), *In the matter of Surjya Narain Singh*.

(1930) AIR 1930 Cal 754(755) : 57 Cal 945 : 32 Cr.L.J. 182, *Nanooram v. Fulchand*.

(1924) AIR 1924 Cal 780(780) : 51 Cal 442 : 26 Cr.L.J. 63, *Jyotsna Nath v. Emperor*.

4. See cases cited in foot-note 3 above.

5. (191) 2 Weir 260 (260), *In re Saradhi Naiko*.

6. (19) AIR 1919 L B 159(160) : 9 L B R 109 : 19 Cr.L.J. 327, *Tambi v. Emperor*.

(1912) 13 Cr. L. J. 443 (445) : 15 I C 75 (All), *Durga Dutt v. Emperor*.

(1929) AIR 1929 Cal 593 (595) : 57 Cal 44 : 30 Cr. L. J. 1107, *G. V. Raman v. Emperor*. (Where Magistrate asked the accused to cross-examine each witness before he left his box and they persistently refused to cross-examine the witnesses and a prayer to reserve cross-examination till a later stage was refused, *held* the Magistrate had committed no error of law.)

(1914) 15 Cr. L. J. 29 (30) : 22 I C 173 (Mad), *In re Mohamed Kasim*.

(1931) AIR 1931 Bom 517 (518) : 33 Cr. L. J. 68, *K. R. Bhat v. Emperor*.

(1927) AIR 1927 Pat 243 (245) : 6 Pat 329 : 28 Cr.L.J. 709, *Sasdat Mian v. Emperor*.

7. (1929) AIR 1929 Cal 593(595) : 57 Cal 44 : 30 Cr.L.J. 1107, *G. V. Raman v. Emperor*.

(1927) AIR 1927 Pat 243 (245) : 6 Pat 329 : 28 Cr.L.J. 709, *Sasdat Mian v. Emperor*.

(1919) AIR 1919 L B 159(160) : 9 L B R 109 : 19 Cr. L. J. 327, *Tambi v. Emperor*.

8. (1930) AIR 1930 Cal 754(755) : 57 Cal 945 : 32 Cr.L.J. 182, *Nanooram v. Fulchand*.

9. (1927) AIR 1927 Pat 243 (246) : 6 Pat 329 : 28 Cr. L. J. 709, *Sasdat v. Emperor*.

10. (1912) 13 Cr. L. J. 443 (445) : 15 I C 75 (All), *Durga Dutt v. Emperor*.

[But see (1929) AIR 1929 Sind 137 (139) : 23 Sind L R 340 : 30 Cr.L.J. 845, *Emperor v. Walidino*. (Magistrate not to allow unnecessarily lengthy cross-examination.)]

11. (1971) 15 Suth W R Cr 34 (35) : 6 Beng L R App 88, *Queen v. Ishan Dutt*.

12. (1915) AIR 1915 Bom 195(196) : 16 Cr. L. J. 747, *Emperor v. Bai Mahalaxmi*.
(1984) 7 All 160 (162) : 1884 A W N 314, *Queen-Empress v. Kallu*.

As to whether the accused is entitled to cross-examine the prosecution witnesses *after the charge is framed*, see Note 7 under S. 213.

Section 208
Notes 10-13

As to the right of the accused to cross-examine in cases commenced as trials but subsequently considered by Magistrate to be fit to be committed to sessions, see S. 347 Note 5.

11. Sub-s. (3) — Summoning of witnesses. — Under this sub-section, the Magistrate is bound to issue process for the attendance of any witness or the production of any document when such process is applied for, either by the prosecution or the accused¹ unless he deems it unnecessary to do so.² If he refuses to issue process, he must record his reasons for his refusal and an omission to record such reasons is an illegality and the subsequent order, either of discharge, or of commitment is liable to be set aside.³ Inordinate delay in applying for summons is a proper reason to refuse process.⁴ So also, if it is brought to the notice of the Magistrate that the witnesses were summoned for the purpose of causing vexation to those witnesses, the Magistrate can refuse to issue summons.⁵ But the Magistrate should not refuse to call evidence on behalf of the accused merely because he will have ample opportunity to produce evidence later on, when he is committed to the sessions.⁶ If the Magistrate has exercised his discretion and recorded his reasons for such refusal, the revisional Court will not interfere with it unless the reason appears on the face of it to be untenable.⁷ A Magistrate is bound to take the evidence of the witnesses summoned under this section.⁸

As to the power of the Magistrate to require process fees and other fees, see Notes to S. 514.

12. Officer conducting prosecution. — See Section 495.

13. Procedure where after commencing case as a trial of a warrant or summons case the Magistrate considers the case to be one which ought to be committed to the sessions. — See S. 347 and Notes thereunder.

Note 11

1. ('24) AIR 1924 All 317 (318) : 46 All 137 : 25 Cr.L.J. 624, *Jaswant v. Emperor*, ('03) 26 All 177 (178) : 1903 A W N 215, *Emperor v. Muhammad Hadi*.
[See ('27) 99 Ind Cas 599 (600) : 28 Cr. L. J. 167 (Lah), *Hira Singh v. Emperor*. (Court should make every attempt to secure the evidence of persons whose evidence is extremely important for the case, either by procuring their attendance or by having their evidence taken on commission.)]
2. ('12) 13 Cr. L. J. 778 (780) : 17 I C 410 : 36 Mad 321, *Sessions Judge of Coimbatore v. Immudi Kumara Kangaya*.
('27) AIR 1927 Pat 243 (247) : 6 Pat 329 : 28 Cr.L.J. 709, *Sasdat Mian v. Emperor*.
3. ('27) AIR 1927 Mad 162 (162, 163) : 27 Cr. L. J. 1327, *Kanda v. Sangaiya*.
4. ('29) AIR 1929 Bom 269 (272), *Emperor v. Yellappa Durgaji Jadhaw*.
('16) AIR 1916 Cal 106 (106) : 16 Cr.L.J. 415 (415) : 42 Cal 608, *Emperor v. Surath*.
5. ('28) AIR 1928 Mad 652 (652) : 29 Cr. L. J. 725, *Saminatha v. Kupusami*.
6. ('39) AIR 1939 Sind 222 (224) : I L R (1940) Kar 95 : 40 Cr. L. J. 818, *Jashan-mal v. Emperor*.
7. ('29) AIR 1929 Bom 269 (271) : 30 Cr.L.J. 1066, *Emperor v. Yellappa Durgaji*.
[But see ('27) AIR 1927 Pat 243 (247) : 6 Pat 329 : 28 Cr. L. J. 709, *Sasdat Mian v. Emperor*. (High Court in revision is not at all concerned as to whether the reasons given would have appealed to another person or not.)]
8. ('12) 13 Cr. L. J. 443 (444) : 15 I C 75 (All), *Durga Dutt v. Emperor*.

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Note 14

14. Commitment by Civil or Revenue Courts in respect of offences committed before or brought under notice of such Court in course of judicial proceeding. — See S. 478 and Notes thereunder.

Section 209

209.* (1) When the evidence referred to in section 208, sub-sections (1) and (3), has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

*** Code of 1882 : S. 209.**

209. When the evidence referred to in S. 208, paras. 1 and 2, has been taken, and he has examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Code of 1872 : S. 195, para. 1 and Expl. III.

195. When a Magistrate finds that there are not sufficient grounds for committing the accused person to take his trial before the Court of Session or High Court, or for remanding him, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed under chapters XVI, XVII or XVIII of this Act.

Explanation III. — An order of discharge cannot be made until the evidence of the witnesses named for the prosecution has been taken.

Code of 1861 : S. 225.

225. When a Magistrate finds that there are not sufficient grounds for committing the accused person to take his trial before the Court of Session or for remanding him, he shall discharge him, unless it shall appear to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed under chapter XIV of this Act.

*Synopsis*Section 209
Note 1

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of the section. 3. "When the evidence referred to in S. 208, sub-ss. (1) and (3) has been taken." 4. Examination of the accused. See S. 342 and Notes thereunder. 5. Sufficient grounds for committing the accused. 6. "Shall discharge him." 7. Effect of order of discharge. 8. Power of Magistrate to award compensation to accused on | <ol style="list-style-type: none"> discharge. See S. 252 and Notes thereunder. 9. Recording reasons for discharge. 10. Order by superior Court for further inquiry or commitment to sessions. See Ss. 435 to 439 and Notes thereunder. 11. "Unless it appears . . . accordingly." 12. Sub-section (2)—Discharge without completing inquiry where charge is groundless. 13. Revision. See Ss. 435 to 439 and Notes thereunder. |
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Other Topics (miscellaneous)

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| <p>Committal when to be made. See S. 206 Notes 5 and 6.</p> <p>Committal when not to be made. See S. 206 Note 6.</p> <p>Competency to give evidence after discharge. See Note 7.</p> <p>Discharge without any evidence. See S. 208 Note 6.</p> <p>Graver offences—Committal preferable. See S. 206 Note 6.</p> | <p>Magistrate's duty. See Notes 5 and 6. See also S. 208 Note 6.</p> <p>Major and minor offences. See Note 6.</p> <p>Question of mere probabilities or complicated questions—Committal preferable. See S. 206 Note 6.</p> <p>Refusal of Magistrate to enquire. See S. 208 Notes 8 and 11.</p> <p>Scope of enquiry. See Notes 5 and 6.</p> |
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1. Legislative changes.*Differences between Codes of 1861 and 1872 —*

- (1) The words "or High Court" were added after the words "Court of Session" in the Code of 1872.
- (2) If the Magistrate should hold that the accused person should be tried before himself, the Code of 1861 provided that he should proceed under chapter 14 thereof which related to the procedure to be followed in the trial of warrant cases; but the Code of 1872 provided that in such circumstances the Magistrate should proceed under chapters 16, 17 or 18 thereof (which laid down the procedure for the trial of summons cases and warrant cases and for summary trials respectively).
- (3) Three explanations were added to the section in the Code of 1872. Explanation I provided that, except in compoundable cases, the absence of the complainant was not in itself a sufficient ground of discharge. Explanation II provided that a discharge was not equivalent to an acquittal and did not bar the revival of a prosecution for the same offence. Explanation III provided that an order of discharge could not be made until the evidence of all the witnesses named for the prosecution had been taken.

Changes made in 1882 —

- (1) The words relating to the taking of evidence referred to in S. 209 and the examination of the accused were added at the beginning of the section.
- (2) The words "before the Court of Session or High Court, or for remanding him" which occurred after the words "for committing the accused person to take his trial" in the Code of 1872 were omitted.

Section 209
Notes 1-3

- (3) The words "or some other Magistrate" after the word "himself" were added in the Code of 1882.
- (4) The three explanations to the section referred to above which occurred in the Code of 1872 were omitted.
- (5) The second paragraph to the section, providing for the discharge of the accused before completely taking the evidence for the prosecution and the defence, was added.

Changes made in 1898 —

- (1) The words "if necessary" were added after the words "he has" and before the words "examined the accused."
- (2) The words requiring reasons to be recorded for an order of discharge under sub-s.(1) were added.

2. Scope of the section.—This section specifies the procedure to be adopted where, after the evidence referred to in S. 208 has been taken, the Magistrate finds that there are not sufficient grounds for committing the accused. Where there are sufficient grounds, a charge should be framed under S. 210. There may be a further examination of witnesses after the charge is framed (ss. 211 and 212), and, if the Magistrate is satisfied after such examination that there are not sufficient grounds for committing the accused to the Court of Session, he can cancel the charge and discharge the accused (S. 213, sub-s.(2)).

The provisions of this section may be compared with those of S. 253 which deals with the discharge of an accused person in the trial of warrant cases. The following are the chief points of distinction between the two sections:

- (1) The ground of discharge under this section is that the Magistrate holds that there are not sufficient grounds for *committing the accused* person for trial; under S. 253 the ground of discharge is that the Magistrate holds that *no case has been made out against the accused* which, if unrebutted, would warrant his conviction.
- (2) The order of discharge under this section is passed after the evidence for the prosecution as well as that for the defence has been taken; while under S. 253 the order of discharge is passed *before* the evidence for the defence is taken.
- (3) Under sub-s.(2) of S. 209, as well as of S. 253 the Magistrate can discharge the accused even before the whole of the evidence referred to in sub-s.(1) of the respective sections has been taken. But under S. 209 the Magistrate must record the reasons whether the order of discharge is under sub-s.(1) or under sub-s.(2); while under S. 253 no reasons need be recorded for an order of discharge under sub-s.(1) though reasons have to be recorded in case of discharge under sub-s.(2).
- (4) There is no provision in the trial of warrant cases for cancelling a charge once framed and for discharging the accused. There is such a provision in the case of preliminary enquiries in sessions cases (S. 213).

3. "When the evidence referred to in S. 208, sub-ss. (1) and (3) has been taken." — Except in cases coming under sub-s.(2) the

Magistrate must hear all the evidence referred to in S. 208, sub-ss.(1) and (3), before he can consider whether there are, or are not, sufficient grounds for commitment.¹ Such evidence includes evidence both for the prosecution as well as the defence and, hence, it is not open to a Magistrate merely on the evidence for the prosecution and before he has taken the evidence for the defence, to consider whether there are sufficient grounds for committing the accused.^{1a} The contrary view² though tenable under the Codes of 1872 and 1861³ cannot be considered good law under the present Code in view of the express language of this section.

Under sub-s.(3) of S. 208, if the prosecution or the accused applies to the Magistrate to issue summons for the attendance of any witnesses whose evidence may be desired, it is open to the Magistrate to refuse the application, if he thinks fit to do so. This section by requiring the Magistrate to take the evidence referred to in sub-s.(3) of S. 208 before considering if there are sufficient grounds for committing the accused does not deprive him of the discretion he has under that sub-section to refuse to summon any witness whom a party may desire to summon.⁴

Although it is open to an accused to insist on giving his evidence before the Magistrate frames a charge against him or decides to discharge him, yet, an accused is not *bound* to tender any evidence in the preliminary inquiry and his refusal to produce any evidence in such inquiry cannot give rise to any adverse inference against him.⁵

Sub-section (2) expressly reserves the power of the Magistrate to discharge an accused person even before he has taken any evidence, if he finds that the charge is *groundless*. See Note 12.

4. Examination of the accused. — See S. 342 and Notes thereunder.

Section 209 — Note 3

1. ('03) 26 All 564 (567) : 1904 A WN 125 : 1 A L J 292 : 1 Cr. L. J. 510, *Fattu v. Fattu*.
- ('99) 1899 All W N 135 (135, 136), *Empress v. Dukes*.
- ('12) 13 Cr. L. J. 443 (444) : 15 I. C. 75 (All), *Durga Dutt v. Emperor*.
- ('72-92) 1872-92 Low Bur Rul 538 (539), *Nga Po Se v. Queen-Empress*.
- [See ('74) 1874 Pun Re No. 17 Cr., p. 29 (30), *Nihal Singh v. Mohamda*. (Order of discharge without examining the witnesses named for the prosecution should not ordinarily be made).
- ('79) 3 Cal L R 263 (264), *Ishen Chunder v. Hury Doyal*. (Order discharging the accused without examining principal witness is bad.)
- ('76) 1876 Rat 100 (101), *Reg. v. Sita*.
- ('77) 1877 Rat 121 (121). (Act X of 1872 did not prevent the discharge of an accused person if all the witnesses named for the prosecution who are forthcoming and accessible have been examined.)
- (1865) 2 Suth W R Cr 65 (65), *Queen v. R. Anderson*. (Magistrate was bound to record specially the evidence on which he thought the commitment justifiable.)]
- 1a. ('28) AIR 1928 Rang 299 (299) : 6 Rang 531 : 30 Cr. L. J. 1, *Emperor v. Nga Khaing*. (Committing Magistrate is bound to consider the defence evidence if it is tendered and omission on his part to do so is not a mere irregularity but an illegality.)
2. [See ('11) 12 Cr. L. J. 20 (20) : 8 I. C. 1103 (Mad), *Jamal Mahomed v. Moideen Sa Rowther*. (Case exclusively triable by the Sessions Court—Prima facie case for committal made out—Ordinarily defence evidence should not be gone into.)]
3. (1865) 2 Suth W R Cr 50 (50), *Queen v. Harnath Roy*.
4. ('12) 13 Cr. L. J. 778 (779, 780) : 36 Mad 321 : 17 I. C. 410, *Sessions Judge of Coimbatore v. Immudi Kumara*.
5. ('27) AIR 1927 Pat 292 (295) : 28 Cr. L. J. 611, *Kumar Prasad v. Emperor*. (Accused is not bound to disclose his defence in a preliminary enquiry.)

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Note 5

5. Sufficient grounds for committing the accused. — In commitment proceedings, what the Magistrate has to see is whether there are sufficient grounds for *commitment* and not whether there are sufficient grounds for *conviction*. Hence, where there is a *prima facie* case for commitment the Magistrate is bound to commit the accused and is not empowered to enter into nice questions of the probabilities of the case and discharge the accused on the ground that in his opinion the evidence is not sufficient to sustain a conviction.¹ But, in order to satisfy himself that there are sufficient grounds for committing the

Note 5

1. ('39) AIR 1939 Bom 372(373,374): 40 Cr.L.J. 951, *Akberally v. Ali Md.* (Magistrate must consider whether conviction is possible and not whether it is probable.)
- ('38) 1938 M W N 819 (820), *Pattu Mudali v. Emperor.* (Magistrate to consider whether conviction is possible on the evidence.)
- ('37) AIR 1937 All 373 (373) : 38 Cr. L. J. 659, *Ishaq v. Emperor.* (Magistrate, in a case of conflicting and doubtful evidence, ought to commit it for trial however unevenly balanced evidence may be in his opinion —He cannot usurp functions of Sessions Court.)
- ('37) AIR 1937 Mad 654 (655) : 38 Cr. L. J. 703, *Ella Reddi v. Emperor.* (If there merely exists in his mind a reasonable doubt as to the truth or otherwise of the evidence before him, he should commit the accused for trial and leave the Sessions Court to appreciate the evidence for itself.)
- ('35) AIR 1935 Bom 137 (141) : 59 Bom 125 : 36 Cr. L. J. 643 (FB), *Ramchandra Babaji v. Emperor.* (27 Bom 84 approved.)
- ('87) 11 Bom 372 (374), *Empress v. Namdev Salvaaji.* (Magistrate ought to commit, when there is enough credible evidence to put the party on his trial.)
- ('06) 4 Cr. L. J. 66 (67) : 28 All 705 : 1906 A W N 191, *Ram Khilawan v. Emperor.*
- ('04) 1 Cr. L. J. 56 (57) : 26 All 227 : 1904 A W N 3, *Chiranji Lal v. Ram Lal.*
- ('71) 3 N W P H C R 27 (27), *Queen v. Maha Singh.*
- ('83) 6 All 40 (42) : 1883 A W N 186, *Empress v. Ram Lal Singh.*
- ('03) 26 All 564 (567) : 1904 A W N 125 : 1 A L J 292 : 1 Cr. L. J. 510, *Fattu v. Fattu.* (Magistrate has no power to declare the accused guilty or innocent of the offence with which he is charged.)
- ('18) AIR 1918 All 126 (126) : 40 All 615 : 19 Cr. L. J. 706, *Hait Ram v. Ganga Sahai.* (S. 209 does not empower Magistrate to write a judgment.)
- ('19) AIR 1919 All 9 (10) : 21 Cr. L. J. 61, *Sahdeo v. Sarjoo.*
- ('03) 27 Bom 84 (89) : 4 Bom LR 779, *Emperor v. Varjwandas.* (It is not necessary that Magistrate should satisfy himself fully of the guilt of the accused before making a commitment.)
- ('27) AIR 1927 All 279 (282) : 49 All 443 : 28 Cr. L. J. 281, *Emperor v. Allah Mahr.* (If the evidence is balanced then it is a matter to be tried and it is his duty to commit for trial.)
- ('10) 11 Cr. L. J. 692 (694) : 8 I C 631 (Bom), *In re Bai Parvati.* (Where a Magistrate entertains a doubt about weight and quality of evidence, the task of resolving the doubt should be left to Sessions Court.)
- ('26) AIR 1926 Cal 528 (528) : 27 Cr. L. J. 509, *Kasim Ali v. Sarada Kripa.* (Do.)
- ('20) AIR 1920 Cal 40 (41) : 21 Cr. L. J. 10, *Moze Ali v. Emperor.* (Magistrate's opinion that the story told by the complainant is exaggerated is no ground for not committing for trial before Court of Session.)
- ('24) AIR 1924 Cal 639 (640) : 51 Cal 849 : 26 Cr. L. J. 117, *Tarapada Biswas v. Kalipada.* (Magistrate can form his opinion about credibility of witnesses but he cannot closely criticise their evidence.)
- ('08) 8 Cr. L. J. 263 (265) : 1908 P R No. 14 Cr, *Hazara v. Bishen.* (The words "sufficient grounds" in S. 209 do not mean sufficient grounds for convicting.)
- ('23) AIR 1923 Lah 337 (338) : 4 Lah 69 : 25 Cr. L. J. 238, *Maulu v. Emperor.*
- ('29) AIR 1929 Lah 403 (404) : 30 Cr. L. J. 234, *Emperor v. Wafadar.*
- ('13) 14 Cr. L. J. 529 (544, 545) : 21 I. C. 129 (Mad), *National Bank of India v. Kothandarama.* (Magistrate is not entitled to draw inferences from the evidence.)
- ('27) AIR 1927 Mad 277 (278) : 28 Cr. L. J. 120, *Chinnammal v. Konda Reddy.*
- ('25) AIR 1925 Mad 1061 (1062, 1063) : 48 Mad 874 : 26 Cri L Jour 1570, *In re Manicka Pandayachi.*
- ('20) AIR 1920 All 52 (52) : 21 Cr. L. J. 318, *Makhni v. Farzand Ali.* (Magistrate finding that one or other of accused was concerned in the affair but discharging

accused for trial by a Sessions Court, the Magistrate is entitled to weigh the evidence from that point of view² and if he finds that the evidence against the accused is totally untrustworthy³ and that there

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Note 5

on ground that there was not sufficient evidence justifying a conviction — *Held* that he ought not to discharge.)

('20) AIR 1920 Pat 591 (592) : 21 Cr. L. J. 202, *Balmakund Das v. Emperor*.

('20) AIR 1920 Mad 94 (96) : 43 Mad 330 : 21 Cr. L. J. 91, *In re Gandhi Apparasu*.

(Committing Magistrate discharging the accused by giving him "benefit of doubt" — *Held* Magistrate was not entitled to discharge the accused.)

('16) AIR 1916 Mad 1226 (1227, 1228) : 16 Cr. L. J. 307, *Narasayanna v. Narasama*.

('93) 1893 Pun Re No. 1 Cr. p. 4(5) (FB), *Mangal Singh v. Empress*. (Magistrate is bound to consider whether the evidence discloses the existence of any of the general or special exceptions contained in Penal Code.)

('25) AIR 1925 Oudh 167 (168) : 25 Cr. L. J. 1189, *Chedda Khan v. Emperor*.

('03) 1903 Pun L R No. 148, p. 408 (409), *King-Emperor v. Mali*.

('29) AIR 1929 Sind 137 (139) : 30 Cr. L. J. 845 : 23 Sind L R 340, *Emperor v. Walidino*. (Magistrate is not justified in allowing long cross-examination of witnesses as he has only to find whether there was a prima facie case for committing to the sessions or not.)

('30) AIR 1930 Sind 99 (103) : 31 Cr. L. J. 117 : 24 S L R 96, *Nur Khan v. Emperor*.

('72-92) 1 L B R 348 (348), *Crown v. Po Nyam*.

('11) 13 Cr. L. J. 688 (688) : 16 I. C. 336 (Cal), *Fazar Ali v. Mazharulla*.

('15) AIR 1915 All 86 (87) : 16 Cr. L. J. 139, *Mangat Rai v. Emperor*.

('28) AIR 1928 Bom 220 (220, 221) : 29 Cr. L. J. 987, *Burjorji Nowroji v. Emperor*.

('81) 2 Weir 652 (653).

('35) AIR 1935 All 366 (368) : 36 Cr. L. J. 1103, *Alopi Din v. Emperor*. (Magistrate not to weigh evidence or give benefit of doubt to accused but to see whether there is sufficient evidence to commit.)

[See ('33) AIR 1933 Lah 39 (39) : 34 Cr. L. J. 39, *Mahamad Khan v. Emperor*. (Evidence both against and in favour of accused — Magistrate committing to sessions deliberately leaving it to Sessions Court to decide as to reliability of the evidence — Commitment not quashed.)]

[See also ('31) AIR 1931 Cal 607 (611) : 59 Cal 275 : 33 Cr. L. J. 3, *Sher Singh v. Jitendranath Sen*. (Prima facie case is not the same thing as "proof.")]

2. ('39) AIR 1939 Bom 372 (373) : 40 Cri L Jour 951, *Akberally v. Ali Mahomed*. ('38) 1938 M W N 819 (820), *Pattu Mudali v. Emperor*.

('37) AIR 1937 Mad 654 (655) : 38 Cr. L. J. 703, *Ella Reddi v. Emperor*. (Magistrate is not precluded from finding that prosecution case is false.)

('37) AIR 1937 Pesh 12 (13) : 38 Cri L Jour 427, *Fazal Razak v. Emperor*.

('35) AIR 1935 Bom 137 (138) : 59 Bom 125 : 36 Cr. L. J. 643 (FB), *Ramchandra Babaji v. Emperor*.

3. ('04) 1 Cr. L. J. 519 (524) : 26 All 564 : 1904 AVN 125 : 1 ALJ 292, *Fattu v. Fattu*.

('22) AIR 1922 Mad 43 (44) : 23 Cri L Jour 209, *Ponniiah Tirumalai Vandayya v. Emperor*. (To hold otherwise would be to make the preliminary enquiry directed by the Code a mere matter of form, while it is intended to be a safeguard against false or frivolous cases being sent up for trial and innocent men from being put to the trouble and expense of undergoing a trial in the Court of Session.)

('38) 1938 M W N 819 (820), *Pattu Mudali v. Emperor*.

('37) AIR 1937 Mad 654 (655) : 38 Cri L Jour 703, *Ella Reddi v. Emperor*. (He should not, of course, require, in cases triable exclusively by the Court of Session, the same high standard of proof for the prosecution as he would require in cases

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Note 5

are not sufficient grounds for commitment,⁴ he is bound to discharge

- (1907) 5 Cr. L. J. 213 (215) : 9 Bom L R 225, *Emperor v. Rawji Hari*.
 (1933) AIR 1933 Bom 158 (161, 162) : 57 Bom 430 : 34 Cr. L. J. 564, *Emperor v. Parashram Bhika*. (Overruled in A I R 1935 Bom 137 (FB), on another point.)
 (1924) AIR 1924 Cal 639 (640) : 51 Cal 849 : 26 Cr.L.J. 117, *Tarapada v. Kalipada*.
 (1926) AIR 1926 Cal 528 (528) : 27 Cri L Jour 509, *Kasim Ali v. Sarada Kripa*.
 (1902-03) 7 Cal W N 77 (79), *Harbans Singh v. Fakir Das*.
 (1909) 1899 All W N 135 (135), *Empress v. Dukes*.
 (1910) 11 Cr. L. J. 751 (752) : 8 I. C. 1044 (Lah), *Mir Abdullah v. Emperor*.
 (1910) 11 Cr. L. J. 18 (19) : 4 I. C. 612 : 1909 Pun Re No. 10 Cr, *Sultani v. Emperor*.
 (1923) AIR 1923 Lah 279 (279) : 23 Cr. L. J. 601, *Ahmed v. Emperor*.
 (1923) AIR 1923 Lah 337 (338) : 4 Lah 69 : 25 Cr. L. J. 238, *Maulu v. Emperor*.
 (1926) 92 Ind Cas 450 (451) : 27 Cr. L. J. 274 (All), *Ratan Mani v. Hans Ram*.
 (1920) AIR 1920 Pat 46 (48) : 21 Cr. L. J. 328, *Tincouri v. Emperor*.
 (1925) AIR 1925 Pat 279 (280) : 25 Cr.L.J. 1089, *Munshi Mander v. Karu Mander*.
 (1914) AIR 1914 Mad 424 (425) : 15 Cr. L. J. 373, *In re Damappa Pillai*.
 (1910) 11 Cr. L. J. 692 (693, 694) : 8 I. C. 631 : 35 Bom 163, *In re Bai Parwati*.
 (1916) AIR 1916 Mad 1226 (1227, 1228) : 16 Cr. L. J. 307 (308), *Narasappayya v. Narasayya*. (Magistrate may examine varying statements of the witnesses for prosecution in order to adjudge on their credibility.)
 (1918) AIR 1918 U B 11 (11, 12) : 3 U B R 29 : 19 Cr. L. J. 102, *Nga Hmyin v. Emperor*. (Proposition laid down in 9 Cal W N 829 is too wide and is inconsistent with provisions of sub-s.(2) of S. 213.)
 (1921) AIR 1921 Sind 5 (6) : 15 Sind L R 1 : 22 Cr.L.J. 570, *Aidas Tekchand v. Saban*.
 (1925) AIR 1925 Oudh 167 (168) : 25 Cr. L. J. 1189, *Chheda Khan v. Emperor*. (Magistrate not bound to commit where conviction is impossible.)
 (1927) AIR 1927 Rang 74 (78) : 4 Rang 471 : 28 Cr.L.J. 219, *Maung Htin Gyaw v. Maung Po Sein*.
 (1903) 1903 Pun L R No. 148, p. 408 (409), *King-Emperor v. Mali*.
 (1981) 1 Weir 288 (289). (Where there is not sufficient evidence to warrant a commitment, the Magistrate is not justified in making a commitment.)
 (1991) 2 Weir 260 (261), *Sankaraya v. Keralal Subba Aiya*. (Where Magistrate had doubted whether any offence had been committed at all, he was justified in discharging the accused.)
 (1930) 1930 Mad W N 683 (683, 684), *Venkataswami v. Bayya Chimpiri*.
 (1931) 1931 Mad W N 116 (117, 118), *Chandrakasi Malavairayer v. Emperor*. (Defence evidence showed that prosecution witnesses could not be believed—Discharge of accused is justified.)
 (1913) 14 Cr. L. J. 491 (491) : 20 I. C. 747 (All), *Shahzad v. Emperor*.
 (1924) AIR 1924 All 664 (665) : 46 All 537 : 25 Cr.L.J. 795, *Ganpat Lal v. Emperor*.
 (1925) AIR 1925 All 670 (670, 671) : 27 Cr. L. J. 2, *Akbar Ali v. Raja Bahadur*.
 (1970) 14 Suth W R Cr 16 (16), *Queen v. Kristo Doba*.
 [See (1926) AIR 1926 Pat 5 (8) : 26 Cr. L. J. 1589, *Pershad Tewari v. Emperor*.]
 4. (1935) AIR 1935 Bom 137 (138, 141, 143) : 59 Bom 125 : 36 Cr. L. J. 643 (FB), *Ramchandra Babaji v. Emperor*.
 (1984) 1884 All W N 14 (14), *Empress v. Sumer*. (Insufficient evidence—Discharge justified.)
 (1924) AIR 1924 All 664 (665) : 46 All 537 : 25 Cri L Jour 795, *Ganpat Lal v. Emperor*. (Magistrate satisfied that prosecution was baseless.)
 (1995) 1895 Rat 746 (746), *Empress v. Vaja Raiji*.
 (1972) 19 Suth W R Cr 49 (51), *Rajah Nilmonce v. Ooma Churn*.
 (1923) AIR 1923 Lah 279 (280) : 23 Cri L Jour 601, *Ahmed v. Emperor*.
 (1999) 1899 All W N 135 (135), *Empress v. Dukes*.
 (1915) AIR 1915 Cal 715 (716) : 16 Cri L Jour 5 (7), *Sreemanta Chatterjee v. Surendra Nath*. (Magistrate is bound to discharge an accused if he believes that he has committed no offence.)
 (1978) 1878 Pun Re No. 35 Cr, p. 86 *Crown v. Fakir Ali*. (Evidence conjectural—But the case committed on the ground that case was serious — Commitment was quashed.)
 (1991) 2 Weir 255 (257), *Chinnasamy Naidu v. Veeriah Naidu*.
 (1905) 2 Cri L Jour 534 (549) : 9 C W N 829, *Sheo Bux Ram v. Emperor*. (Mere suspicion, even strong suspicion, is not enough for commitment.)
 (1933) AIR 1933 All 482 (484) : 34 Cri L Jour 1201, *Mt. Inoyia v. Harbans Prasad*. (If the Magistrate discharges the accused in such a case the Magistrate cannot be said to usurp the functions of a trial Court.)

the accused under this section. See also Notes to S. 437, and the undermentioned cases.⁵

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Notes 5-7

6. "Shall discharge him." — It has been seen in Note 5 that when the Magistrate finds that there are no sufficient grounds for committing the accused, he is bound to discharge him. Hence, where in a proceeding against *A* some of the witnesses say that the offence was committed by *B*, the Magistrate should not suspend the proceeding against *A* and go on with the case against *B*, with a view to commit either the one or the other of them. The Magistrate should go on with the inquiry against *A*, and proceeding should not be started against *B* until *A* is either convicted, acquitted or discharged.¹

It has been held that an order of discharge may be presumed to have been made though there is no formal order on the record.² Similarly, it has been held that where a person is charged with a major offence and the Magistrate, finding that such a charge does not lie, frames a charge for a minor offence and proceeds on the basis of such charge, his proceeding amounts to a discharge of the accused with reference to the major offence so as to enable a Court of revision to direct a further inquiry or a commitment to the sessions.³ But, where the prosecution did not press for a charge being framed for a major offence, the mere fact that the accused has been charged with a minor offence does not mean that he has been discharged in respect of the major offence.⁴

7. Effect of order of discharge. — An order of discharge does not operate as an acquittal and does not bar a fresh trial of the accused for the same offence (S. 403). But the person discharged is no longer an accused person and the disqualification of an accused person to give evidence in his own case does not attach to him.¹ A discharge is also such a termination of a prosecution as would entitle the

[See ('32) AIR 1932 Rang 193 (194) : 10 Rang 495 : 34 Cri L Jour 187, *Emperor v. Maung Chit Sen.*]

5. ('39) AIR 1939 Mad 253 (254, 255) : 40 Cri L Jour 392, *Palaniappa Thevan v. Karuppa Gounden.* (Magistrate in preliminary inquiry of dacoity case discharging accused as no prima facie case made out against them — Magistrate acting properly in assessing evidence — Sessions Judge who took different view held acted improperly in ordering commitment of accused for dacoity without specific finding of prima facie evidence of dacoity.)

('73) 1873 Rat 73 (73), *Reg. v. Sangapa.* (Magistrate not justified in discharging an accused person merely because he had been illegally arrested by the police.)

('74) 1874 Pun Re No. 17 Cr, p. 29, *Nihal Singh v. Mohamda.* (Offence disclosed different from offence complained—No ground for discharge.)

Note 6

1. ('29) AIR 1929 Sind 17 (17) : 30 Cr. L. J. 459, *Sher Mahomed v. Emperor.* (A contrary procedure is not illegal but was held to be unsuitable.)

2. ('77) 1 Bom 610 (619), *Reg. v. Hanmanta.*

3. ('19) AIR 1919 All 66 (66, 67) : 42 All 128 : 20 Cri L Jour 778, *Sheo Narain Singh v. Radha Mohan.*

('32) AIR 1932 Nag 85 (85) : 33 Cri L Jour 558, *Ram Rao v. Emperor.*

4. ('19) AIR 1919 Mad 847 (847) : 19 Cri L Jour 945 : 41 Mad 982 (983), *In re Marappa Goundan.*

See also S. 253 Note 4; S. 403 Note 14 and S. 437 Note 8.

Note 7

1. ('08) 9 Cr. L. J. 370 (372) : 4 Low Bur Rul 362, *Aung Min v. Emperor.* (This is so whether the order of discharge is legal or illegal.)

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Notes 7-12

discharged person to maintain an action for damages for malicious prosecution.²

8. Power of Magistrate to award compensation to accused on discharge. — See S. 250 and Notes thereunder.

9. Recording reasons for discharge. — The Magistrate must record his reasons when he discharges an accused person under this section.¹ But he need not record a formal *judgment* as laid down in S. 367.² Where there are several accused and different accused are discharged at different stages of the inquiry, it is enough if the reasons for their discharge are recorded at the end of the inquiry.³

10. Order by superior Court for further inquiry or commitment to sessions. — See Ss. 435 to 439 and Notes thereunder.

11. "Unless it appears . . . accordingly." — Where there are not sufficient grounds for commitment, the Magistrate may, in proper cases, try the case himself or send it to any other Magistrate for trial instead of discharging the accused.¹ But where there are good grounds for commitment the Magistrate is bound to frame a charge and commit the case to the Court of Session. He has no power in such cases to send the case to a Magistrate with special powers under S. 30, although such specially empowered Magistrate may have jurisdiction to try the offence.² A Magistrate should not treat a grave offence beyond his jurisdiction as a less grave offence in order to bring it within his jurisdiction.³

12. Sub-section (2)—Discharge without completing inquiry where charge is groundless. — Section 195 of the Code of 1872 expressly forbade a Magistrate in a preliminary inquiry under this chapter to discharge an accused person before completely taking the evidence for the prosecution. This provision has been omitted in the later Codes and sub-s. (2) has been added which expressly permits the Magistrate to discharge an accused person at any stage of the inquiry

2. ('81) 6 Bom 376 (380), *Venu v. Coorya Narayan*.

Note 9

1. ('39) AIR 1939 Bom 372 (374) : 40 Cr. L. J. 951, *Akberally v. Ali Mahomed*.
(27) AIR 1927 Rang 74 (78) : 4 Rang 471 : 28 Cr. L. J. 219, *Maung Htim Gyaw v. Maung Po Sein*.

2. ('18) AIR 1918 All 126 (126) : 40 All 615 : 19 Cr. L. J. 706, *Hait Ram v. Ganga*.

3. ('22) AIR 1922 Mad 195 (196, 197) : 24 Cr. L. J. 269, *Naramban v. Emperor*.

Note 11

1. ('37) AIR 1937 Lah 217 (219) : 38 Cri L Jour 992, *Kirpal Singh v. Emperor*. (Magistrate has jurisdiction to decide whether the offence was triable by Sessions Court or was triable by himself—And where there is nothing to show that the Magistrate snatched at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence his order will not be upset.)

('99) 22 Mad 459 (460) : 2 Weir 254, *Queen-Empress v. Rangamani*.

('84) 10 Cal 85 (86) : 13 Cal L R 375, *Empress v. Paramananda*. (Section 209 empowers a Magistrate holding an enquiry to try the case himself if he thinks that only an offence within his jurisdiction has been committed although there is some evidence which if believed would take the case out of his jurisdiction — But this course should be very rarely, if ever, taken by any officer invested with special powers under S. 30.)

2. ('03) 7 Cal W N 457 (460), *Amir Khan v. Emperor*. See also S. 30 Note 3.

3. ('11) 12 Cri L Jour 20 (20) : 8 I. C. 1103 (Mad), *Jamal Mahomed v. Moideen Sa*. (A Magistrate should not treat a grave offence beyond his jurisdiction as a less grave offence in order to bring it within his jurisdiction.)

if he finds that the charge is groundless although he has not fully taken the evidence either for the prosecution or for the accused.¹ Thus, when the account given by the prosecutor himself, of a transaction is of such a nature as to deprive it of a criminal character, the Magistrate is justified in concluding that the charge is groundless and in discharging the accused immediately without proceeding further with the inquiry.² But an order of discharge under this sub-section can only be passed by a Magistrate who is legally seised of the case. Thus, where a case cannot be taken cognizance of, for want of a complaint from the proper source under S. 195, the Magistrate cannot discharge the accused under this sub-section.³

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Notes 12-13

13. Revision. — See Ss. 435 to 439 and Notes thereunder.

210.* (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate
When charge is to be framed.

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* Code of 1882 : S. 210.

210. When, upon such evidence being taken and such examination (if any) being made, the Magistrate finds that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

Charge to be explained, As soon as the charge has been framed, it shall be read and explained to the accused and a copy thereof and copy furnished to shall, if he so requires, be given to him free of cost.

Code of 1872 : S. 198, para. 1 and S. 199.

198. When the Magistrate determines to send the accused person before the Court of Session or High Court for trial, he shall after the evidence has been recorded, make a written instrument under his hand and seal, declaring with what offence the accused person is charged, and shall direct him to be tried by such Court on such charge. He shall also record his reasons for committing such accused person.

199. As soon as the charge on which the accused person is to be tried has been prepared, it shall be read and explained to him; and a copy or translation thereof shall be furnished to him, if he so require.

Copy of charge to be furnished to accused.

Code of 1861 : Ss. 227 and 233.

227. As soon as the charge on which the accused person is to be tried has been prepared as hereinafter directed, it shall be read to him, and a copy or translation of it shall be furnished to him, if he require it.

233. When the Magistrate has determined to send the accused person before the Court of Session for trial, he shall make a written instrument under his hand and seal, declaring with what offence the accused person is charged, and shall direct the accused person to be tried by such Court on such charge. A copy of this instrument shall be forwarded with the record of the preliminary inquiry to the Court of Session before which the accused person is to be tried, and a copy shall also be sent to the Public Prosecutor or to the officer appointed to conduct the prosecution.

Note 12

1. ('84) 1884 Rat 201 (201), *Dhanjibhoy v. Pyarji*.

('33) AIR 1933 All 690 (694): 34 Cr. L. J. 967: 55 All 1040, *S. H. Jhabwala v. Emperor*.

2. ('28) AIR 1928 Lah 945 (946), *Amar Nath v. Emperor*.

('84) 1884 Rat 201 (201), *Dhanjibhoy v. Pyarji*.

See also S. 253 Note 7.

3. ('33) AIR 1933 Mad 413 (416): 34 Cr. L. J. 800, *Subramanya v. Swami Kannu*.

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Note 1

is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

(2) As soon as such charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost.

Charge to be explained,
and copy furnished, to
accused.

Synopsis

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. Legislative changes (S. 210 and S. 213). 2. Scope of the section. 3. "When upon such evidence being taken." 4. Examination of the accused. See S. 342 and Notes thereunder. 5. "Is satisfied that there are sufficient grounds for committing the accused." 6. "He shall frame a charge." 7. Form and contents of charge. See Ss. 221 to 232. | <ol style="list-style-type: none"> 8. Joinder of charges. See Notes under S. 207 and Ss. 233 to 239. 9. Power of Sessions Court to add to or alter charge framed by committing Magistrate. See Note under S. 226. 10. Plea of insanity raised in defence — Procedure. See S. 469. 11. Sub-section (2) — Charge to be read and explained to accused. 12. Right of accused to cross-examine prosecution witnesses after charge is framed. See S. 213 Note 7. |
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Other Topics (miscellaneous)

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|--|---|
| <p>Addition or amendment of charges. See Note 2.</p> <p>Committal where some to be committed and others who need not be committed. See S. 206 Note 6.</p> <p>Discharge even after charge. See Note 2.</p> <p>Duties of Magistrate under this chapter. See Ss. 209 to 213; S. 209 Notes 5 and 6; S. 208 Note 6.</p> <p>Duty of framing charge is with Magistrate. See Note 6.</p> | <p>Framing charge as opposed to committal. See Note 2.</p> <p>Improper addition of charges. See Note 6.</p> <p>Jurisdiction of District Magistrate to interfere. See S. 206 Note 8.</p> <p>Object of the section. See S. 206 Notes 3 and 4.</p> <p>Scope of enquiry. See S. 209 Notes 5 and 6.</p> <p>Sessions Court without jurisdiction. See S. 206 Note 9.</p> |
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1. Legislative changes (S. 210 and S. 213).

Differences between Codes of 1861 and 1872 —

Referring to the circumstances under which a case could be committed to the sessions, S. 226 of the Code of 1861 used the words "when evidence has been given before a Magistrate which appears to be sufficient for the conviction of the accused" whereas the words used in S. 196 of the Code of 1872 were "when evidence has been given before a Magistrate which appears to justify him in sending the accused person to *take his trial*"

Changes made in 1882 —

- (1) The opening words of the section were added in order to make it clear that the Magistrate must consider the evidence for the accused also before determining the question whether he should discharge the accused or whether he should frame a charge against him.

- (2) The provision for the supply of a *translation* of the charge to the accused, which occurred in the prior Code (S.193), was omitted.
- (3) The provision that the supply of a copy of the charge to the accused should be *free of cost* was new.
- (4) The Code of 1872 provided that the order for commitment should be made in the charge itself (S.193 of the Code) whereas the Code of 1882 provided for a separate order of commitment (S. 213).

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Notes 1-3

Changes made in 1898 —

Sub-section (2) to S. 213 was newly added providing for the cancellation of a charge already framed by the Magistrate and the discharge of the accused even after a charge was framed against him.

2. Scope of the section.—Section 209 lays down when an accused person may be discharged in commitment proceedings. This section provides for the framing of a charge in such proceedings. A charge under this section should be framed only if the Magistrate is satisfied that there are good grounds for commitment. But the mere framing of a charge does not, by itself, amount to a commitment, which should be made by a separate order under S. 213.¹ It may also be noted that the order of commitment under S. 213 cannot be made immediately on a charge being framed, or simultaneously with it² without anything further being done. There is a further procedure to be followed under ss. 211 to 213 before an order of commitment can be made. Moreover, it is open to a Magistrate to take further evidence after the charge is framed and if upon such evidence being taken, he finds there are not sufficient grounds for committing the accused, he can cancel the charge and discharge the accused.³ It is also open to a Magistrate to amend the charge after it is framed and proceed to try the case himself instead of committing it to the sessions.⁴

3. "When upon such evidence being taken." — This expression refers to the evidence mentioned in S. 208, sub-ss. (1) and (3).¹ The section requires that the Magistrate should consider whether there are sufficient grounds for committing the accused to the sessions, only after such evidence has been taken. Hence, the Magistrate has no power to frame a charge under this section until he has taken all the evidence which the accused may desire to produce.² But this does not.

Section 210 — Note 2

1. ('85) 15 Cal 608 (622) (FB), *Hari Dass v. Saritulla*. (Per Princep, J.) ('10) 11 Cri L Jour 486 (487, 488) : 7 Ind Cas 450 (Bom), *Emperor v. Venkatesh*.
- ('14) AIR 1914 Cal 312 (312) : 15 Cri L Jour 16, *Arjun Naik v. Bira Bhoi*.
2. ('40) AIR 1940 Pat 355 (359) : 19 Pat 413, *Musahru v. Emperor*.
3. ('40) AIR 1940 Pat 355 (359) : 19 Pat 413, *Musahru v. Emperor*.
[But see ('81) 1881 Rat 161 (162), *In re Mari*. (Case under prior Code; not good law.)]
4. ('10) 11 Cr. L. J. 486 (488) : 7 I. C. 450 (Bom), *Emperor v. Venkatesh Sadashiv*. See also S. 213 Note 1.

Note 3

1. ('36) AIR 1936 Lah 533 (535) : 17 Lah 176 : 37 Cr. L. J. 742 (FB), *Mt. Niamat v. Emperor*.
2. ('98) 20 All 264 (265) : 1898 A W N 52, *Queen-Empress v. Ahmadi*.

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mean that a Magistrate is *bound to summon* any witness that a party may desire to call; under sub-s.(3) of S. 208 the Magistrate has a discretion to refuse an application for summons to any witness.³ Similarly, the Magistrate need not go on recording evidence when it is *unnecessary* to do so. Thus, when the evidence already let in by the prosecution is sufficient to establish a *prima facie* case against the accused, the Magistrate is not bound to take the rest of the prosecution evidence also.⁴ Section 208, sub-s.(1) empowers the Magistrate to call for any evidence that he may consider necessary and it is open to him to call witnesses himself and take their evidence for the purpose of finding out if the case is a fit one for committal to the sessions.⁵

As to the power of a Magistrate to frame a charge on the basis of evidence recorded by another Magistrate, see Notes under S. 250.

See also Notes under Ss. 208 and 209.

4. Examination of the accused. — See S. 342 and Notes thereunder.

5. "Is satisfied that there are sufficient grounds for committing the accused." — A charge must be framed under this section only on the Magistrate being satisfied that there are sufficient grounds for commitment.¹ As to what are sufficient grounds for commitment, see Notes under S. 209 and the undermentioned cases.²

6. "He shall frame a charge." — The task of framing a charge is the duty of the Magistrate and not of the prosecutor.¹ The Magistrate must base the charge on the materials before him and not merely on the allegations of the complainant or prosecutor. He may frame a charge for any offence disclosed on the evidence though it may be different from that mentioned in the complaint.² In framing a charge, the Magistrate must confine his attention to the question as to what offence is disclosed on the materials before him and should not be influenced by any considerations as to what would be the *effect*

(1904) 1 Cri L Jour 357 (357, 358) : 26 All 177, *Emperor v. Muhammad Hadi*.

3. (1912) 13 Cr. L. J. 778 (779, 780) : 17 Ind Cas 410 : 36 Mad 321, *Sessions Judge of Coimbatore v. Immudi Kumara Kangaya*.

4. (1933) AIR 1933 All 690 (694, 695) : 55 All 1040 : 34 Cri L Jour 967, *S. H. Jhabwala v. Emperor*.

(1966) 3 Mad H C R App ii (iii).

5. (1926) AIR 1926 Pat 5 (8) : 26 Cri L Jour 1589, *Parshad Tewari v. Emperor*. (If the police do not send up all the material witnesses, it is the committing Magistrate's duty to examine them himself.)

Note 5

1. (1881) 1881 Pun Re No. 6 Cr, p. 5 (6), *Empress v. Gyano*.

2. (1922) 15 Mad 323 (325, 326, 327) : 1 Weir 366, *Srinivasa v. Annaswami*. (Charge under S. 372, Penal Code, against manager of temple for appointing dancing girl for temple — Finding that dancing girl of temple lived partly at least by prostitution — *Held*, that charge must be framed.)

(1911) 6 Cal 582 (583) : 8 C L R 255, *Empress v. Salik Roy*. (Charge under S. 211, Penal Code, for bringing false charge — *Held* that commitment was not illegal merely because the complaint, which the accused made, had not been judicially inquired into but was based on the report of the police that the case was a false one.)

Note 6

1. (1889) 1889 Pun Re No. 26 Cr p. 85 (89) (FB), *Sant Singh v. Empress*.

2. (1909) 12 Suth W R Cr 40 (41) : 5 Beng L R App 82, *Kalidas v. Mohendranath*. (1908) 11 C P L R Cr 9 (9, 10), *Local Government v. Sukha Musalman*.

See also S. 254 Note 5.

of framing a charge for a particular offence.³ Further, the Magistrate should be careful not to mention anything in the charge in a form which is not justified by the materials before him.⁴

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Notes 6-12

Though a Magistrate is at liberty to frame a charge for any offence disclosed on the materials before him, he cannot frame a charge which would amount to his prejudging the case which has to be tried by another Court. Thus, where an accused was charged with the offence of wrongful confinement and he raised the defence that he had lawful excuse for his act because the person confined was caught in his house under circumstances which led to the belief that he had committed house-breaking by night, and the Magistrate committed the accused, not only for wrongful confinement but, disbelieving the defence, also for fabricating false evidence and making a false charge, it was held that the commitment in respect of the two last charges was illegal inasmuch as in putting the accused on his trial on such charges the Magistrate was really prejudging the defence which the accused had raised to the first charge.⁵

Where, under S. 423, the appellate Court directs a Magistrate to commit the accused for trial before the Court of Session, the Magistrate has no jurisdiction to make further enquiry and the enquiry already held is sufficient for the purposes of this chapter. The Magistrate has then to frame a charge under this section and to proceed under Ss. 211 and 213 to commit the accused.⁶ See also S. 423 Note 30.

7. Form and contents of charge. — See Ss. 221 to 232.

8. Joinder of charges. — See Notes under S. 207 and Ss. 233 to 239.

9. Power of Sessions Court to add to or alter charge framed by committing Magistrate. — See Notes under S. 226.

10. Plea of insanity raised in defence — Procedure. — See S. 469.

11. Sub-s. (2)—Charge to be read and explained to accused. — This sub-section requires that after the charge is framed it must be read and explained to the accused. A mere framing of the charge is not enough.¹

12. Right of accused to cross-examine prosecution witnesses after charge is framed. — See S. 213 Note 7.

211.* (1) The accused shall be required at
List of witnesses once to give in orally or in writing,
for defence on trial. a list of the persons (if any) whom
he wishes to be summoned to give evidence on his
trial.

Section 211

* 1882 : S. 211; 1872 : S. 200 paras. 1 and 3; 1861 : S. 227.

3. ('01) 1901 Pun Re No. 5 Cr, p. 15 (15, 16); 1901 P L R 51, *Mukerji v. Empress*. See also S. 254 Note 7.

4. ('89) 1889 Pun Re No. 26 Cr, p. 85 (90) (FB), *Sant Singh v. Empress*.

5. ('79) 4 Cal L R 338 (339, 340), *In the matter of Turibullah*.

6. ('35) AIR 1935 All 579 (583) : 36 Cri L Jour 1013, *Sahdeo Ram v. Emperor*.

Note 11

1. (1865) 2 Suth W R Cr 50 (50), *Queen v. Hurnath Roy*.

Section 211
Notes 1a-1

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

Synopsis

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|---|---|
| 1a. Object of the section. | 4. Refusal of Magistrate to summon witnesses. |
| 1. "The accused shall be required." | 5. Reserving of defence by the accused. |
| 2. "At once." | 6. Failure of the accused to give a list — Effect of. |
| 3. Right of accused filing the list—
Enforcement of attendance of witnesses. | 7. Further list. |

1a. Object of the section. — The purpose of this section is merely that executive authorities should be able to compel the attendance of such witnesses as the accused wishes to be summoned in order that when the trial of the case comes on in the Sessions Court, the case may be heard from day to day and no time should be wasted. Under s. 291 the accused can examine witnesses who are present in Court although they were not previously named by him.¹

1. "The accused shall be required." — After the charge framed against the accused has been read and explained to him under s. 210, sub-s.(2) above, the Magistrate is *bound* under this section to require the accused to give in a list of witnesses, if any, whom he wishes to be summoned to give evidence on his trial in the Court of Session.¹ The accused must be clearly and specifically asked for a *list of witnesses*. It is not enough to put the question "Have you any evidence?" Such a question is ambiguous and might suggest to the accused, only an inquiry as to whether he has witnesses ready in Court.²

The language of the section is imperative, and a failure to ask an accused person to give in his list of witnesses will render his conviction liable to be quashed, even though he has been tried along with others, who had been so asked.³

It is also necessary that the names of witnesses for the defence must appear on the record. Where a Magistrate omits to enter the

Section 211 — Note 1a

1. ('36) AIR 1936 Lah 533 (535, 536) : 17 Lah 176 : 37 Cr. L. J. 742 (FB), *Mt. Niamat v. Emperor*.

Note 1

1. (1865) 2 Suth W R Cr 50 (50), *Queen v. Hurnath Roy*.
(05) 7 Bom L R 723 (724) : 2 Cr. L. J. 601, *Emperor v. Kondi Raghu*.
(34) AIR 1934 Lah 23 (23) : 35 Cri L Jour 616, *Mahomed Sharif v. Emperor*.
(Accused must be informed of the necessity of giving in his list of witnesses at any time or of the fact that he has a right to give in any such list.)
2. ('05) 7 Bom L R 723 (724) : 2 Cr. L. J. 601, *Emperor v. Kondi Raghu*.
3. ('68) 10 Suth W R Cr 7 (7), *Bhugwan v. Dojal Gope*.

names of witnesses for the defence on the record and the omission is brought to the notice of the Sessions Judge, he ought not to try the accused, in the absence of such witnesses.⁴

Section 211
Notes 1-4

2. "At once."—The list of witnesses should be presented as soon as the charge has been framed.¹ The view taken in the undermentioned decision² that it is ordinarily incumbent on the accused to put in his list of defence witnesses on the day when the order of *commitment* is made is, it is submitted, incorrect.

3. Right of accused filing the list — Enforcement of attendance of witnesses. — The accused is entitled, as a matter of right, to have the witnesses named by him in the list, summoned and examined on his behalf at the trial.¹ In the event of the witnesses ignoring or not complying with the summons, the accused is entitled to have their attendance enforced² and the Crown is charged with the duty of securing their attendance.³ The examination of such witnesses cannot be refused on the ground that it would be inconvenient to adjourn the case in order to secure their attendance.⁴ When some of the witnesses named in the list given by the accused do not appear, an application for enforcing their attendance should not be refused, though made when the case is ready for arguments.⁵ A conviction will not, however, be set aside on the ground that the attendance of some of the witnesses was not enforced unless the accused has been thereby prejudiced.⁶

4. Refusal of Magistrate to summon witnesses. — A Magistrate may, under the second proviso to S. 216, refuse to summon any witness mentioned in the list on the ground that such witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice. He cannot, however, refuse to summon a witness on the ground that he is suspected to be implicated in the offence with

4. ('72) 18 Suth W R Cr 20 (20, 21), *Queen v. Rajnarain Mytec.*

Note 2

1. ('40) AIR 1940 Pat 355 (359) : 1940 P W N 83 (89) : 19 Pat 413, *Musahru v. Emperor*. (It is not desirable that the presentation of the list of defence witnesses should be postponed till the last minute—In this case the list was first presented in the Sessions Court.)
2. ('30) AIR 1930 Cal 188 (189) : 31 Cr. L. J. 695, *Kali Bilash v. Emperor*.

Note 3

1. ('40) AIR 1940 Pat 355 (359) : 1940 P W N 83 : 19 Pat 413, *Musahru v. Emperor*. (1865) 2 Suth W R Cr 6 (6), *Queen v. Bhoobun Isher Goosame*. (1865) 3 Suth W R Cr 35 (36), *Queen v. Abdul Satar*. ('71) 15 Suth W R Cr 7 (7) : 6 Beng L R App 65, *Ram Shahai v. Sankar Bahadur*. ('71) 15 Suth W R Cr 15 (15, 16), *In re Mohima Chunder Shah*. ('75) 23 Suth W R Cr 56 (56), *Queen v. Prosanno Kumar Moitra*. ('31) AIR 1931 Cal 6 (7) : 58 Cal 412 : 32 Cr. L. J. 316, *Ram Mamud v. Emperor*. ('30) AIR 1930 Cal 188 (188) : 31 Cr. L. J. 695, *Kali Bilash v. Emperor*. See also S. 216 Note 2, S. 257 Note 3 and S. 291 Note 3.
2. ('30) AIR 1930 Cal 188 (188) : 31 Cr. L. J. 695, *Kali Bilash v. Emperor*. ('31) AIR 1931 Cal 6 (7) : 58 Cal 412 : 32 Cr. L. J. 316, *Ram Mamud v. Emperor*.
3. ('31) AIR 1931 Cal 6 (7) : 58 Cal 412 : 32 Cr. L. J. 316, *Ram Mamud v. Emperor*.
4. ('31) AIR 1931 Cal 6 (7) : 58 Cal 412 : 32 Cr. L. J. 316, *Ram Mamud v. Emperor*. See also S. 291 Note 3.
5. ('20) AIR 1920 Cal 531 (531) : 47 Cal 758 : 21 Cr. L. J. 842, *Foizuddi v. Emperor*.
6. ('30) AIR 1930 Cal 188 (190) : 31 Cr. L. J. 695, *Kali Bilash v. Emperor*.

Section 211
Notes 4-6

which the accused is charged¹ or that the Magistrate entertains doubts as to the value of the evidence of such witness² or that the list contains a large number of witnesses.³ Where a *further list* is given under sub-s.(2), subsequent to the order of commitment, the Magistrate is bound, on receipt of such list, to exercise his discretion and state distinctly whether he would summon the witnesses or not. If he is of opinion that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, the Magistrate ought to proceed under the second proviso to s. 216.⁴

5. Reserving of defence by the accused. — Though the language of the section is imperative, there is nothing in it which enables the Magistrate to prevent the accused person from reserving his defence for the Court of Session.¹ As a matter of fact, the accused is entitled to reserve his defence, and refuse to disclose the names of witnesses whom he intends to call at the trial.² Thus, where an accused on being asked to give a list of witnesses, does not give it, but says he will file a list subsequently, the Magistrate would be acting with sound judicial judgment and in accordance with law, if he does not cross-examine the accused as to the names of his witnesses and what those witnesses would be called to prove.³ This is because there may be the danger, in some cases, of the accused running the risk of his witnesses being tampered with. In such a case, it will be wise on the part of the accused to decline to give a list to the Magistrate, and to reserve his defence for the Court of Session.⁴

But an accused person, who has reserved his defence, cannot claim to keep back any of his witnesses mentioned in the list from being examined by the Magistrate under s. 212, on the ground that his right of reserving the defence would be prejudicially affected thereby.⁵

6. Failure of the accused to give a list — Effect of. — If an accused person, on being asked by the Magistrate to give in a list of his witnesses, declines to give in such a list, he cannot compel the Magistrate, after committal, to issue summonses for witnesses on his behalf. He is, however, entitled under s. 291 to call any witness in the Court of Session and examine him, if he is in attendance in such Court, whether or not, he has caused such witness to be summoned.¹ In such

Note 4

1. ('71) 15 Suth W R Cr 7 (7) : 6 Beng L R App 65, *Ram Shahai v. Sankar Bahadur*.
 2. ('71) 15 Suth W R Cr 15 (15, 16), *In re Mohima Chunder Shah*.
 3. ('85) 11 Cal 762 (766), *Harendra Narain Singh v. Bhobaniprea Baruani*.
 4. ('71) 16 Suth W R Cr 14 (15), *Queen v. Rajcoomar*.
- [See also ('40) AIR 1940 Pat 355 (358) : 19 Pat 413, *Musahru v. Emperor*.]

Note 5

1. ('70) 13 Suth W R Cr 1 (11) : 4 Beng L R App 1, *In re Mohesh Chunder*.
 2. ('92) 14 All 242 (245) : 1892 A W N 83, *Queen-Empress v. Hargobind Singh*.
 3. ('92) 14 All 242 (245) : 1892 A W N 83, *Queen-Empress v. Hargobind Singh*.
 4. ('97) 19 All 502 (504) : 1897 A W N 134, *Queen-Empress v. Shakir Ali*.
 5. ('96) 18 All 380 (380, 381) : 1896 A W N 114, *In the matter of Rudra Singh*.
- See also S. 212 Note 1.

Note 6

1. ('36) AIR 1936 Lah 533 (536) : 17 Lah 176 : 37 Cr. L. J. 742 (FB), *Mt. Niamat v. Emperor*. (Ss. 211 and 291 read together show that if the accused has willing witnesses at the Sessions Court, he can be allowed to produce them, but if he

a case, if the accused applies to the Sessions Court for issue of summons to any witness, he is not *entitled* to the issue of such summons. But the Sessions Court has a *discretion* to issue summons in such a case and where the Sessions Court considers that the evidence of a witness would be material, it is the duty of the Sessions Court to issue summons to such witness.²

Section 211
Notes 6-7

Where an accused person gives no list of witnesses to the committing Magistrate and applies, at a late stage of the trial in the Sessions Court, for an adjournment thereof in order to procure the attendance of witnesses for his defence, it would be perfectly legal for the Court to refuse the application.³ See also S. 291 and the Notes thereto.

7. Further list. — It has been seen that for an accused to have his witnesses summoned as of right, he must give in a list under this section. Where he does not give in his list immediately after the charge is framed, the Magistrate has a discretion to accept a list subsequently.¹ When a further list has been allowed to be filed by the Magistrate under sub-s.(2), it is governed by the same principles, as a list under sub-s.(1).²

An accused committed for trial before a High Court is entitled under sub-s.(2) to give to the Clerk of the Crown, at any time before his trial, a further list of witnesses for his defence.

212.* The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under section 211.

Section 212

*1882 : S. 212; 1872 : S. 200, para. 2; 1861 : S. 207.

requires the Court to issue process for compelling attendance, he is confined to those witnesses whose names he has previously included in his list of witnesses.)

(197) 19 All 502 (503) : 1897 A W N 134, *Queen-Empress v. Shakir Ali*.

See also S. 216 Note 2, S. 291 Note 3 and S. 540 Note 7.

2. (140) AIR 1940 Pat 355 (358, 359) : 19 Pat 413, *Musahru v. Emperor*. (It is not a wise exercise of the discretion for the Sessions Judge to reject the application on the ground that it is not *bona fide* or to offer to issue summons at the risk of the accused and on his depositing the expenses of the witnesses, though the rejection of the application is not in violation of the law.)

(197) 19 All 502(504):1897 A W N 134, *Empress v. Shakir Ali*. (14 All 242, explained.)

3. (125) AIR 1925 Lah 557 (557, 558) : 27 Cr. L. J. 134, *Nazir Singh v. Emperor*.

(124) 25 Cri L Jour 97 (97, 98) : 76 I. C. 97 (Pesh), *Abdul Wahab v. Emperor*.

Note 7

1. (140) AIR 1940 Pat 355 (358):1940 PWN 83(88):19 Pat 413, *Musahru v. Emperor*.

(136) AIR 1936 Lah 533(535):17 Lah 176:37 Cr.L.J.742(FB), *Mt. Niamat v. Emperor*.

(131) AIR 1931 All 434 (435) : 53 All 692 : 32 Cr. L. J. 849, *Ram Ghulam v. Emperor*.

2. (130) AIR 1930 Cal 188 (189) : 31 Cri L Jour 695, *Kali Bilash v. Emperor*.

[See however (140) AIR 1940 Pat 355 (358) : 19 Pat 413, *Musahru v. Emperor*. (In this case it is observed that the discretion to accept a supplementary list of witnesses under sub-section (2) is to be exercised subject to the provisos to S. 216 — It is submitted that this is not correct — S. 216 does not refer to the acceptance of a supplementary list of witnesses under sub-s.(2) of S. 211 but to the question of issuing processes to the witnesses named by the accused and does not make any distinction between witnesses named in the list submitted under sub-s. (1) and those named in the supplementary list submitted under sub-s. (2) of this section.)]

See also S. 291 Note 3.

Section 212
Note 1

1. Scope of the section. — The object of the section is twofold: *firstly* to prevent any hasty commitment and to ensure a thorough enquiry previous to the commitment¹ and, *secondly*, to prevent the concoction of false evidence after the commitment.² In order to achieve this object, the section gives the Magistrate the widest possible discretion to summon and examine any witness named in the list given by the accused under S. 211. Thus, he may summon and examine the witnesses for the defence even when the accused has reserved his defence for the Court of Session.³ The discretion thus vested entitles the Magistrate to ascertain, after weighing the evidence,⁴ whether there is a presumption of guilt against the accused or whether he is innocent,⁵ for it is possible that after hearing the witnesses for the defence the enquiry may result in the discharge of the accused under S. 213, sub-s.(2).⁶ But this discretion has to be exercised sparingly and cautiously as any inconsiderate or premature examination of witnesses may prejudice the accused in his defence at the trial in the Sessions Court.⁷

The accused has no *right* to have his witnesses summoned and examined *after the charge* is framed under S. 210.⁸ And a Magistrate is not required to *record* his reasons for acting or refusing to act under this section.⁹

Section 213

213.* (1) When the accused, on being required to give in a list under section 211, has declined to do so, or when he has given in such list and the witnesses (if any)

Order of commitment.

*** Code of 1882 : S. 213.**

213. When the accused, on being required to give in a list under S. 211, has declined to do so, or when he has given in such list, and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under S. 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

1872 : S. 198, para. 1 and S. 200, para. 2 ; 1861 : Ss. 226, 227.

Section 212 — Note 1

1. See ('70) 14 Suth W R Cr 16 (16), *Queen v. Kristo Doba*. (Necessity of making proper inquiries before committing to sessions pointed out.)
[But see ('70) 13 Suth W R Cr 1 (11) : 4 Beng L R App 1, *In re Mohesh Chunder*.]
2. See ('70) 13 Suth W R Cr 1 (11) : 4 Beng L R App 1, *In re Mohesh Chunder*.
3. ('96) 18 All 380 (381, 382) : 1896 A W N 114, *In the matter of Rudra Singh*. See also S. 211 Note 5.
4. ('10) 11 Cri L Jour 751 (752) : 8 I. C. 1044 (Lab), *Mir Abdullah v. Emperor*.
5. ('70) 14 Suth W R Cr 16 (16), *Queen v. Kristo Doba*.
6. ('12) 13 Cri L Jour 778 (780) : 36 Mad 321 : 17 Ind Cas 410, *Sessions Judge of Coimbatore v. Immudi Kumara Kangaya*.
7. ('06) 4 Cri L Jour 452 (452) : 1906 A W N 306, *Emperor v. Mathura*.
8. ('70) 13 Suth W R Cr 1 (11) : 4 Beng L R App 1, *In re Mohesh Chunder*.
9. ('27) AIR 1927 Pat 243 (246) : 6 Pat 329 : 28 Cr. L.J. 709, *Sasdat Mian v. Emperor*.
10. ('12) 13 Cri L Jour 778 (780) : 36 Mad 321 : 17 Ind Cas 410, *Sessions Judge of Coimbatore v. Immudi Kumara Kangaya*.
[See ('15) AIR 1915 Mad 947 (948) : 15 Cri L Jour 704 (704), *In re Sessions Judge of Madura*.]
11. ('96) 18 All 380 (381, 382) : 1896 A W N 114, *In the matter of Rudra Singh*.

included therein whom the Magistrate desires to examine have been summoned and examined under section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

Section 213
Notes 1-4

(2) If the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.

Sub-section (2) was newly added in the Code of 1893. For legislative changes, see Section 210 Note 1.

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. "May make an order committing the accused." 2. Commitment by Magistrate having no territorial jurisdiction — Effect. See S. 531 and Notes thereunder. 3. Commitment to Sessions Court having no territorial jurisdiction to try the offence—Effect. See Notes under Ss. 215 and 531. | <ol style="list-style-type: none"> 4. Reasons for commitment. 5. Power of Magistrate to cancel charge and discharge accused or to try him himself. 6. "After hearing the witnesses for the defence." 7. Right of accused to cross-examine prosecution witnesses after charge is framed. 8. Practice. |
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Other Topics (miscellaneous)

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| <ul style="list-style-type: none"> Compromise by prosecutor after committal. See Note 5. Committal in cases of several persons jointly charged. See S. 206 Note 6. Committal of a case triable by Magistrate—Record of reasons. See Note 4. Committal of some and trial of the rest. See Note 5. | <ul style="list-style-type: none"> Defence evidence includes cross-examination of prosecution evidence. See Note 7. Duty of Magistrate to weigh evidence. See Note 5. No cancellation after committal. See Note 5. No discharge after committal. See Note 5. |
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1. "May make an order committing the accused." — This section leaves it to the discretion of the committing Magistrate whether or not to commit an accused to the Sessions. Hence, even after a charge is framed with a view to commitment, the Magistrate may change his mind and proceed to try the case himself¹ or cancel the charge and discharge the accused: see sub-section (2).

2. Commitment by Magistrate having no territorial jurisdiction—Effect. — See S. 531 and Notes thereunder.

3. Commitment to Sessions Court having no territorial jurisdiction to try the offence — Effect. — See Notes under Ss. 215 and 531.

4. Reasons for commitment. — The section requires the committing Magistrate to record his reasons for committing a case to

Section 213 — Note 1

1. ('10) 11 Cr. L. J. 486 (487, 488) : 7 Ind Cas 450 (Bom), *Emperor v. Venkatesh*. See also S. 210 Note 2.

Section 213
Notes 4-5

the Court of Session.¹ Where the offence is not exclusively triable by a Court of Session, the reasons must disclose grounds, not only for not discharging the accused, but also for committing the case to the Court of Session instead of its being tried by the Magistrate himself.² As to what are proper grounds for committing a case, see Notes to Ss. 206, 207, 209 and 210.

5. Power of Magistrate to cancel charge and discharge accused or to try him himself. — The enactment of sub-section (2) in the Code of 1898 makes it clear that even after a charge is framed with a view to commitment, the Magistrate has power to cancel the charge and discharge the accused if, in view of the evidence of the defence witnesses examined subsequent to the charge, the Magistrate considers that there are not sufficient grounds for committing the case.¹ The decisions prior to the Code of 1898, which held that the Magistrate had no such power,² are no longer good law. But the sub-section is only intended to provide for cases, in which the evidence recorded after a charge, so changes the aspect of the case as to leave no reasonable doubt that a conviction is not sustainable. It does not apply when the evidence merely casts some doubt on the case.³ But when the Magistrate comes to the conclusion that the evidence of the defence witnesses, examined subsequent to the charge, rebuts that produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow, he may act upon his opinion and pass an order of discharge.⁴ See also S. 209 Notes 3 and 5, and S. 210 Note 5.

Note 4

1. [See (1865) 2 Suth W R Cr 65 (65), *Queen v. Anderson*. (Magistrate making an inquiry with a view to commit is bound to record specially the evidence on which the commitment is made.)
(1866) 5 Suth W R Cr 6 (6), *Empress v. Kodai Kahar*. (Magistrate in his grounds of commitment should specifically note with exactness and precision the proof against each particular prisoner and the manner in which it is supported.)
(1866) 5 Suth W R Cr 17 (18), *Queen v. Ishur Manjee*. (Magistrate should give in the grounds of commitment particulars of the case—He should render his grounds of commitment a proper and complete act of accusation.)]
2. (1914) AIR 1914 Bom 237 (238) : 38 Bom 114 : 14 Cr.L.J. 609, *Emperor v. Nanji*. (Omission to give reasons in such a case is not a mere irregularity but illegality.) See also S. 347 Note 4.

Note 5

1. (1925) AIR 1925 Oudh 547 (548) : 26 Cr.L.J. 520, *Bishambhar Nath v. Emperor*.
(1918) AIR 1918 U B 11 (11, 12) : 3 U B R 29 : 19 Cr.L.J. 102, *Nga Hmyin v. Emperor*.
(1914) AIR 1914 Cal 312 (312) : 15 Cr. L. J. 16, *Arjun Naik v. Bira Bhoi*. (Commitment is not complete before commitment order is formally drawn up—Even after recording that the accused is committed, if before the commitment order is drawn up, accused's pleader wants to examine witnesses and the committing Magistrate yields to his request, he can thereafter discharge the accused.)
(1910) 11 Cr. L. J. 486 (487, 488) : 7 Ind Cas 450 (Bom), *Emperor v. Venkatesh Sadashiv*. (Mere framing of a charge as required by S. 210 is distinct from and does not amount to an order of commitment which has to be made under S. 213—The framing of the charge alone does not divest the Magistrate of his jurisdiction to proceed with the case and to try the case himself instead of committing it.)
2. (1881) 1881 Rat 161 (162), *In re Mari*.
3. (1900-02) 1 L B R 348 (348), *Crown v. Po Nyan*.
4. (1922) AIR 1922 All 168 (169) : 44 All 57 : 22 Cr.L.J. 703, *Md. Abdul v. Baldeo Sahai*.
(1915) AIR 1915 All 186 (188) : 37 All 355 : 16 Cr.L.J. 429, *Dharam Singh v. Joti Prasad*.
(1925) AIR 1925 All 670 (670) : 27 Cr. L. J. 2, *Akbar Ali v. Raja Bahadur*. (This discretion is to be carefully exercised.)

Section 213
Notes 5-7

The power to cancel a charge and discharge the accused applies only *before* the case is committed. Once the case has been committed, the Magistrate becomes *functus officio* and cannot thereafter change his mind and cancel the commitment or discharge the accused.⁵ Moreover, the Magistrate's power under the sub-section arises only in cases where he has taken further evidence after the framing of the charge; where he has *not taken such further evidence*, he cannot cancel the charge once framed and discharge the accused.⁶ The power of cancelling a charge once framed and discharging the accused does not apply to trials of *warrant cases*; the only course open to a Magistrate who, after framing a charge in such cases finds that the charge is unsustainable, is to acquit the accused⁷; see S. 258 and Notes thereunder; see also Note 1, and Notes to section 210.

6. "After hearing the witnesses for the defence." — As has been seen in Note 5, the power of the Magistrate under sub-s.(2) to cancel the charge and discharge the accused arises only in cases in which, after framing the charge, the Magistrate *examines further defence witnesses*; where further evidence is not taken by him, he cannot cancel the charge and discharge the accused.¹

As to whether the phrase "witnesses for defence" in sub-s.(2) is wide enough to cover evidence elicited by cross-examination of prosecution witnesses, see Note 7.

7. Right of accused to cross-examine prosecution witnesses after charge is framed. — Under the general principles of evidence (see Evidence Act, section 138) and the specific provision contained in S. 208, sub-section (2), the accused, in preliminary inquiries in sessions cases, is entitled as of right to cross-examine the witnesses for the prosecution. Ordinarily, the cross-examination of each witness must be made immediately after his examination-in-chief is over; it cannot

5. ('05) 2 Cal L Jour 33n (33n), *Makaru Das v. Jogeswar Singh*. (Accused committed to Sessions upon certain charges—Committing Magistrate has no jurisdiction to take further evidence to cancel some of the charges and to try the accused on the remaining charges.)

(1865) 2 Suth W R Gr 57 (57), *Queen v. Salim Sheikh*. (Committal once made cannot be annulled by allowing the prosecutor to file a compromise.)

('81) 4 All 150 (152) : 1881 A W N 167, *Empress of India v. Janghir*. (Do.)

See also S. 215 Note 7 and S. 345 Note 15.

6. ('02) 2 Low Bur Rul 140 (140), *King-Emperor v. Nga Po Saw*.

7. ('25) AIR 1925 Oudh 547 (547, 548) : 26 Cri L Jour 520, *Bishambarnath v. Emperor*. (Magistrate finding that there is no proof that accused has committed a part of the offence but that there are *prima facie* grounds for believing that he committed the other part and that the circumstances require a commitment to the sessions. In committing the case to the sessions with regard to the latter part of the offence, the Magistrate cannot discharge the accused with reference to the former part of the offence but must acquit the accused. It is only in respect of the offence which is committed to the sessions that the proceedings are taken out of the purview of Chap. 21 under S. 347 and with reference to the other part of the offence, the procedure under that chapter alone should be followed and after a charge is framed an accused can only be acquitted and cannot be discharged. S. 347 does not authorize such a discharge.)

Note 6

1. ('03) 2 Low Bur Rul 140 (140), *King-Emperor v. Nga Po Saw*.

Section 213
Notes 7-8

be reserved till the examination-in-chief of all the witnesses for a side is over, though the Court can, in the exercise of its discretion, allow such reservation. Hence, an accused, who has declined to cross-examine the prosecution witnesses then and there and who has not been permitted by the Magistrate to reserve his cross-examination till a later stage, is not *entitled* to cross-examine the prosecution witnesses after the charge is framed;¹ *a fortiori*, if he has already cross-examined the prosecution witnesses under S. 208, before the charge was framed, he is not *entitled* to cross-examine them again after the charge is framed.² (Contrast the right of an accused in the trial of warrant cases under S. 256.) The expression "witnesses for the defence" in sub-s.(2) refers to witnesses whom the Magistrate in his discretion examines under S. 212; that expression does *not* include the witnesses for the prosecution who are cross-examined, and therefore does not confer any right on the accused to cross-examine the prosecution witnesses after the charge is framed.³ But the Magistrate has an *inherent power* to allow the accused an opportunity to cross-examine the prosecution witnesses after the charge is framed.⁴ Further, if the accused did not have an opportunity of cross-examining the prosecution witnesses before the charge was framed, he is entitled to cross-examine them after the charge is framed and before the order for commitment is passed.⁵

As to the right of an accused to cross-examine prosecution witnesses in cases where the proceedings are started as a trial of a warrant case but subsequently the Magistrate decides to commit the case to the Court of Session, see S. 347 and Notes thereunder.

8. Practice. — See the undermentioned cases.¹

Note 7

1. ('29) AIR 1929 Cal 593 (593, 594, 595) : 57 Cal 44 : 30 Cri L Jour 1107, *G. V. Raman v. Emperor*.
2. ('31) AIR 1931 Bom 517 (518) : 33 Cri L Jour 68, *K. R. Bhat v. Emperor*.
3. ('19) AIR 1919 Low Bur 159 (160) : 9 L B R 109 : 19 Cr.L.J. 327, *Tambi v. Emperor*.
4. ('17) AIR 1917 Oudh 200 (200) : 18 Cr.L.J. 105; 19 Oudh Cas 239, *Baldco v. Emperor*.
5. See ('31) AIR 1931 All 434 (435) : 53 All 692 : 32 Cr.L.J. 849, *Ram Ghulam v. Emperor*.
6. ('29) AIR 1929 Cal 593 (595) : 57 Cal 44 : 30 Cr.L.J. 1107, *Raman v. Emperor*.
7. ('29) AIR 1929 Cal 593 (595) : 57 Cal 44 : 30 Cr.L.J. 1107, *Raman v. Emperor*.
8. ('19) AIR 1919 Low Bur 159 (160) : 9 L B R 109 : 19 Cr.L.J. 327, *Tambi v. Emperor*.
9. ('12) 13 Cri L Jour 774 (774) : 39 Cal 885 : 17 I. C. 406, *Jogendranath v. Motilal*.
(The words "witnesses for the defence" in S. 213 (2) are wide enough to cover evidence extracted by cross-examination from the witnesses for the prosecution.)
10. See ('30) AIR 1930 Cal 754 (755) : 57 Cal 945 : 32 Cri L Jour 182, *Nanooram Goenka v. Fulchand Jaypuria*.

Note 8

1. ('66) 6 Suth W R Cr 9 (10), *Queen v. Khoda Sonthal*. (The grounds of commitment and the remarks of the committing officer should be entered or copied in the calendar which ought to be complete in itself.)
2. ('68) 9 Suth W R Cr Cir 5 (7). (Magistrate should be careful to arrange their commitments with a view to the trials taking place at the earliest or next ensuing session, in order to avoid the needless detention of accused persons for prolonged periods.)

214.* [Person charged outside presidency-towns jointly with European British subject. (*Repealed by section 10 of the Criminal Law Amendment Act, XII of 1923.*)]

Section 214

The provisions of the repealed section have been partly incorporated in S. 413.

215.† A commitment once made under section 213 * * * by a competent Magistrate * * or by a Civil or Revenue Court under section 478, can be quashed by the High Court only, and only on a point of law.

Section 215

Quashing commitments under section 213.

Synopsis

- | | |
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| 1. Legislative changes. | 7. "By the High Court only." |
| 2. Scope of the section. | 8. "On a point of law." |
| 3. "Once made." | 9. Grounds held insufficient for quashing commitment. |
| 4. Under Section 213, etc. | 10. Time for quashing commitment. |
| 5. Competent Magistrate. | 11. Effect of quashing commitment. |
| 6. "Civil or Revenue Court under section 478." | |

Other Topics (miscellaneous)

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| Commitment made to the prejudice of accused. See Note 9. | Joint inquiry and investigation. See Note 9. |
| Commitment of an approver. See Note 9. | No application to quash commitment will lie after commencement of trial. See Note 10. |
| Commitment of an European British subject. See Note 9. | Not giving reasons may invalidate. See Note 8. |
| Commitment without discretion. See Note 8. | Section does not apply to directions to commit but the High Court may revise. See Note 2. |
| Insufficient evidence how far a ground. See Notes 8 and 9. | Want of sanction under S. 195 and lapse of sanction. See Note 8. |
| Irregularities in procedure how far vitiate the trial. See Note 7. | When commitment cannot be quashed. See Note 10. |
| Issuing a warrant instead of summons. See Note 9. | When Sessions Court can discharge without trial. See Note 7. |
| Joint inquiry does not vitiate commitment. See Note 9. | |

1. Legislative changes.

- (1) There was no section corresponding to this in the Code of 1861.
- (2) The explanation to S. 197 of the Code of 1872, which corresponded to this section, did not contain the equivalent of the words "under S. 213," and "or by a Civil or Revenue Court under S. 478."

* Code of 1898, original S. 214.

214. If any person (not being an European British subject) is accused before a Magistrate other than a Presidency Magistrate of having committed an offence conjointly with an European British subject who is about to be committed for trial, or to be tried before the High Court on a similar charge arising out of the same transaction, and the Magistrate finds that there are sufficient grounds for committing the accused for trial, he shall commit him for trial before the High Court, and not before the Court of Session.

1882 : S. 214; 1872 : S. 197; 1861 : S. 226.

† 1882 : S. 215; 1872 : S. 197, Expln.; 1861 — Nil.

Section 215
Notes 1-2

- (3) In s. 215 of the Code of 1882, the words "under S. 213 or 214" were for the first time introduced and even that section did not contain the words "or by a Civil or Revenue Court under S. 478."
- (4) In the Code of 1898, the words "or by a Court of Session under S. 477 or by a Civil or Revenue Court under S. 478" were introduced after the word 'Magistrate'.
- (5) The section was amended in 1923. The words "or S. 214" were removed by the Criminal Law Amendment Act, XII of 1923, consequent on the repeal of S. 214. Likewise the words "or by a Court of Session under S. 477" were removed by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923, consequent upon the repeal of S. 477.

2. Scope of the section. — Where a commitment is made —

- (1) under S. 213 by a competent Magistrate, or
- (2) by a Civil or Revenue Court under S. 478,

it can be quashed only by the *High Court* and only on a *point of law*.¹

When the commitment is not made under S. 213 or S. 478, this section does not apply. Thus, a commitment under S. 437² or by the Appellate Court under S. 423³ or by the High Court under S. 526⁴ is not one under S. 213 and the High Court can, in revision, where such an order of commitment is open to revision, consider the propriety of the order of commitment on points both of law and of fact. An order of commitment under S. 347, however, falls within the purview of S. 213 and can be quashed, if at all, only under this section.⁵

When a commitment is *not* made by a *competent* Magistrate, the commitment may be quashed under S. 532, which does not apply when the commitment is made by a competent Magistrate.⁶

The section does not in any way restrict the powers of the High Court to pass any orders subsequent to the quashing of the commitment.⁷ This section does not control S. 494.⁸

Section 215 — Note 2

1. ('24) AIR 1924 Rang 165 (167) : 1 Rang 526 : 25 Cr.L.J. 261, *Mahomed Moidin v. Emperor*. (High Court cannot quash commitment merely because of doubts as to credibility of evidence.)
- (20) AIR 1920 Mad 144 (145) : 43 Mad 361 : 21 Cr.L.J. 28, *Venkatagiri Aiyer v. N. M. Firm*. (Letters Patent (Madras) Cl. 15 is controlled by this Section.)
2. ('07) 6 Cr.L.J. 406 (408) : 12 CWN 117 : 6 C. L. J. 760, *Rash Behari v. Emperor*.
- (03) 7 Cal W N 327 (328), *Pirithi Chand Lal v. Sampatia*.
- (19) AIR 1919 LB 146 (147, 148) : 9 LB R 208 : 19 Cr.L.J. 801, *Tambi v. Emperor*.
- (04) 1 Cr. L. J. 275 (277) : 27 Mad 54 : 7 I. C. 752, *In re Kalagava Bapiiah*. (Commitment by the High Court under S. 526 cannot be even revised.)
- See also S. 437 Note 20 and S. 439 Note 28.
3. ('22) AIR 1922 Low Bur 40 (40) : 11 LBR 375 : 25 Cr.L.J. 518, *Emperor v. Nga Thet She*.
4. ('04) 1 Cr.L.J. 275 (277) : 27 Mad 54 : 7 I. C. 752, *In re Kalagava Bapiiah*. (Commitment order by High Court under S. 526 is not revisable.)
5. ('24) AIR 1924 Sind 61 (62, 63) : 17 SLR 188 : 26 Cr.L.J. 148, *Utlilai v. Emperor*.
6. ('18) AIR 1918 Bom 117 (118) : 43 Bom 147 : 20 Cr.L.J. 71, *Emperor v. Madhav*.
7. ('33) AIR 1933 Bom 494 (495) : 35 Cr.L.J. 479, *Emperor v. Sher Alam Khan*. (High Court can direct Magistrate to try accused himself.)
8. ('32) AIR 1932 Cal 699 (703) : 60 Cal 233 : 34 Cr. L. J. 433, *Giri Bala Dasi v. Mader Gazi*.

3. "Once made." — This section refers only to commitments actually made. But where the Sessions Judge acting under s. 427, sets aside the order of discharge and *directs* a commitment to be made, the High Court can interfere in its revisional jurisdiction and can consider questions of law and *fact*.¹

4. Under Section 213, etc. — Commitments are authorized by the Code under ss. 213, 329, 346, 347, 348, 423, 437, 439, 445, 462, 478 and 526. As seen in Note 2 above, this section applies only in cases of commitments made under s. 213 or s. 478.

5. Competent Magistrate. — The phrase "competent Magistrate" has been held to include for the purposes of this section —

- (1) a Magistrate to whose file a case has been transferred from that of another Magistrate;¹
- (2) the District Magistrate to whom a case had been transferred under section 349;²
- (3) a Magistrate to whose notice an offence contemplated under s. 195 is brought in a judicial proceeding;³
- (4) a first class Magistrate who had been appointed as a special Magistrate to try the case since he has powers to commit ordinarily under s. 203.⁴

But where a Magistrate who has become disqualified to try a case by virtue of s. 556, holds a preliminary enquiry and commits the case without the leave necessary under that section,⁵ or where a Magistrate holds the enquiry in cases in which a sanction to prosecute is necessary and commits the case without such sanction,⁶ it has been held that the commitment is not by a "competent Magistrate" within the meaning of this section. However, where a case has been pending before a Magistrate, and he has not been restrained from going on with the enquiry by any order staying the proceedings, his jurisdiction to commit is not ousted and he does not cease to be a competent Magistrate merely on the ground that, after the records had been called for by and sent to the superior Court, he took advantage of a short interval when the records were sent to him for the purpose of recording the evidence of a particular witness, and completed the enquiry and committed the accused.⁷

As to the effect of an order of commitment by a Magistrate who has no local jurisdiction over the offence, see Note 9 below and s. 531 Note 2.

Note 3

1. ('07) 5 Cr. L. J. 100 (100, 101); 30 Mad 224; 16 M. L. J. 529, *In re Muthiah Pillai*.

Note 5

1. ('14) AIR 1914 All 45 (45, 46); 36 All 315; 15 Cr. L. J. 354, *Emperor v. Nanhua*.
2. ('87) 1887 Rat 350 (353), *Queen-Empress v. Bapuda*.
3. ('94) 1894 Rat 704 (705), *Queen-Empress v. Ganpat*.
4. ('31) AIR 1931 Bom 517 (518, 519); 33 Cr. L. J. 68, *K. R. Bhat v. Emperor*. See also S. 14 Note 5.
5. ('04) 2 Low Bur Rul 209 (211), *King-Emperor v. Maung Lat*.
6. ('93-1900) 1893-1900 Low Bur Rul 377 (378), *Queen-Empress v. Sit Law*.
7. ('05) 2 Cr. L. J. 534 (538, 539, 543); 9 C W N 829, *Sheobux Ram v. Emperor*.

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Notes 6-7

6. "Civil or Revenue Court under section 478." — As to the circumstances when a Civil or Revenue Court can make an order of commitment, see S. 478. As to the procedure of such Courts in these cases, see S. 479. As to what are Civil or Revenue Courts, see Ss. 478 and 195.

7. "By the High Court only." — It is only the High Court that can quash a commitment under this section. The committing Magistrate himself cannot after he has once committed the case, quash the commitment and discharge the accused on the ground that the complainant wants either to withdraw or compound the case.¹ Nor can the Sessions Judge to whom a case is committed, quash the commitment and direct a retrial² even if the commitment had been in pursuance of his direction.³ The only course open to the Judge in such cases is to proceed with the trial and acquit the accused if there is no proof of his guilt or if the public prosecutor withdraws the prosecution with the leave of the Court.⁴ But when a Magistrate commits an accused who is a foreign subject for an offence in a foreign territory, the commitment is void *ab initio* and the Sessions Judge can discharge the accused or refer the matter to the High Court for orders.⁵

The Judicial Commissioner of Sind, sitting in the Sessions Division, is not divested of his dual capacity as a High Court Judge and he can quash commitments under this section even when sitting as a Sessions Judge.⁶ Similarly, a single Judge of the High Court

Note 7

1. ('82) 4 All 150 (152) : 1881 A W N 167, *Empress of India v. Janghir*. (1865) 2 Suth W R Cr 57 (57), *Queen v. Salim Sheikh*.
See also S. 213 Note 5 and S. 345 Note 15.
2. ('39) AIR 1939 Pat 35 (36) : 39 Cr. L. J. 997 : 18 Pat 82, *Emperor v. Sadasibo Majhi*. (Sessions Judge is not competent to quash commitment.)
(07) 5 Cr. L. J. 99 (100) : 16 M L J 525, *In re Bheema*.
(1900-1902) 1 Low Bur Rul 88 (88, 89), *Crown v. Nga Swe Yauk*.
(97) 10 C P L R Cr 13 (14), *Empress v. Bali Ram*.
(1900) 13 C P L R Cr 126 (127, 129), *Empress v. Ghulam Kadir Khan*.
(26) AIR 1926 Mad 865 (870) : 49 Mad 525 : 27 Cr. L. J. 1031 (FB), *Public Prosecutor v. Ratnavelu Chetty*.
(88) 12 Mad 35 (36) : 2 Weir 457, *Queen-Empress v. Sivarama*.
(87) 10 Mad 232 (239) : 2 Weir 181 (FB), *Queen-Empress v. Sheikh Beari*.
(19) AIR 1919 Lah 389 (390) : 20 Cr. L. J. 3 : 1919 P R No. 5 Cr, *Emperor v. Mt. Ruri*.
(74) 1874 Pun Re No. 3 Cr, p. 5 (5), *Crown v. Jamal Khan*.
(67) 1867 Pun Re No. 24 Cr, p. 45 (45), *Crown v. Goonga*. (Under the Code of 1861 Chief Court only had the power.)
(01) 5 Cal W N 411 (413), *Jogeshwar Ghose v. Emperor*.
(18) AIR 1918 Bom 117 (118) : 43 Bom 147 : 20 Cr. L. J. 71, *Emperor v. Madhav*.
(72) 4 N W P H C R 6 (6), *Queen v. Mata Dyal*.
(82) 1882 All W N 165 (165) : 5 All 62, *Empress v. Ram Baksh*.
(72) 1872 Pun Re No. 28 Cr, p. 37 (37), *Crown v. Alya*. (Deputy Commissioner to whom case had been committed under Code of 1872 had no power to quash.)
(81) 1881 All W N 60 (60), *Empress v. Sunder*. (Sessions Judge cannot release a person committed without putting him on trial without taking his defence.)
[See ('01) 3 Bom L R 703 (703), *King-Emperor v. Pandurang*.]
3. ('75) 7 N W P H C R 211 (213), *In re Hassan Raza Khan*.
4. ('81) 1881 All W N 60 (60), *Empress v. Sunder*.
5. ('97) 1897 Rat 922 (923), *Queen-Empress v. Lagma Laxamana*.
6. ('24) AIR 1924 Sind 61 (62) : 17 S L R 188 : 26 Cr. L. J. 148, *Utlilai v. Crown*.
(32) AIR 1932 Sind 157 (159) : 26 S L R 407 : 34 Cr. L. J. 14, *Maniram v. Emperor*.

exercising original criminal jurisdiction has jurisdiction to quash a commitment made to that Court under this section.⁷

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Notes 7-8

The principles laid down in s. 537 should generally guide the High Court in dealing with an application under this section.⁸

8. "On a point of law." — A commitment can be quashed only on a point of law.¹ The test is to see from the judgment of the Magistrate what his findings on the evidence are and whether those findings are capable *prima facie* of sustaining the charges he has framed and on which the commitment to the Court of Session is made.² A commitment should only be quashed when on the face of it there is something of the nature of a fatal flaw in the prosecution.³ In dealing with an application under this section, the High Court is not required to appreciate the evidence, but it proceeds on the assumption that the facts as stated in the order of commitment will be proved at the trial. All that the High Court is required to apply its mind to is to see whether, assuming the facts are proved, they do justify the conviction of the accused or not.^{3a} The following are illustrative instances of errors of law justifying the quashing of the commitment:

- (1) Where the commitment is made without any enquiry or examination of the prosecution witness⁴ or on an enquiry so imperfect as to result in prejudice to the accused.^{4a}
- (2) Where the charge framed is altered or added to at a late stage and the commitment is made without re-examining the witnesses as

7. ('08) 8 Cr. L. J. 221 (223) : 36 Cal 48 : 12 C W N 1014, *Phanindra v. Emperor*.
(38) AIR 1938 Rang 105 (107) : 39 Cri L Jour 470, *M. J. Mamsa v. The King*.
(29) AIR 1929 Cal 777 (778) : 56 Cal 785 : 31 Cri L Jour 181, *Emperor v. Girish*.
8. ('26) AIR 1926 Cal 470 (477, 478) : 53 Cal 350 : 27 Cri L Jour 385 (FB), *Emperor v. Colin Mackenzie Mackey*.
(11) 12 Cri L Jour 320 (321) : 10 Ind Cas 616 (Sind), *Emperor v. Jhamandas*.

Note 8

1. ('40) AIR 1940 All 896 (397), *Emperor v. Mihi Lal*.
(40) AIR 1940 Oudh 15 (15) : 40 Cr. L. J. 903, *Sheomangal Pande v. Emperor*.
(38) AIR 1938 Mad 675 (676) : 39 Cr. L. J. 894, *In re Ramaswamy Goundan*.
(36) AIR 1936 Sind 3 (7) : 37 Cri L Jour 314 : 29 Sind L R 281, *Francis Xavier Fernandez v. Emperor*. (Plea that there is no medical evidence to prove offence is not point of law.)
(35) AIR 1935 Oudh 9 (9) : 36 Cr. L. J. 175, *Emperor v. Chhedammi*.
(05) 2 Cri L Jour 432 (433) : 7 Bom L R 457, *Emperor v. Sita*.
(14) AIR 1914 All 191 (192) : 36 All 4 : 15 Cr. L. J. 64, *Sailani v. Emperor*.
(12) 13 Cr. L. J. 842 (844) : 37 Bom 146 : 17 L. C. 714, *Emperor v. Intya Salabat Khan*.
(03) 26 Mad 139 (142) : 2 Weir 197, *In re Chennan Goud*.
(29) AIR 1929 Cal 428 (429) : 31 Cr. L. J. 750, *Mahendra Nath v. Emperor*.
(29) AIR 1929 Sind 250 (251) : 30 Cr. L. J. 1121, *Wahid Bux v. Emperor*.
(34) AIR 1934 All 963 (969) : 57 All 412 : 36 Cr. L. J. 187 (FB), *Emperor v. Md. Mehdi*.
2. ('40) AIR 1940 All 896 (398), *Emperor v. Mihi Lal*.
(29) AIR 1929 Bom 269 (269) : 30 Cr. L. J. 1066, *Emperor v. Yellapa Durgaji*.
3. ('25) AIR 1925 All 751 (751) : 26 Cr. L. J. 1233, *Gulab Singh v. Emperor*.
3a. ('32) AIR 1932 Sind 157 (159) : 26 S L R 407 : 34 Cr. L. J. 14, *Mani Ram Mangamul v. Emperor*.
4. ('82) 4 Mad 227 (227, 228) : 2 Weir 584, *Queen v. Chinna Vedagiri Chetty*.
(12) 13 Cri L Jour 443 (444, 445) : 15 Ind Cas 75 (All), *Durga Datt v. Emperor*.
(06) 1906 All WN 306 (307) : 4 Cr. L. J. 452, *Emperor v. Malhura*. (A committal without examining witnesses of the defence on the ground of an order of superior Court is illegal and will be quashed.)
(76) 1876 Rat 100 (101), *Reg. v. Sita*.
4a. ('81) 1881 Pun Re No. 6 Cr, p. 6 (6), *Empress v. Gyano*.

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Note 8

required by s. 213 and without allowing the production of evidence with reference to the altered or added charge.⁵

- (3) Where the commitment is made in the absence of the accused,⁶ or without giving him a reasonable opportunity of showing cause against the committal,⁷ or of cross-examining the prosecution witnesses,⁸ or without examining the witnesses tendered by the accused.^{8a}
- (4) Where the commitment is made on evidence legally inadmissible⁹ such as evidence taken even prior to the apprehension of the accused.¹⁰
- (5) Where the commitment is made to a Court of Session or High Court which has no authority to try the case.¹¹

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5. ('24) AIR 1924 All 665 (665, 666) : 25 Cr. L. J. 798, *Mohan Lal v. Emperor*. ('74) 22 Suth W R Cr 14 (16) : 14 Beng L R 54, *Queen v. Mt. Itwarya*. ('21) AIR 1921 All 148 (148, 149) : 22 Cr. L. J. 496, *Damarcha v. Emperor*. (The accused was seriously prejudiced by such alteration of the charge.) [See also ('72) 17 Suth W R Cr 44 (44), *Queen v. Mooktaram*.]
6. ('01) 5 Cal W N 110 (113), *In the matter of Suriya Narain Singh*. ('81) 1881 Pun Re No. 22 Cr, p. 47 (49), *Empress v. Haibat*. (Not even the Sessions Judge can order committal of accused not present before the Magistrate at the original enquiry.)
7. ('13) 14 Cr.L.J. 605 (605) : 21 I. C. 477 (Lah), *Anokha Singh v. Emperor*. (Commitment without notice to the accused quashed.) ('01) 28 Cal 434 (437, 438) : 5 C W N 609, *Reily v. King-Emperor*.
8. ('93) 21 Cal 642 (663), *Empress v. Sagal Samba*. (The prejudice to the accused was aggravated as the Sessions Judge allowed such evidence in the sessions trial.) ('15) AIR 1915 All 411 (412) : 38 All 29 : 16 Cr. L. J. 801, *Rustom v. Emperor*. (Conviction was illegal as absconding of the accused was not proved.) ('70) 13 Suth W R Cr 21 (22) : 4 Beng L R App 69, *Queen v. Hari Doss*. ('27) AIR 1927 Pat 243 (246) : 6 Pat 329 : 28 Cr.L.J. 709, *Sasdat Mian v. Emperor*. ('30) AIR 1930 Cal 754 (755, 756) : 57 Cal 945 : 32 Cr.L.J. 182, *Nandoram Goenka v. Fulchand Jajpuria*.
- 8a. ('12) 13 Cr. L. J. 877 (883, 887, 888) : 17 I. C. 813 : 6 L B R 129 (F B), *Emperor v. Channing Arnold*.
9. ('98) 20 All 264 (265) : 1898 All W N 52, *Queen-Empress v. Ahmadi*. ('04) 1 Cri L Jour 357 (358) : 26 All 177, *Emperor v. Muhammad Hadi*. ('06) 4 Cri L Jour 452 (452, 453) : 1906 All W N 306, *Emperor v. Mathura*. ('32) AIR 1932 Mad 502 (502, 503) : 33 Cri L Jour 765, *Lakshminarayana v. Suryanarayana*.
9. ('40) AIR 1940 All 396 (397), *Emperor v. Mihi Lal*. (Commitment made on no legal evidence—High Court can act under S. 215.) ('68) 10 Suth W R Cr 56 (56), *In re Munger Bhooyan*. ('34) AIR 1934 Mad 691 (692) : 36 Cri L Jour 319, *K. Belli Gowder v. Emperor*. (Separate trials and convictions of two persons — Order for commitment of both to sessions for joint trial for conspiracy—Commitment on evidence taken in former trials.) ('29) AIR 1929 Sind 250 (251, 252) : 30 Cr. L. J. 1121, *Wahid Bux v. Emperor*.
10. ('04) 2 Weir 259 (260), *In re Chinnappan*.
11. ('10) 11 Cr. L. J. 54 (55) : 4 I. C. 812 (All), *Emperor v. Jagmohan*. (Where the offence consists in the giving of false information to the police and the case does not go further than a police enquiry, the offence falls within the first paragraph of S. 211 and not the second paragraph of S. 211—Committal is therefore bad in law.) ('97) 19 All 465 (465, 466) : 1897 All W N 115, *Queen-Empress v. Schade*. (Case under S. 9, Opium Act of 1878—Magistrate taking cognizance of the case could not commit it to Sessions Court.) [See ('69-70) 5 Mad HCR 277 (279), *Reg. v. Donoghue*. (Case under the old Code—In this case a European British subject was tried in the sessions division of the original side of High Court.)]

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Note 8

- (6) Where the commitment is made by a Magistrate who is disqualified under S. 556.¹² but not when he has merely taken part in the identification parade.¹³
- (7) Where the commitment is made by a Magistrate who has no jurisdiction to do so.¹⁴
- (8) Where the commitment is made on no legal ground. Thus, a commitment on the ground that it is done on the request of the accused or that the case had created a sensation or that the amount involved is large,¹⁵ or that the District Judge or District Magistrate has directed a committal,¹⁶ or that it is in accordance with a Government resolution.¹⁷
- (9) Where the commitment is made on the ground that the accused had been committed in some other connected case, without the Magistrate being of opinion that he cannot himself award adequate punishment.¹⁸ (On this point see also section 217 Note 4.)
- (10) Where two sets of accused are committed on the ground that one or the other of them is guilty of the offence.¹⁹
- (11) Where, in cases requiring previous sanction or complaint, the commitment is made on an enquiry held without such sanction or complaint,²⁰ or on an enquiry held *prior* to the grant of the

12. ('03-04) 2 Low Bur Rul 209 (211), *King-Emperor v. Maung Lat*. (Superintendent of Police who had personal interest in the investigation committed in his capacity as a District Magistrate.)

13. ('32) AIR 1932 Lah 196 (198) : 13 Lah 461 : 33 Cr. L. J. 188, *Bhola Ram v. Emperor*.

(127) AIR 1927 Oudh 369 (377, 378) : 2 Luck 631 : 29 Cr. L. J. 129, *Ram Prasad v. Emperor*.

See also S. 556, Note 7.

14. ('14) AIR 1914 Low Bur 9 (9) : 15 Cr. L. J. 270, *Emperor v. Nga Thaung Thu*. (Absence of territorial jurisdiction is a question of law but failure of justice must be involved.)

15. ('26) AIR 1926 Bom 251 (252, 253) : 27 Cr. L. J. 479, *Emperor v. Achaldas*.

(17) AIR 1917 Bom 33 (34) : 42 Bom 172 : 19 Cr. L. J. 342, *Emperor v. Bhimaji*.

16. ('82) 1882 All W N 105 (105), *Empress v. Muhammad Baksh*. (Sessions Court.)

(92) 15 Mad 39 (40) : 2 Weir 542, *Empress v. Munisami*. (District Magistrate.)

17. ('17) AIR 1917 Bom 33 (34) : 42 Bom 172 : 19 Cr. L. J. 342, *Emperor v. Bhimaji Venkaji*.

18. ('18) AIR 1918 Nag 141 (142) : 20 Cr. L. J. 97, *Emperor v. Hanuman*.

19. ('07) 17 Mad L Jour 46 (46) (N R C).

20. ('17) AIR 1917 Lah 338 (341) : 18 Cr. L. J. 518 (551) : 1917 Pun Re No. 19 Cr, *Emperor v. Gurditta*.

(69) 6 Bom H C R Cr 54 (55), *Reg. v. Muhammad Khan*. (Where false evidence was given before a Magistrate who himself committed the accused for trial by the Sessions Court, held that no formal sanction was necessary as it could be implied in such cases.—Moreover, the objection as to want of sanction was taken only in appeal in this case.)

(15) AIR 1915 All 110 (111) : 37 All 283 : 16 Cr. L. J. 310, *Zahir Singh v. Emperor*.

(17) AIR 1917 Bom 33 (33) : 42 Bom 172 : 19 Cr. L. J. 342, *Emperor v. Bhimaji*.

(72-76) 18 Suth W R Cr 32 (33), *In re Dinonath Burooa*.

(87) 10 Mad 154 (158) : 2 Weir 120, *In re Venkatachala Pillai*. (Sub-Registrars' sanction was found necessary for prosecuting for forgery of a will which was registered under S. 41 of the Registration Act.)

(01) 24 Mad 121 (123) : 2 Weir 170, *Queen-Empress v. Munda Shetti*.

(33) AIR 1933 Pat 273 (274, 275) : 12 Pat 353 : 34 Cr. L. J. 938, *Hari Charan Misra v. Emperor*.

[See however ('31) 1931 Mad W N 361 (363), *Bakthavatsalu Naidu v. Emperor*. (By the amended S. 227 (a) of the Local Boards Act which came into force in August 1930, the previous sanction of the Local Government is necessary for

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sanction,²¹ or on an inquiry based on an invalid sanction.²² As to the effect on commitment of absence of certificate or sanction under S. 188, see S. 188 Note 7.

- (12) Where the commitment is made without proper reasons in cases not triable exclusively by the Court of Session and in which the Magistrate can pass an adequate sentence.²³ But if the Magistrate considers that he cannot award an adequate sentence or on some other proper grounds considers that the case ought to be tried by the Sessions Court, committal is not illegal and will not be quashed.²⁴ See also S. 347 Note 4.

the Court to take cognizance of any offence alleged to have been committed by the President or Member of a Local Board—Where, however, the Magistrate has taken up the case prior to the amendment when no such sanction was necessary, the order of commitment made by him is not illegal merely because after the initiation of the proceedings and prior to the order of commitment, the amendment had come into force.]]

See also S. 532 Note 2.

21. ('82) 1882 Pun Re No. 28 Cr, p. 35 (36), *Empress v. Mulla Abdul Rahim*.
22. ('81) 6 Cal 584 (585) : 8 C L R 265, *Empress v. Shibo Behara*.
('93) 16 Mad 468 (473, 474) : 3 M L J 227 : 2 Weir 220, *Queen-Empress v. Samuvier*.
See also S. 439 Note 26.
23. ('40) AIR 1940 Oudh 15 (15, 16) : 40 Cr. L. J. 903, *Sheomangal Pande v. Emperor*.
('38) AIR 1938 Sind 79 (79) : 39 Cri L Jour 507, *Emperor v. Waroo*.
('37) AIR 1937 Sind 32 (32, 33) : 38 Cri L Jour 379 : 31 S. L. R. 403, *Emperor v. Ghousbaksh*.
('18) AIR 1918 Sind 60 (61) : 11 S. L. R. 79 : 19 Cr. L. J. 319, *Emperor v. Ismail*.
(Case of simple hurt which Magistrate was competent to try and punish adequately — Committal amounts to error in law and hence will be quashed.)
('06) 3 Cri L Jour 94 (95, 96) : 3 A L J 14 : 1906 A W N 28, *Emperor v. Dharam*.
(1900-02) 1 Low Bur Rul 158 (159, 160), *Crown v. Major Hodgson*.
('13) 14 Cr. L. J. 657 (658) : 21 I. C. 897 (Bom), *Emperor v. Asha Bathi*. (Here the connection with another sessions case was found to be remote as not to embarrass the accused if separately tried—So commitment quashed.)
('72) 17 Suth W R Cr 14 (14), *In re Anunto Koyburt*.
('02) 4 Bom L R 85 (86), *King-Emperor v. Pema Ranchod*.
('29) AIR 1929 Cal 756 (761, 762) : 57 Cal 1042 : 31 Cri L Jour 506 (F B), *Girish Chandra v. Emperor*.
('29) AIR 1929 Cal 777 (778) : 56 Cal 785 : 31 Cri L Jour 184, *Emperor v. Girish Chandra Kundu*.
('32) AIR 1932 Lah 263 (264) : 33 Cr. L. J. 680, *Kesar v. Emperor*. (Unnecessary committal justifies quashing of commitment order.)
('34) AIR 1934 Lah 95 (95) : 35 Cr. L. J. 1459, *Emperor v. Mir Alam*. (Accused charged under S. 148, Penal Code, committed to Sessions for convenience—Ground ceasing to exist, commitment is bad in law.)
('97) 24 Cal 429 (431, 432) : 1 C W N 414, *Queen-Empress v. Kayemullah Mandal*.
('10) 11 Cri L Jour 54 (54, 55) : 4 Ind Cas 812 (All), *Emperor v. Jagmohan*.
('30) AIR 1930 Sind 145 (146) : 24 Sind L R 157 : 31 Cri L Jour 596, *Emperor v. Allahadad*. (Even if the death of a person is involved in the offence.)
('14) AIR 1914 Sind 94 (95) : 8 S. L. R. 23 : 15 Cr. L. J. 664, *Diwani Chand v. Emperor*.
('24) AIR 1924 Sind 61 (63, 64) : 17 S. L. R. 188 : 26 Cr. L. J. 148, *Utlilai v. Emperor*.
('17) AIR 1917 Lah 251 (252) : 18 Cri L Jour 524 (526) : 1917 Pun Re No. 13 Cr., *Emperor v. Ali*. (That opposite party has been committed to the sessions in respect of the same transaction is a good reason.)
[See ('36) AIR 1936 Pesh 139 (139) : 37 Cr. L. J. 852, *Emperor v. Madan Lal*. (Commitment of a case which the committing Magistrate could try himself under the Code (without the assistance of powers under S. 30) is an error of law and can be quashed.)]
24. ('18) AIR 1918 Nag 141 (142) : 20 Cri L Jour 97, *Emperor v. Hanuman*.
('20) AIR 1920 Sind 55 (56, 57) : 14 S. L. R. 85 : 21 Cr. L. J. 791, *Ghani v. Emperor*.
('13) 14 Cri L Jour 304 (304) : 19 Ind Cas 960 (All), *Emperor v. Baldeo*.
('86) 1886 All W N 256 (256), *Empress v. Behari*.
('19) AIR 1919 Mad 907 (908, 909) : 42 Mad 83 : 19 Cri L Jour 997, *Crown Prosecutor v. Bhagavathi*.

Section 215
Note 9

9. Grounds held insufficient for quashing commitment. —

The following have been held not to be grounds for quashing a commitment —

- (1) Where the Magistrate finds subsequent to the order of committal that he should not have committed the accused.¹
- (2) Where a joint commitment is made of several accused when with reference to S. 233, they should have been committed separately. In such cases the Sessions Court can try the accused separately or amend the charge.²
- (3) Where the committing Magistrate acts on the evidence recorded by the Magistrate from whose file the case has been transferred to his own Court (S. 350 applies to such a case³).
- (4) Where the commitment is made merely on wrong exercise of discretion.⁴
- (5) Where the only evidence against the accused is the uncorroborated testimony of an accomplice. The reason is that acting upon such evidence in proper cases is not illegal.⁵ Where the commitment is made to the same Sessions Judge who gave the direction for prosecution of the accused for the offence of giving false evidence before him, when there is no Assistant or Additional Sessions Judge in the District.⁶
- (6) Where the first class Magistrate who had discharged the accused under S. 209, committed him as per orders of the District Magistrate passed under S. 436. The reason is that the order of such Magistrate was not without jurisdiction.⁷

(83) 1883 All W N 257 (257): 6 All 129, *Empress v. Zaharia*. (Sessions trial on a charge of grievous hurt—Death of person hurt during trial—Commitment quashed—Fresh inquiry for culpable homicide ordered.)

(83) 1883 All W N 39 (39): 5 All 293, *Empress v. Sheodin*. (Commitment quashed on a misjoinder of charges.)

(97) 1897 Rat 925 (926), *Queen-Empress v. Daulata Dhondi*.

(85) 9 Bom 288 (300) (FB), *Queen-Empress v. Mortan*.

(73) 1873 Pun Re No. 17 Cr, p. 19 (20), *Crown v. Piran Ditta*.

(32) AIR 1932 Sind 157 (159): 26 SLR 407: 34 Cr. L. J. 14, *Mani Ram v. Emperor*.

(11) 12 Cr. L. J. 66 (66, 67): 9 I. C. 361 (Cal), *Lal Behari Singh v. Emperor*.

(35) AIR 1935 Oudh 9 (9): 36 Cr. L. J. 175, *Emperor v. Chhedanmi*. (Commitment not quashed on technical grounds as Sessions Judge had ample opportunity to remedy defects and quashing would have meant unnecessary delay and expense to accused.)

Note 9

1. (85) 1885 All W N 53 (53), *Empress v. Madari*.

2. (1900) 1900 All W N 206 (206), *Queen-Empress v. Salamatullah Khan*.

(05) 2 Cri L Jour 432 (433): 7 Bom L R 457, *Emperor v. Sita*.

(03) 26 Mad 592 (594): 2 Weir 262, *In re Gorindu*.

(17) AIR 1917 Mad 612 (612): 17 Cr. L. J. 369 (369), *In re Krishnamurthi Ayyar*.

3. (14) AIR 1914 All 45 (45, 46): 36 All 315: 15 Cr. L. J. 354, *Emperor v. Nanhua*.

4. (18) AIR 1918 All 296 (296): 19 Cri L Jour 224, *Emperor v. Goda Ram*.

(29) AIR 1929 Cal 593 (595): 57 Cal 44: 30 Cr. L. J. 1107, *G. V. Raman v. Emperor*.

(32) AIR 1932 Bom 63 (64): 56 Bom 61: 33 Cr. L. J. 262, *Hari Moreshwar v. Emperor*.

(76) 1876 Rat 110 (110), *Sholapur Sessions Judge's Letter No. 838*.

5. (27) AIR 1927 All 90 (91): 49 All 181: 27 Cr. L. J. 1369, *Balchand v. Emperor*.

6. (76) 1 Bom 311 (313), *Reg. v. Gaji*. (In such cases it would be better for the Magistrate in district where there is no Assistant or Joint Sessions Judges to try the case himself and if the sentence which the Magistrate can pass is insufficient, the Sessions Judge should refer the case for enhancement to the High Court.)

7. (85) 9 Bom 100 (104), *Queen-Empress v. Pirya Gopal*.

Section 215
Note 9

- (7) Where a civil suit is pending in respect of a document in connexion with which the accused had been committed by the Civil Judge under S. 478, for using a forged document,⁸ In such cases it would, however, be desirable to postpone further criminal proceedings till the decision of the civil suit.⁹
- (8) Irregularities of procedure before the Magistrate who transfers the case to a superior Magistrate under S. 319 do not vitiate the committal by the latter Magistrate.¹⁰
- (9) Where the commitment for trial in one and the same case of some accused is for robbery and of some for receiving property stolen in that robbery.¹¹
- (10) Where the commitment is made by a Civil Court (as opposed to Military Court) of a British born European soldier, on proceedings taken at the request and consent of military authorities.¹²
- (11) Commitment in two different cases, for offences under S. 193, Penal Code in one, and under Ss. 471 and 109 of the same Code in another, in respect of the same act, though it is not desirable that there should be two trials in respect of the same act.¹³
- (12) Non-observance of the provisions of S. 360, before the committing Magistrate and partly before the Court of Session.¹⁴
- (13) After the commitment to the Sessions, the fact that graver charges triable by the Court of Session have been withdrawn is no ground for quashing the commitment in respect of the minor charges triable by the Magistrate and thereby take away the right of trial by jury.¹⁵
- (14) Omission to issue notice under S. 204, where the accused is present.¹⁶
- (15) Where the case is triable by a Court of Session, the mere fact that the Magistrate did not give reasons for commitment when there was a specially empowered Magistrate who could try the case.¹⁷
- (16) Where an approver whose pardon has been withdrawn has been committed, the mere fact that he was examined as a witness only

8. ('94) 18 Bom 581 (584), *In re Devji Bhawani*.

9. ('94) 2 Weir 260 (261), *Sankarayya v. Karala Subba Aiya*.

10. ('87) 1887 Rat 350 (353), *Queen-Empress v. Bapuda*.

11. ('97) 1897 Rat 915 (915), *Queen-Empress v. Raghu*.

12. ('74) 22 Suth W R Cr 20 (24) : 13 Beng L R 474, *Queen v. William Jackson*.

13. ('25) AIR 1925 Oudh 610 (610, 611) : 26 Cr.L.J. 1567, *Emperor v. Gajadhar*.

14. ('25) AIR 1925 Cal 928 (928, 929) : 26 Cr. L. J. 1276, *Abdur Rahim v. Emperor*. (Recall of witnesses, in whose respect provisions of S. 360 were not complied with was ordered.)

15. ('27) AIR 1927 Cal 199 (200) : 28 Cr. L. J. 141, *Emperor v. Monmotha Nath*.

16. ('19) AIR 1919 Lah 389(390) : 20 Cr.L.J.3:1919 P R No. 5 Cr, *Emperor v. Mt. Buri*.

17. ('34) AIR 1934 Lah 326 (327), *Indoo v. Emperor*.

(18) AIR 1918 Nag 141 (142) : 20 Cr. L. J. 97, *Emperor v. Hanuman*. (The committing Magistrate himself was specially empowered in this case.)

(14) AIR 1914 Bom 237 (238) : 14 Cri L Jour 609 (610) : 38 Bom 114, *Emperor v. Nanji Samal*. (Case exclusively triable by Court of Session.)

[See also ('36) AIR 1936 Pesh 139 (140) : 37 Cri L Jour 852, *Emperor v. Madan Lal*. (Commitment of case exclusively triable by Sessions Court is legal—Commitment cannot be quashed merely because committing Magistrate could give sufficient punishment under S. 30.)

ection 215
Note 9

in the preliminary enquiry and not in the trial before the Sessions Judge or the fact that the pardon had been withdrawn by the District Magistrate and not by the Sessions Judge is not a ground for quashing the commitment.¹⁸

- (17) The fact that some of the co-accused are not yet arrested.¹⁹
- (18) The fact that the evidence is doubtful²⁰ or that it is insufficient²¹ or that the evidence is not direct but circumstantial.²² The test to be applied, in such cases to decide whether a committal ought or ought not to be made on the facts, is this—assuming that the whole evidence telling against the accused is true, is there a case which a Judge at a trial could leave to a jury? If the evidence is such that the Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to be made. If there was any evidence which called for an answer—however great the preponderance in favour of the prisoner might be—then the committal was proper.²³
- (19) Where the Magistrate discharged the accused but subsequently becoming aware of the presence of another witness, cancelled his order of discharge, took further evidence and committed the accused. It was held there was no *prejudice* to the accused.²⁴
- (20) Records disclosing only an offence triable by the Magistrate himself²⁵ or an offence other than the one charged.²⁶
- (21) The order for further enquiry under S. 497, which ended in the commitment being made without notice to the accused.²⁷
- (22) Not examining the defence witnesses under S. 208, for reasons recorded.²⁸

18. ('01) 24 Mad 321 (323, 325) : 2 Weir 396, *Queen-Empress v. Ramasami*.

19. ('10) 11 Cri L Jour 333 (333) : 5 I. C. 933 (Mad), *In re Ramasami Servai*.

20. ('14) AIR 1914 Low Bur 9 (9) : 15 Cr. L. J. 270, *Emperor v. Nga Taung Thu*.

(28) AIR 1928 Bom 220 (221) : 29 Cr. L. J. 987, *Burjorji Nowroji v. Emperor*.

21. ('40) AIR 1940 All 396 (397), *Emperor v. Mihi Lal*.

(36) AIR 1936 Sind 3 (7) : 37 Cri L Jour 314 : 29 S L R 281, *Francis Xavier Fernandes v. Emperor*. (A plea that there is no medical evidence on the record to prove that the accused committed the offence with which he is charged, does not raise any point of law and is no ground for quashing commitment.)

(1864) 1 Suth W R Cr 8 (8), *Queen v. Gokul Bandari*.

(22) AIR 1922 Oudh 109 (109) : 23 Cri L Jour 79, *Mahabir v. Emperor*.

[See also ('18) AIR 1918 Upp Bur 11 (12) : 3 U B R 29 : 19 Cri L Jour 102, *Nga Hmyin v. Emperor*.]

22. (1900) 4 Cal W N cxvi (cxvi), *Empress v. Ananda Kishore Chowdhuri*.

23. ('05) 2 Cri L Jour 534 (548) : 9 C W N 829, *Seobux Ram v. Emperor*.

(24) AIR 1924 Rang 165 (167) : 1 Rang 526 : 25 Cr. L. J. 261, *Md. Moidin v. Emperor*.

24. ('74) 2 Weir 258 (259) : 7 Mad H C R App xl.

25. ('10) 11 Cri L Jour 333 (333) : 5 I. C. 932 (Mad), *In re Sessions Judge of Trichinopoly*.

(82) 1882 Pun Re No. 22 Cr, p. 29, *Empress v. Mallu Shah*.

26. ('71) 16 Suth W R Cr 63 (63), *Queen v. Firman Ali*. (Commitment for slavery under S. 370, Penal Code—Sessions Judge may alter the charge if necessary.)

27. ('01) 3 Bom L R 703 (703, 704), *King-Emperor v. Pandurang*.

28. ('08) 8 Cr. L. J. 221 (223) : 36 Cal 48 : 1 I. C. 469, *Phanindra Nath v. Emperor*.

(12) 13 Cri L Jour 778 (780) : 36 Mad 321 : 17 I. C. 410, *Sessions Judge of Coimbatore v. Kangaya*. (Long delay in producing defence witnesses.)

(1865) 2 Suth W R Cr 50 (50), *Queen v. Hurnath Roy*.

(16) AIR 1916 Cal 106 (106) : 16 Cri L Jour 415 (415) : 42 Cal 608, *Emperor v. Surath*. (Application by accused for summoning further witnesses on day of commitment was refused.)

- (23) Commitment for an offence under S. 211 of the Penal Code by reason of the Magistrate proceeding on the report of the police that the complaint was false, without making a judicial enquiry into the complaint.²⁰
- (24) Vagueness of sanction to prosecute.³⁰
- (25) Absence of an order for retrial by the Sessions Judge, who set aside the conviction in appeal, is not a ground for quashing the commitment by another Magistrate on fresh proceedings.³¹
- (26) The omission by the Magistrate to weigh the evidence and express any opinion whether the guilt had been proved.³²
- (27) A commitment by the Munsif under S. 478, for offences under ss. 467 and 471, Penal Code, cannot be quashed because the document in question has not been given in evidence.³³
- (28) The commitment of an European British subject to the Court of Session by the Extra Assistant Commissioner of Baluchistan is not without jurisdiction and cannot be quashed.³⁴
- See also the undermentioned cases.³⁵

Section 215
Notes 9-10

As to whether a commitment can be quashed on ground of want of territorial jurisdiction, see S. 531, Note 2.

10. Time for quashing commitment. — The High Court can, according to the view taken by the Patna High Court, quash the commitment *at any stage* of the proceedings.¹ The Calcutta High Court had in an earlier case² taken a similar view but has, in recent cases,³ expressed the view that a commitment cannot be quashed after

(14) 15 Cr. L. J. 704 (704) : 26 I. C. 152 (Mad), *In re Sessions Judge, Madura*.

(98) 1898 Rat 975 (975, 976), *In re Clive Durant*.

29. (81) 6 Cal 582 (583) : 8 C L R 255, *Empress v. Salik Roy*.

30. (18) AIR 1918 Bom 117 (118) : 43 Bom 147 : 20 Cri L Jour 71, *Emperor v. Madhav Laxman*.

31. (02) 29 Cal 412 (413, 414), *Abdul Ghani v. Emperor*.

32. (33) AIR 1933 Lah 39 (39) : 34 Cr. L. J. 39, *Mahommed Khan v. Emperor*.

33. (95) 22 Cal 1004 (1005, 1006), *Akhil Chandra v. Queen-Empress*.

34. (07) 6 Cr. L. J. 108 (111) : 1907 Pun Re No. 5 Cr, *Emperor v. Arther Mercer*.

35. (38) AIR 1938 Mad 675 (676) : 39 Cr. L. J. 894, *In re Ramaswamy Goundan*. (For committal of one accused prosecution not relying only on confession of other accused but also on other evidence — Commitment cannot be said to be liable to be quashed on question of law.)

(14) 15 Cr. L. J. 704 (704) : 26 I. C. 152 (Mad), *In re Sessions Judge Madura*.

(09) 9 Cr. L. J. 146 (146, 147) : 32 Mad 218 : 1 I. C. 54, *Palaniandy Gounden v. Emperor*.

(30) AIR 1930 Sind 145 (146) : 24 S L R 157 : 31 Cri L Jour 596, *Emperor v. Allahabad*. (If a Magistrate without any adequate reason commits a case to the sessions in which he could adequately punish the accused himself, it would be a point of law and the High Court can quash the commitment.)

(13) 14 Cr. L. J. 657 (658) : 21 Ind Cas 897 (Bom), *Emperor v. Asha Bhatki*. (Do.)

(28) AIR 1928 Bom 22 (23) : 29 Cri L Jour 225, *Ukha Mahadu v. Emperor*.

(01) 28 Cal 211 (215 to 217) : 5 C W N 169, *Queen-Empress v. Dolegobind Dass*.

(98) 20 All 529 (531, 532), *Queen-Empress v. Brij Narain*.

(1900-02) 1 L B R 88 (88, 89), *Crown v. Nga Sawe Yauk*. (Magistrate quashed his own commitment order on ground that evidence to support a charge under S. 413, Penal Code was insufficient.)

Note 10

1. (33) AIR 1933 Pat 273 (275) : 12 Pat 353 : 34 Cr. L. J. 938, *Hari Charan v. Emperor*.

2. (81) 6 Cal 584 (585) : 8 Cal L R 265, *Empress v. Shibo Behara*.

3. (83) 12 Cal L R 120 (121), *Empress v. Sagambur*.

(26) AIR 1926 Cal 410 (411) : 26 Cr. L. J. 1560, *Kasem Molla v. Emperor*.

See also S. 512 Note 12.

Section 215
Notes 10-11

the accused has been put on his trial and pleads to the charge as it is then too late to object to the commitment. This latter view is shared also by the High Courts of Madras⁴ and Lahore⁵ and the Court of the Judicial Commissioner of Sind.⁶ Where the accused is put on his trial and pleads to the charge, the Judge should proceed according to law and dispose of the case under chapter XXIII of the Code or the Public Prosecutor may, with the consent of the Court, withdraw the prosecution under S. 491.⁷

11. Effect of quashing commitment. — The primary effect of the order quashing the commitment is to supersede any action taken by the Magistrate under S. 210, and his proceedings subsequent thereto. In such a case it is necessary for the Magistrate to go back to the point at which he took cognizance of the complaint. The order does not amount to discharge of the accused and no fresh complaint is necessary.¹ The accused may be charged again with the offence.²

Section 216

216.* When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed :

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly :

Provided, also, that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that

Summons to witnesses
for defence when accused
is committed.

Refusal to summon
unnecessary witness
unless deposit made.

* 1882 : S. 216; 1872 : Ss. 358, 359; 1861 : S. 228.

4. ('02) 2 Weir 262 (262), *Sessions Judge of Trichinopoly v. Arokia Padayachi*.
5. ('25) AIR 1925 Lah 557 (557) : 27 Cr. L. J. 134, *Nazir Singh v. Emperor*.
6. ('08) 9 Cr. L. J. 250 (250, 251) : 1 S. L. R. 6, *Crown v. Haji*.
7. ('02) 2 Weir 262 (262), *Sessions Judge of Trichinopoly v. Arokia Padayachi*.

Note 11

1. ('37) AIR 1937 Sind 32 (33) : 38 Cri L Jour 379 : 31 S. L. R. 403, *Emperor v. Ghousbakish*. (Where the Magistrate who had originally tried the case, had to proceed so far as to express his opinion as to the guilt of the accused, the case should not be sent for re-trial to the same Magistrate but to some other Magistrate.)
- ('33) AIR 1933 Bom 494 (495) : 35 Cr. L. J. 479, *Emperor v. Sher Alam Khan*.
- ('29) AIR 1929 Cal 756 (761) : 57 Cal 1042:31 Cr.L.J. 506 (FB), *Giris v. Emperor*.
2. ('15) AIR 1915 Mad 24 (25):15 Cr.L.J. 665, *In re Sessions Judge of Coimbatore*.

the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

Section 216.
Notes 1-2.

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. Refusal to summon unnecessary witness.
4. Expenses of expert witnesses.

Other Topics (miscellaneous)

Duty of Magistrate is to summon, save in excepted cases. See Note 2.
Reasons for refusal should be recorded even if evidence is not material. See Note 3.
Sessions Court to enforce attendance. See Note 2.
Witnesses not included in the list. See Note 2. See also S. 291.

1. Legislative changes.

Differences between Codes of 1861 and 1872 — In S. 228 of the Code of 1861, it was provided that if the Magistrate was not satisfied that there were reasonable grounds for believing that a particular witness was material, he was not bound to summon the witness “*unless such a sum shall be deposited with the Magistrate as he shall consider necessary to defray the expense of obtaining the attendance of the witness.*” Hence, even if the Magistrate was not satisfied that a witness was a material witness, he was bound to summon him if the accused was prepared to pay his expenses and deposited the expenses with the Magistrate.¹ This position was altered in the Code of 1872 which left it to the discretion of the Magistrate to summon a witness and empowered him to refuse to summon a witness even though the accused might be willing and prepared to bear the expenses of the witnesses.

Changes made in 1882 — The provision as to leaving it to the Clerk of the Crown to summon the witnesses in cases of commitment to the High Court was new.

Changes made in 1898 — The words “and all other proper expenses” were added at the end of the section.

2. Scope and applicability of the section.—It is the duty of the committing Magistrate to see that all the evidence available, whether for the prosecution or for the defence, is before the Sessions Court.¹ The procedure provided in this section is to *summon* the witnesses named by the accused to give evidence at the trial in the Sessions Court. This applies to the witnesses named by the accused who have *not* been examined by the Magistrate. The next section applies to the complainant and the witnesses for the prosecution and such of the

Section 216 — Note 1

1. ('68) 4 Mad H C R 81 (83), *In re Subharaya Mudali*.

Note 2

1. ('20) AIR 1920 Pat 165 (166) : 21 Cr. L. J. 718, *Ajodhya Prasad v. Emperor*.

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Notes 2-3

witnesses for the accused *as have appeared* and given evidence before the committing Magistrate. In their case, that section provides that the Magistrate should require them to *execute bonds* for their appearance and for giving evidence in the Sessions Court at the trial.

Under this section, the Magistrate is *bound* to summon the witnesses who have been named in the list given by the accused under S. 211 and who have not appeared before him,² except in the cases mentioned in the two provisos. But this duty arises only in the case of persons named by the accused in the list supplied by him to the Magistrate under S. 211.³ Hence, where on being asked to give such list the accused declines to do so, the Magistrate is not bound to summon any witnesses that he may desire to be called subsequent to the commitment.⁴

Under S. 291, the Sessions Judge is *bound* to enforce the attendance of the witnesses summoned under this section, who fail to appear at the trial.⁵

3. Refusal to summon unnecessary witness.—The Magistrate has no power to refuse to summon a witness on the ground that his evidence will not be material,¹ unless he considers that the witness is included in the list merely for purposes of vexation or delay or of defeating the ends of justice. But where the Magistrate considers that the witness is included in the list for any such purpose, he can require the accused to show how the evidence of the witness will be material. Where he is not satisfied that the evidence of the witness will be material, he may refuse to summon him recording his reasons for doing so.² As to the liability of the accused to pay process fees and other fees for summoning witnesses, see Notes to S. 544.

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2. ('71) 15 Suth W R Cr 34 (35) : 6 Beng L R App 88, *Queen v. Ishan Dutt*.
(1865) 2 Suth W R Cr 6 (6), *Queen v. Bhoobun Isher*.
(70) 13 Suth W R Cr 1 (11) : 4 Beng L R App 1, *In the matter of Mahesh Chunder*.
(75) 23 Suth W R Cr 56 (56, 57), *Queen v. Prosunno Coomar*.
(35) AIR 1935 Sind 69 (71) : 29 S. L. R. 64 : 36 Cr. L. J. 889, *Kundanlal v. Emperor*. (In this particular case it was held that it would have been proper to summon witnesses on behalf of other accused though a list was not made.)
See also S. 211 Note 3, S. 257 Note 3 and S. 291 Note 3.
3. ('71) 16 Suth W R Cr 28 (29, 30), *Queen v. Bholanath Mookerjee*.
4. ('97) 19 All 502 (503) : 1897 A W N 134, *Queen-Empress v. Shakir Ali*.
See also S. 211 Note 6, S. 291 Note 3 and S. 540 Note 7.
5. ('20) AIR 1920 Cal 531 (531, 532) : 47 Cal 758 : 21 Cr. L. J. 842, *Foijuddi v. Emperor*.
(31) AIR 1931 Cal 6 (7) : 58 Cal 412 : 32 Cr. L. J. 316, *Ran Mamud v. Emperor*.
(Sessions Judge cannot refuse to secure attendance of absent witnesses on the ground that it will cause inconvenience.)
[See also ('72) 18 Suth W R Cr 20 (21), *Queen v. Rajnarain Mytec*.
(30) AIR 1930 Cal 362 (363) : 31 Cr. L. J. 1077, *Muktal Hossein v. Emperor*.
(96) 19 Mad 375 (382) : 6 M L J 195, *Queen-Empress v. Virasawmi*.]

Note 3

1. ('86) 8 All 668 (671) : 1886 A W N 260, *In the matter of Rajah of Kantil*.
(82) 2 Weir 263 (264), *In re Marinagi Reddi*.
(1865) 3 Suth W R Cr. L. 16, *In re Ram Kishen*.
(91) 15 Bom 491 (498, 499), *Queen-Empress v. Fakirapa*.
[See also ('34) AIR 1934 All 735 (737) : 36 Cr. L. J. 33, *Raghubar Dayal v. Emperor*.
(Magistrate has no right to arbitrarily limit number of defence witnesses.)]
2. ('86) 8 All 668 (671) : 1886 A W N 260, *In the matter of Rajah of Kantil*.

4. Expenses of expert witnesses. — See the undermentioned case.¹

Section 216
Note 4

217.* (1) Complainants and witnesses for the

Section 217

Bond of complainants
and witnesses.

prosecution and defence, whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.

(2) If any complainant or witness refuses to

Detention in custody in
case of refusal to attend
or to execute bond.

attend before the Court of Session or High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.

1. Scope of the section.—This section empowers the committing Magistrate to compel the complainant, the witnesses for the prosecution and the witnesses for the defence, who have appeared in his Court to give evidence,¹ to execute bond for their appearance in the Sessions Court at the trial and for giving evidence there. If any of these persons refuses to execute the bond, the Magistrate has the power to detain him in custody till he executes the bond or till he can be sent to the Sessions Court for giving evidence there. But, where a witness has not refused to attend or to execute the bond required of him, the Magistrate has no power to demand bail from him instead of a recognizance merely because he has been declared hostile.² Though the section does not expressly empower the Magistrate to *summon*

* 1882 : S. 217; 1872 : S. 360; 1861 : S. 232.

Note 4

1. ('32) AIR 1932 Lah 481 (482, 483) : 33 Cr. L. J. 761, *Ram Narain v. Emperor*. (In warrant cases ordinarily it is the Government that must pay expenses both for the Crown and the defence. It is no doubt open to a Magistrate to direct that a particular witness named in order to delay the case should not be summoned. It is the duty of the Magistrate to fix fees of expert witnesses and he cannot leave it to the parties to negotiate with the witnesses and fix their fees. If an expert witness on payment of a reasonable fee fixed by the Magistrate declines to give evidence there is ample power in the Magistrate to compel him to do so.)

Section 217 — Note 1

1. ('36) AIR 1936 Lah 533 (536, 537) : 17 Lah 176 : 37 Cri L Jour 742 (FB), *Mt. Niamat v. Emperor*.
2. ('94) 21 Cal 642 (663, 664), *Queen-Empress v. Sagal Samba Sajao*.
See also S. 91 Note 2.

Section 217
Note 1

a witness, it has been held in the undermentioned case³ that the Magistrate has the power under this section to summon a witness to give evidence before the Sessions Court. The prosecution is not bound to examine in the Sessions Court all the witnesses for whose attendance a bond is taken under this section; it is open to the prosecution to decline to examine any witness whom it has reason to believe to be false or unnecessary.⁴ But all the witnesses executing bonds under this section must be in attendance at the trial in the Sessions Court till they are discharged by the Court.⁵ Under this section the Magistrate is not bound to take bonds from all the witnesses who have been examined in his Court. Only such of the witnesses as are 'necessary,' have to execute the bonds under this section.⁶

Section 218

218.* (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the *Provincial Government*^a in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge; and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court.

Commitment when to be notified.

Charge, etc., to be forwarded to High Court or Court of Session.

(2) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

English translation to be forwarded to High Court.

a. Substituted by A. O. for "Local Government."

* 1882 : S. 218; 1872 : S. 198, paras. 2, 3 & 4 and S. 202, para. 1; 1861 : Ss. 229, 231.

3. ('20) AIR 1920 Pat 165 (166) : 21 Cri L Jour 718, *Ajodhya Prasad v. Emperor*.

4. ('30) AIR 1930 Lah 82 (84) : 31 Cri L Jour 176, *Amar Singh v. Emperor*.

('92) 14 All 521 (523) : 1892 A W N 110, *Queen-Empress v. Stanton*.

('94) 16 All 84 (86, 87) : 1894 A W N 7 (FB), *Queen-Empress v. Durga*.

5. ('94) 16 All 84 (87) : 1894 A W N 7 (FB), *Queen-Empress v. Durga*.

[See also ('22) AIR 1922 Lah 1 (11, 12) : 3 Lah 144 : 23 Cr. L. J. 513, *Mahant Narain Das v. Emperor*.]

6. ('83) 1883 All W N 37 (37), *Empress v. Naik Lal*.

219.* (1) The committing Magistrate or, in the absence of such Magistrate, any other Magistrate empowered by or under section 206 may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

Section 219

Power to summon supplementary witnesses.

(2) Such examination shall, if possible, be taken in the presence of the accused, and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall be given to the accused free of cost.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Free copy of evidence to be given to accused.
4. Examination, if to be in presence of accused.

1. Legislative changes.

Changes introduced by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923 —

- (1) For the word "Magistrate" in sub-s.(1) the words "The committing Magistrate . . . S. 206" were substituted.
- (2) For the words "shall, if the accused so require, be given to him free of cost" in sub-s.(2) the words "shall be given to the accused free of cost" were substituted.

2. Scope of the section.—This section empowers the Magistrate *even after a case has been committed*, to call and examine supplementary witnesses and forward their evidence to the Sessions Court.¹ But the power cannot be exercised by any and every Magistrate; it is confined to the committing Magistrate or any other Magistrate empowered to commit cases to the Sessions. Moreover, the power exists only till the commencement of the trial in the Sessions Court. Where the trial has actually commenced, the Magistrate has no power to add to the record by examining additional witnesses under this section even under the orders of the Sessions Court.² But before the commencement of the trial, this power can be exercised at any time. The Magistrate

* 1882 : S. 219 ; 1872 : S. 357, para. 2; 1861 : Nil.

Section 219 — Note 2

1. ('86) AIR 1936 Lah 533 (536) : 17 Lah 176 : 37 Cr. L. J. 742 (FB), *Mt. Niamat v. Emperor*.
('85) AIR 1935 All 267 (267) : 36 Cri L Jour 446, *Motilal v. Emperor*. (Magistrate can require complainant as witness under S. 219.)
- ('22) AIR 1922 Oudh 109 (109) : 23 Cri L Jour 79, *Mahabir v. Emperor*.
[See ('94) 21 Cal 97 (103), *Queen-Empress v. Sukee Kaur*.]
2. ('88) 1888 Pun Re No. 29 Cr, p. 59 (61, 62), *Hasan v. Empress*.

Section 219
Notes 2-4

can exercise the power on his own accord or on being directed to do so by the Sessions Judge who, on examining the record finds gaps in the evidence which he deems necessary to be filled up.³ Even in cases in which the accused has confessed his guilt, the Magistrate is justified in examining supplementary witnesses so as to have on the record all the material evidence.⁴ The additional evidence can be taken either at the request of the prosecution or of the defence; but the Magistrate should be fair to both the sides and if he examines additional witnesses on one side he should allow the other side to let in rebutting evidence if it desires to do so.⁵ Under this section the Magistrate can only supplement the *evidence* already taken. He has no power to add to or alter the charge after the order of commitment. Similarly, the power to amend or add to the charge under S. 226, applies only to cases where the charge is imperfect as at the date of commitment. That section cannot justify the charge being amended or added to on the basis of supplementary evidence taken under this section.⁶

3. Free copy of evidence to be given to accused. — The section provides that when the Magistrate is not a Presidency Magistrate a copy of the evidence of witnesses examined under this section should be given to the accused free of cost. Such copies are also exempt from court-fees under S. 35, Court-fees Act, 1870.¹

4. Examination, if to be in presence of accused. — The words "if possible" in sub-s.(2) indicate that the examination of the supplementary witnesses after commitment may be taken when the accused is not present.¹

Section 220

220.* Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant, to custody.

1. Discharge from custody on acquittal. — See Section 306, Note 5.

* 1882 : S. 220 : Same ; 1872 and 1861 : Nil.

3. ('92) 1892 Pun Re No. 4 Cr, p. 9 (10), *Awal Khan v. Empress*.

4. ('96) 1896 Rat 842 (842), *Queen-Empress v. Mahadu*. (Because confessions are often retracted.)

5. ('33) AIR 1933 Pat 577 (578) : 35 Cr. L. J. 85, *Brijnandan Prasad v. Emperor*.

6. ('33) AIR 1933 Mad 247 (250) : 34 Cr. L. J. 278, *In re Bhogi Reddi Ankamma*. See also S. 226, Note 2.

Note 3

1. ('34) AIR 1934 Bom 487 (487) : 36 Cr. L. J. 344, *Emperor v. Dhondiba Santoo*.

Note 4

1. ('36) AIR 1936 Lah 533 (536) : 17 Lah 176 : 37 Cr. L. J. 742 (FB), *Mt. Niamat v. Emperor*.

OF THE CHARGE

Form of Charges.

221.* (1) Every charge under this Code shall Section 221

Charge to state offence. state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

Specific name of offence sufficient description.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

How stated where offence has no specific name.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

What implied in charge.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

Language of charge.

(7) If the accused having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence,

Previous conviction when to be set out.

* Code of 1898, original S. 221.

Sub-sections (1) to (6) and the illustrations were the same. Sub-s. (7) ran as follows:

If the accused has been previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If such statement is omitted, the Court may add it at any time before sentence is passed.

1882 : S. 221 — Same as original section of the Code of 1898.
1872 : S. 439; 1861 : Ss. 234, 235.

Section 221 the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it at any time before sentence is passed.

Illustrations

(a) *A* is charged with the murder of *B*. This is equivalent to a statement that *A*'s act fell within the definition of murder given in Ss. 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to S. 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception applied to it.

(b) *A* is charged, under S. 326 of the Indian Penal Code, with voluntarily causing grievous hurt to *B* by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by S. 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(c) *A* is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that *A* committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(d) *A* is charged, under S. 184 of the Indian Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

The words "having been previously . . . and it is intended . . . subsequent offence," in sub-s.(7) were substituted for the words "has been previously . . . competent to award" and the words "is omitted" in the same sub-section were substituted by the words "has been omitted," by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

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|---|---|
| 1. Charge — General. | 8. Liability to whipping if to be stated in the charge. |
| 2. "Shall state the offence" — Sub-section (1). | 9. Aggravating circumstances. |
| 3. Description of offence by name — Sub-section (2). | 10. Special exceptions. |
| 4. Definition of the offence — Sub-section (3). | 11. Constructive offences. |
| 5. Section of law to be stated — Sub-section (4). | 12. Unnecessary averments in the charge — Surplusage. |
| 6. Previous convictions — Sub-section (7). | 13. Defective charge — Effect of. See S. 225. |
| 7. Charge for offences one of which is triable as a warrant case and the other as a summons case. | 14. Form of charge in various offences. See S. 223. |
| | 15. Cases where no charge need be framed. |

Other Topics (miscellaneous)

- | | |
|--|--|
| Accused entitled to know exact value of charge made against him. See Note 1. | For the purpose of affecting the punishment. See Note 6. |
| Charge of previous conviction—Time to add. See Note 6. | Notice of the matter. See Note 1. |
| Charge under I. P. C., how to be stated. See Note 1. | Proof of previous conviction. See Ss. 310 and 511. |
| Effect of omission to state previous conviction. See Note 6. | What is a previous conviction. See Note 6. |
| Fact, date and place of previous conviction. See Note 6. | Where the law gives no specific name. See Notes 2 and 4. |
| | Words of the statute should be adhered to. See Note 4. |

Section 221
Note 1

1. Charge—General.—It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of the charge brought against him.¹ Otherwise, he may be seriously prejudiced in his defence.^{1a} It is therefore imperative that before a person is convicted of any offence he should (subject to certain exceptions) be *formally charged* with having committed the offence specified and be given an opportunity to defend himself against such charge.² He can be convicted only on proof of the *particular offences so specified* and not for offences not so specified.³

A 'charge' in this country corresponds to an 'indictment' in English law and is very much more than a mere form.⁴ It should be carefully drawn up in accordance with the offence disclosed.⁵

Section 221 — Note 1

1. ('36) AIR 1936 Lah 409 (411) : 37 Cr. L. J. 732, *Indar Pal v. Emperor*.
- 1a. ('16) AIR 1916 Cal 188 (192) : 16 Cr. L. J. 497; 42 Cal 957, *Amritlal v. Emperor*.
- ('26) AIR 1926 Cal 439 (440) : 26 Cr. L. J. 567, *Chhakari Shah v. Emperor*.
- ('25) AIR 1925 Cal 160 (160) : 25 Cr. L. Jour 1186, *Balaram Kundu v. Emperor*.
- ('02) 15 C P L R 112 (113), *Emperor v. Vinayak*. (Proper charge not drawn up.)
- See also S. 223 Note 1, S. 255 Note 3, S. 286 Note 1 and S. 535 Note 3.
2. ('26) AIR 1926 Cal 581 (582) : 53 Cal 466 : 27 Cr. L. Jour 606, *Harun Rashid v. Emperor*. (Case not covered by exception under S. 237.)
- ('32) AIR 1932 Pat 215 (216) : 11 Pat 523; 33 Cr. L. J. 861, *Ghysuddin v. Emperor*.
- ('16) AIR 1916 All 126 (126) : 17 Cr. L. Jour 407 (407), *Qasim Ali v. Emperor*.
- ('03) 27 Bom 391 (399, 400), *In re Vallabhdas Jairam*. (Offence under S. 50, Indian Insolvent Act.)
- ('10) 11 Cr. L. Jour 274 (275) : 3 I. C. 311 (Mad) (FB), *In re Ganapathy Sastri*. (Order under S. 13 of the Legal Practitioners Act can only be made, after notice has been given to the pleader to show cause why he should not be suspended or dismissed — The notice must formulate the charges with sufficient precision to enable the pleader to know the charge which he is called upon to meet.)
3. ('25) AIR 1925 Oudh 676 (676) : 26 Cr. L. J. 1012, *Bishambar Nath v. Emperor*. (Matter irrelevant to charge against accused should be eliminated.)
- ('33) AIR 1933 Sind 225 (225, 226) : 35 Cr. L. Jour 582, *Parasram Kundraj v. Emperor*. (Charge on one set of facts — Conviction of same offence but on other set of facts — Conviction is illegal.)
- ('01) 1901 All W N 120 (121), *Emperor v. Lajja*. (Persons charged with an offence under S. 365, Penal Code, cannot properly be convicted of an offence under S. 493.)
- ('21) 22 Cr. L. Jour 311 (312) : 60 Ind Cas 999 (1000) (Pat), *Darbari Choudhury v. Emperor*. (Where accused was charged with offence of theft, he cannot be convicted of abetment of theft.)
- ('90) 1890 Rat 529 (530), *Queen-Empress v. Nathoo Lalji*. (Charge for storing wool—No conviction for storing cotton.)
- ('25) AIR 1925 Cal 903 (904) : 26 Cr. L. Jour 594, *Nayanullah v. Emperor*. (S. 233, Criminal P. C., can have no application in this case.)
- (1900) 27 Cal 660 (662), *Jatu Singh v. Mahabir Singh*. (Charge for theft — Accused cannot be convicted of rioting.)
- ('01) 5 Cal W N 567 (568), *In the matter of Chinibas*. (Charge under S. 447, Penal Code—Conviction under Ss. 447 and 290, Penal Code, is illegal.)
- ('22) AIR 1922 Lah 135 (135, 136) : 23 Cr. L. Jour 5, *Girdhara Singh v. Emperor*. (Conviction for an offence under a section which originally included but scored out by trial Court — Illegal.)
- ('30) 1930 Mad W N 249 (283), *C. K. N. Sundaresa Iyer v. Emperor*. (Accused has to defend himself on the charge framed against him and on no other.)
- ('23) 24 Cr. L. Jour 119 (119) : 71 Ind Cas 247 (Cal), *Hajari Sonar v. Emperor*. (Charge of house trespass with object of theft—Conviction of house trespass with some other object—Illegal.)
- [See also ('22) AIR 1922 Oudh 280 (282) : 24 Cr. L. Jour 10 : 26 Oudh Cas 4, *Sarju Prasad v. Emperor*.]
4. ('26) AIR 1926 Oudh 148 (149) : 27 Cr. L. Jour 62, *Sheo Shankar v. Emperor*.
5. ('01) 1901 Pun Re No. 5 Cr, p. 11 (15, 16) : 1901 Pun L R No. 51, *Mukherji v. Empress*.

Section 221
Notes 1-2

This section and the next two sections specify the particulars that should be stated in the charge, the object of such statement being to enable the accused person to know the substantive charge he will have to meet and to be ready for it before the evidence is given.⁶ Reading them together, every charge should contain the following particulars:

1. A statement of the *offence* with which the accused is charged (S. 221 sub-sections 1 to 3.)
2. A statement of the law and the section of the law against which the offence is said to have been committed (sub-section (4)).
3. Particulars as to the *time* and *place* of the alleged offence and the person against whom or the *thing* in respect of which it was committed (S. 222).
4. Particulars of the *manner* in which the alleged offence was committed. This is, however, necessary only where the particulars mentioned in S. 221 and S. 222 do not give the accused sufficient notice of the matter with which he is charged (S. 223).

The *extent* of the particulars necessary to be given will depend upon the facts and circumstances of each case.⁷ In drawing up a charge all verbiage should be avoided⁸ as also matters which are not necessary for the prosecution to prove.⁹ Abbreviation, as by using the words '*et cetera*,' should also be avoided.¹⁰ A charge should be *precise* in its scope and *particular* in its details.¹¹

The charge should be stated to the accused by the Magistrate himself and not be left to be stated by others.¹²

2. "Shall state the offence"—Sub-section (1).—Every charge must *state the offence* with which the accused is charged. Where the offence has a name given to it by law, it is *sufficient* to describe it by its *name* only (sub-s. (2)). Where it has no name given to it by law, so much of the definition of the offence *must* be stated as to give the accused notice of the matter with which he is charged (sub-s. (3)).

Where a person is charged with several offences all having reference to the *same subject-matter or series of transactions*, a single charge may be framed with several *counts* or heads of charge for the several offences.¹

6. ('16) AIR 1916 All 60 (60): 17 Cr.L.J. 411 (411), *Ram Chandar Sahai v. Emperor*. See also S. 221 Note 1, S. 223 Note 1, S. 476 Note 14 and S. 535 Note 3.

7. ('93) 1893 Rat 659 (666), *Queen-Empress v. Waman*.

8. (1864) 1 Suth W R Cri Letters 1 (1, 2).

9. ('26) AIR 1926 Oudh 245 (247, 248): 27 Cri L Jour 57, *Bhulan v. Emperor*.

10. (1864) 1 Suth W R Cri Letters 13 (13, 14).

11. ('19) AIR 1919 Pat 27(30):20 Cr.L.J.161:4 Pat LJ 74(FB), *Mt. Kesar v. Emperor*.

('26) AIR 1926 Oudh 148 (149): 27 Cri L Jour 62, *Shco Shankar v. Emperor*. (Accused is entitled to be informed with greatest precision what acts he is alleged to have committed and under what sections of Penal Code they fall.)

12. ('71) 16 Suth W R Cr 43 (43), *Queen v. Jehangcer Buksh*.

See also S. 221 Note 1.

Note 2

1. ('38) AIR 1938 Cal 460 (462): 39 Cri L Jour 674, *Ebadi Khan v. Emperor*. (Accused charged with offences of kidnapping and abduction in respect of same occurrence — Charge should be framed under two heads — Framing of charges under one head does not, however, vitiate trial unless accused is prejudiced.)

Section 221
Notes 3-5

3. Description of offence by name—Sub-section (2).—Where an offence has a *name* given to it by law such as "rioting", "theft", etc., the Court *may* describe it by its *name* only. Thus, in a charge under S. 147, Penal Code, where the word "rioting" is included in the charge, the words "by force or by show of force" need not be included because the suggestion of force is contained in the word "rioting."¹ Similarly, it is open to the prosecution to charge abetment generally and then, if the evidence did not establish abetment other than in one particular form, to rely on this particular form for a conviction. The charge will amount to notice to the accused that he will have to meet a case of abetment in one or more of the different ways indicated in S. 107, Penal Code.² The Court has, however, a discretion to give further details according to the facts and circumstances of each case. Where further details are given, they should be *fully and accurately* stated and should be such as to give the accused clear notice of the accusation against him.³

4. Definition of the offence — Sub-section (3).—In giving the definition of the offence charged, it is always a sound rule for the Court to adhere to the *language of the statute* as far as possible.¹ Thus, for an offence under S. 211 of the Penal Code the charge should set forth that the prisoner "falsely charged" and not that he "made an accusation."² A repetition of the words in the *marginal note* to the section is not enough.³

5. Section of law to be stated—Sub-section (4).—Where the section of the Penal Code with which a person is intended to be charged contains *several parts*, that *part* of the section which is applicable to the case should be stated.¹

(28) AIR 1928 Cal 675 (677): 29 Cr. L. J. 1022: 55 Cal 858, *Satyannarain v. Emperor*.
[See also ('35) 36 Cr. L. Jour 1037 (1038): 156 I. C. 972 (Sind), *Khemji Khetsi v. Emperor*. (It has however been held that where the same facts will constitute different offences, the indictment may, and ought to, charge each such offence so as to meet every possible view of the case.)

(15) AIR 1915 Sind 50 (51): 16 Cr. L. J. 573 (574): 9 S. L. R. 37, *Dodo v. Emperor*. (Charge means whole series of counts.)]

Note 3

1. ('36) AIR 1936 Pat 627 (628): 38 Cr. L. J. 87, *Suraj Dusadh v. Emperor*.
2. ('38) AIR 1938 Cal 125 (126): 39 Cr. L. J. 395, *Harendra Kumar v. Emperor*.
3. (1865) 2 Suth W R Cri Letters 24 (24).
(1864) 1 Suth W R Cri Letters 10 (11).
(1865) 3 Suth W R Cri Letters 20 (20). (Framing of charge of abetment.)

Note 4

1. ('26) AIR 1926 Cal 439 (440): 26 Cr. L. J. 567, *Chhakari v. Emperor*. (Departure from the words of the statute benefits nobody and only introduces complications.)
(16) AIR 1916 Cal 188 (195): 16 Cr. L. Jour 497: 42 Cal 957, *Anritatal Hazara v. Emperor*. (Charge under S. 4 (b), Explosive Substances Act, VI of 1908.)
(92) 5 C P L R Cr 18 (19), *Empress v. Jhengria*. (Offence of mischief by fire.)
(92-96) 1 Upp Bur Rul 32 (32), *Queen-Empress v. Nga Kyaw*.
2. (1865) 2 Suth W R Cri Letters 2 (2).
3. (1865) 2 Suth W R Cri Letters 6 (6). (S. 307, Penal Code.)
(1865) 2 Suth W R Cri Letters 7 (7). (S. 326, Penal Code.)

Note 5

1. ('90) 15 Bom 189 (193, 194), *Queen-Empress v. Abaji Ramchandara*. (Charge under S. 475, Penal Code.)

Section 221
Note 6

6. Previous convictions — Sub-section (7). — If a person is intended to be tried and punished with *enhanced punishment or with punishment of a different kind* as being a previous offender, the particulars of the previous conviction should be stated in the charge,¹ though the *extent* of the former punishment need not be stated.² In the absence of such statement, the accused cannot be awarded enhanced punishment.³ A statement of the previous conviction in the charge is, however, not necessary where such conviction is to be taken into consideration, not for the purpose of awarding the enhanced punishment under s. 75, Penal Code, but merely for the purpose of exercising the discretion of the Court as to the extent of the punishment to be awarded *within the maximum fixed for the offence charged*.⁴

A "previous conviction" within the meaning of this section means a previous conviction by a British Indian Court and not by a foreign Court.⁵ Further, it means a conviction obtained before the moment of

Note 6

1. ('86) 9 Mad 284 (285) : 2 Weir 266, *Queen-Empress v. Dorasami*. (Separate charge under S. 75, Penal Code, must be framed.)
- ('32) AIR 1932 Nag 111 (112) : 28 Nag L R 18 : 33 Cr. L. J. 573, *Gayaprasad v. Emperor*. (Certified copy of entry in register of criminal cases relating to previous conviction of accused filed along with challan.)
- ('17) AIR 1917 Low Bur 58 (58) : 18 Cr. L. J. 79 (79) : 8 L B R 461, *Nga Hla v. Emperor*. (Failure to do so is, however, irregularity curable by S. 537 in the absence of prejudice.)
- ('17) AIR 1917 Mad 968 (969) : 17 Cr. L. J. 288 (288), *Subramanian v. Emperor*. (Ordinary precaution of charging prisoners under S. 75, Penal Code, should always be taken.)
- ('11) 12 Cr. L. J. 233 (234) : 10 L. C. 241 (Lah), *Dungri Md. Ali v. Emperor*.
- ('10) 11 Cr. L. J. 217 (217) : 5 L. C. 743 (Mad), *In re Abbulu*. (Omission to set out in due form is curable.)
- ('06) 3 Cri L Jour 97 (98) (Kathiawar), *In re Ilahibaksh Khaju*.
- ('74) 22 Suth W R Cr 39 (40), *Queen v. Sheik Jakir*.
- ('74) 21 Suth W R Cr 40 (40), *Queen v. Esan Chunder Dey*.
- ('73) 19 Suth W R Cr 41 (42), *Queen v. Rajcoomar Bose*.
- ('83) 1883 All W N 110 (110), *Empress v. Haidar*.
- ('81) 1881 All W N 144 (144), *Empress v. Mundar*.
- ('81) 1881 All W N 32 (32), *Empress v. Raghib Ali*.
- ('02) 4 Bom L R 177 (177), *King-Emperor v. Govind Sakharan*. (Mere admission of accused that he had once been in jail is insufficient to show that he pleaded guilty to previous conviction.)
- (1900) 2 Bom L R 304 (321, 322), *Queen-Empress v. Vinayak Narayan*.
- ('73) 1873 Rat 78 (78), *Reg. v. Jay Kison*. (Omission to set forth previous conviction in the charge however did not cause failure of 'justice'.)
- ('73) 1873 Rat 70 (72), *Reg. v. Annaji Krishna*.
- ('71) 1871 Rat 52 (52), *Reg. v. Tukaram Dowlal*.
- ('78) 2 Weir 267 (268), *High Court Proceedings, 21st October 1878*.
- ('93-1900) 1893-1900 Low Bur Rul 310 (311), *Empress v. Nga Lu Gyi*.
- ('72-92) 1872-1892 Low Bur Rul 337 (337), *Empress v. Po Thavng*.
2. ('68-69) 4 Mad H C R App xi (xi).
3. ('83) 2 Weir 264 (265), *In re Ramanjulu Naik*.
- ('06) 3 Cri L Jour 97 (98) (Kathiawar), *In re Ilahibaksh Khaju*.
- ('74) 2 Weir 265 (265, 266).
- ('73) 1873 Rat 70 (72), *Reg. v. Annaji Krishna*.
4. ('28) AIR 1928 Rang 200 (203, 205) : 6 Rang 391 : 29 Cri L Jour 869 (FB), *Emperor v. Nga Ba Shein*. (S. 326, Penal Code.)
- ('33) AIR 1933 Nag 315 (316) : 29 N L R 309:34 Cr. L. J. 1166, *Abdul v. Emperor*.
- ('30) AIR 1930 Sind 211 (214, 216) : 31 Cr. L. J. 1046 : 24 S L R 252, *Baksho v. Emperor*.
5. ('13) 14 Cr. L. J. 527 (527) : 20 I. C. 1007 : 1913 Pun Re No. 17 Cr, *Bahawal v. Emperor*. (Conviction in Bikanir State.)

time when the charge is framed.⁶ It may also be noted that for purposes of s. 75 of the Penal Code, a person cannot be charged with a conviction for an offence committed subsequent to the date of the offence for which he is on trial.⁷ Similarly, s. 75 of the Penal Code does not apply to a case where the subsequent offence is committed before the conviction for the former offence.^{7a}

Section 221
Notes 6-7 :

The word "punishment" in this section does not include an order under s. 565 for not notifying the address of the offender and consequently it is not necessary, for the purpose of making this order, that the previous conviction should be mentioned in the charge.⁸

Where the previous conviction has been omitted from the charge, it may be added at any time *before sentence* is passed. A sentence passed *already* cannot be enhanced by the subsequent discovery of the fact that the prisoner has been previously convicted.⁹ The High Court may, however, in revision, add the charge in proper cases and direct evidence to be taken on such charge.¹⁰

See also the undermentioned case bearing upon s. 75 of the Penal Code.¹¹

See also Notes under section 311.

7. Charge for offences one of which is triable as a warrant case and the other as a summons case. — Where it is intended to proceed to try a person for two offences one of which is triable as a warrant case (in which a charge is to be framed) and the other as a summons case (in which no charge need be framed), the charge in respect of the former offence should also state the latter offence.¹

('30) 1930 Mad W N 173 (174), *Syed Khader Sahib v. Emperor*. (Conviction in Kolar Mysore State.)

('19) AIR 1919 All 63 (63) : 42 All 136 : 21 Cr L Jour 141, *Bhanwar v. Emperor*. (Bharatpur State.)

See also S. 348 Note 4.

6. ('79) 1879 Pun Re No. 21 Cr, p. 60 (64), *Empress v. Sultani*.

7. ('75) 1 Weir 39 (39), *High Court Proceedings*, 20th January 1875.

7a. ('26) AIR 1926 Bom 305 (305) : 27 Cr. L. J. 726, *Sayad Abdul v. Emperor*.

8. ('13) 14 Cr. L. J. 390 (390, 391) : 9 N L R 88 : 20 I. C. 214, *Emperor v. Jhagroo*. See also S. 565 Note 2.

9. ('89) 1889 Rat 458 (458), *Empress v. Chimaba*.

('89) 1889 Rat 457 (458), *Empress v. Nahma*. (Ss. 454 and 380, Penal Code.)

('73) 19 Suth W R Cr 41 (42), *Empress v. Rajcoomar Bose*. (Conviction under Postal Act, 1866.)

10. ('79) 1879 Pun Re No. 19 Cr, p. 54 (56), *Kasim v. Empress*.

('79) 1879 Pun Re No. 28 Cr, p. 78 (79), *Empress v. Yusuf*. (Accused escaping detection as an old offender by giving a false name at the trial—High Court set aside conviction and directed new trial with the amended charge.)

11. ('04) 1 Cr. L. J. 1061 (1063) : 1904 Pun Re No. 17 Cr, *King-Emperor v. Khan Muhammad*. (Conviction under the Punjab Frontier Crimes Regulation—Not a previous conviction under Penal Code, so as to attract S. 75, Penal Code.)

Note 7

1. ('02) 29 Cal 481 (482) : 6 C W N 599, *Hosein Sardar v. Kalu Sardar*. (Summons for offences under Ss. 379 and 143, Penal Code—Charge framed under S. 379 only — Conviction under S. 143 only — Accused misled in defence—Conviction set aside.)

('06) 3 Cr. L. J. 350 (350) : 3 Low Bur Rul 113, *Emperor v. Maung Gale*. (Formal charges should be framed for both offences.)

See also S. 254 Note 5.

Section 221
Notes 8-11

8. Liability to whipping if to be stated in the charge. — It has been held in the undermentioned case¹ that when a person is tried for an offence which is liable to be punished with whipping, the liability to whipping must be stated in the charge.

9. Aggravating circumstances. — Where a person is charged of an offence which provides a certain punishment under certain circumstances and a higher punishment under aggravating circumstances, the existence of such aggravating circumstances should be set forth in the charge.¹

10. Special exceptions. — Under ss. 235 to 237 of the Code of 1861, the charge had to deny the existence of special exceptions where the section defining the offence charged had exceptions.¹ This is now no longer necessary as those sections have not been repeated in the present Code.

11. Constructive offences. — Under S. 149 of the Penal Code, if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, every person who at the time of committing that offence is a member of the same assembly is guilty of that offence. Where a person is charged with an offence constructively by force of S. 149, the charge should specify such fact. Thus, where the accused was only charged with an offence under S. 126 of the Railways Act, a conviction for an offence under that section read with S. 149 on the basis of constructive liability cannot be sustained where it has prejudiced the accused.¹ Where *A* is charged constructively for an offence, it clearly intimates to him that he did not himself commit the substantive offence but that he is guilty inasmuch as somebody else in prosecution of the common object of the riot did commit such substantive offence. If the person charged with committing the substantive offence is acquitted of such offence, the offence by implication also disappears, and *A* cannot be convicted of the substantive offence.²

Note 8

1. ('82) 5 Mad 158 (158), *Badiya v. Queen*.

Note 9

1. ('71) 1871 Rat 55 (56), *Reg. v. Mukta* (S. 397, Penal Code.)
(1897) 1897 Rat 921 (921), *Queen-Empress v. Punya Sakharam*. (Charge under S. 395, Penal Code—To justify conviction under S. 398, Penal Code, the carrying of arms must be specifically alleged in charge.)

Note 10

1. (1864) 1 Suth W R Cri Letters 9 (9). (S. 300, Penal Code).
(1866) 5 Suth W R Cri Cir 2 (2).
(1864) 1 Suth W R Cri Letters 10 (11). (S. 375, Penal Code).
(1879) 4 Cal 124 (126, 127) : 3 CL R 122, *In re Shibo Prosad Pandah*. (Defamation.)
(1872) 9 Bom H C R 451 (457), *Reg. v. Kikabhai Parbhudas*. (Do.)
(1869) 1869 Rat 20 (20). (Hurt).
(1867) 8 Suth W R Cri Cir 3 (3).

Note 11

1. ('24) AIR 1924 Mad 338 (339, 340) : 25 Cr. L. J. 212, *In re Thaikottathil Kunheem*.
(1925) AIR 1925 Mad 1 (5, 6) : 47 Mad 746 : 25 Cr. L. J. 1297 (FB), *In re Theethumalai Goundar*. (Conviction on such a defective charge is not bad unless the accused has been materially prejudiced in his defence.)
2. ('12) 13 Cri L Jour 502 (503) : 15 Ind Cas 646 (Cal), *Razuddi v. Emperor*. (S. 325 read with S. 149, Penal Code.)

A charge under S. 149 is not for any specific *named* offence and the fact that an offence is committed in *pursuance of the common object* is of the essence of the case. It is therefore necessary to mention the same in the charge unless it has already been set out in the main charge.³

See also the undermentioned case.⁴

Section 221
Notes 11-15

12. Unnecessary averments in the charge — Surplusage. — As has been seen in Note 1, a charge should never contain more than what is necessary for the prosecution to prove.¹ Allegations in the charge which are not necessary to be proved to constitute an offence and which might be entirely omitted without affecting the charge against the prisoner and without detriment to the indictment are, however, considered as mere surplusage and may be disregarded in evidence.²

13. Defective charge — Effect of. — See Section 225.

14. Form of charge in various offences. — See Section 223.

15. Cases where no charge need be framed. — No charge is necessary to be framed in the following cases :

- (1) inquiries under S. 117;
- (2) trials of summons cases (see S. 242); and
- (3) summary cases where no appeal lies (S. 263).

There is a difference of opinion as to whether there should be a definite charge in prosecutions under the Insolvency Acts. According to the Judicial Commissioner's Court of Nagpur it is not essential that there should be a definite charge, a finding and a conviction as a foundation for a sentence under the said provisions. All that the law requires is that the principles underlying a criminal trial should be observed. So, where an insolvent proceeded against under that Act was informed of the nature of the proceedings and the offence with which he was charged, it was held that the essentials of criminal trial were sufficiently complied with.¹ The High Court of Calcutta² and the Chief Court of the Punjab³ have, however, taken a contrary view.

3. ('12) 13 Cr. L. J. 218 (219) : 39 Cal 781 : 14 I. C. 314, *Kudrutullah v. Emperor*.
4. ('26) AIR 1926 Nag 459 (460, 461) : 27 Cri L Jour 830, *Deoji v. Emperor*. (Where the accused was separately charged under S. 325 (grievous hurt) and S. 149 (unlawful assembly), but there was no mention of S. 149 in the charge under S. 325 — *Held*, that the irregularity was curable under S. 537.)

Note 12

1. ('26) AIR 1926 Oudh 245 (247, 248) : 27 Cr. L. J. 57, *Bhulan v. Emperor*. (For a charge under S. 396 it is not necessary for the prosecution to prove that the murder was committed jointly by all the accused.)
2. ('28) AIR 1928 Cal 675 (676, 677) : 55 Cal 858 : 29 Cri L Jour 1022, *Satya Narain v. Emperor*. (See Russel on Crimes, Book 6, Ch. 2, S. 3.)
- ('67) 4 Bom H C R Cr Cas 17 (22), *Reg. v. Francis Cassidy*.

Note 15

1. ('18) AIR 1918 Nag 214 (214, 215) : 19 Cri L Jour 627, *Ganpaty v. Chimnaji*.
2. ('15) AIR 1915 Cal 117 (117) : 16 Cr. L. J. 135, *Harihar Singh v. Moheshwar*. ('20) AIR 1920 Cal 624 (625) : 21 Cr. L. J. 481, *J. M. Lucas v. Official Assignee of Bengal*. (Charge not framed in pursuance of notice which did not set forth the substance of offence—Conviction under that charge set aside.)
3. ('16) AIR 1916 Lah 182 (183) : 17 Cr. L. J. 318 (319) : 1916 Pun Re No. 110, *Cr. Nawab v. Topan Ram*. (No charge of any specific offence under S. 43, Provincial Insolvency Act — Proceedings *held* wholly irregular.)

Section 222

222.* (1) The charge shall contain such particulars as to time, place and person. particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234 :

Provided that the time included between the first and last of such dates shall not exceed one year.

Synopsis

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|--|---|
| 1. Legislative changes. | 7. Applicability of sub-section (2) to cases where there are two or more accused persons. |
| 2. Scope of the section. | |
| 3. Time of offence. | |
| 4. Person against whom offence was committed. | 8. Charge under sub-section (2), whether trial for another item misappropriated during same period is barred. |
| 5. Thing in respect of which offence was committed. | |
| 6. Sub-section (2) — Charge of criminal breach of trust or dishonest misappropriation. | 9. Charge of criminal conspiracy. |

Other Topics (miscellaneous)

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| Charge and proof. See Note 2. | General deficiency in accounts. See Note 6. |
| Charge to be definite — Else bad. See Notes 2 and 6. | Joining of other offences. See Note 6. |
| Cheating a corporation. See Note 4. | Specification of different items. See Note 6. |
| Dates extending for more than a year—Illegal. See Note 6. | Sub-section (2)—Scope, object and effect. See Note 6. |
| Definite charges even in specification of gross sum. See Note 6. | Sufficiency of particulars. See Notes 2 and 3. |
| Different offences not to be clubbed. See Note 6. | Sufficient notice. See Notes 2 and 3. |
| Finding as to definite sum misappropriated needed. See Note 6. | Within the meaning of S. 234 and not other sections. See Note 6. |

1. Legislative changes.*Differences between the Codes of 1861 and 1872 :*

There was no corresponding section in the Code of 1861. The section was first enacted in the Code of 1872 as S. 440.

* Code of 1882 : S. 222 : Same as sub-s. (1). Sub-section (2) was added in 1893.
Code of 1872 : S. 440 ; Code of 1861 — Nil.

Changes introduced in 1882 :

The *thing* in respect of which the offence was committed was made one of the matters in respect of which particulars were to be given in the charge.

Changes made in 1898 :

Sub-section (2) was added. See Note 6.

Section 222
Notes 1-3

2. Scope of the section.—In addition to the particulars specified in S. 221 it is necessary, as provided by this section, that the charge should contain particulars as to the time and place of the alleged offence and the person (if any) against whom and the thing (if any) in respect of which the offence is alleged to have been committed.¹ Such particulars of the above points must be given as are reasonably sufficient to give the accused notice of the matter with which he is charged.² But the charge is not necessarily invalidated by the giving of *more* particulars than are absolutely necessary.³

As to the effect of an omission to state or of an error in the statement of the particulars required by this section, see Ss. 225 and 232. As to when the manner of the commission of the offence should be given in the charge, see S. 223 and Notes thereunder.

3. Time of offence.—The time of the alleged offence should be given in the charge with as much particularity as is necessary to give the accused sufficient notice of the matter of which he is charged.¹

Section 222 — Note 2

1. ('91) 15 Bom 491 (503, 504), *Queen-Empress v. Fakirappa*.
 ('19) AIR 1919 Mad 487 (490, 497):20 Cr.L.J. 354, *Kumaramuthu Pillai v. Emperor*.
 ('19) AIR 1919 Pat 27 (30):4 P L J 74:20 Cr.L.J. 161 (FB), *Mt. Kesar v. Emperor*.
 (Charge to be precise in scope and particular in detail.)
 ('16) AIR 1916 Mad 571 (572) : 16 Cr.L.J. 298 (299), *In re Mekalakati Subbadu*.
 (Vagueness of charge—Place and name of articles stolen etc., not mentioned.)
 ('07) 6 Cri L Jour 446 (448, 449) (Lab), *Gowardhan Das v. Emperor*. (Charge for rioting should set out the period, place and the common object.)
 (1864) 1 Suth W R Cri Letters 2 (2). (Forms of charge in cases of rape indicated.)
 ('84) 6 All 204 (207), *Empress v. Khairati*. (Charge under S. 377, Penal Code, should allege the time when, the place where and any known or unknown person with whom the particular act charged as offence under S. 377 was committed.)
 ('12) 13 Cri L Jour 504 (504) : 15 Ind Cas 618 (Mad), *Govinda Reddy v. Emperor*.
 (Charge under Rule 8 of S. 26 of the Madras Forest Act should state that the place from where the tree was cut was reserved forest.)
 ('94) 1894 Rat 710 (713), *Queen-Empress v. Abdul Razak*. (Place of the rioting should be stated.)
 ('74) 1874 Rat 80 (80, 81), *Reg v. Gokaldas*. (Charge under Ss. 193, 194, Penal Code, should specify before what Court the alleged false statement was made.)
2. ('02) 15 C P L R 112 (113), *Emperor v. Vinayak Jageshwar*. (Charge of house trespass at Nagpur is too vague.)
 [See ('79) 1879 Pun Re No. 18 Cr, p. 48 (53), *Sher Ali v. Empress*. (Charge of criminal conspiracy within limits of determinate area (e. g., a village) is not too vague.)]
- ('91) 15 Bom 491 (503, 504), *Queen-Empress v. Fakirappa*.
3. ('78) 2 Weir 267 (268), (Charge of breaking into a house with intent to commit theft—Mention of house-owner's name proper though not quite necessary.)
 ('67) 4 Bom H C R Cr 17 (22, 24), *Reg v. Francis Cassidy*. (Unnecessary allegations in charge may be rejected as surplusage, and it is not necessary to prove them in order to sustain the charge.)

Note 3

1. ('03) 30 Cal 402 (404) : 7 C W N 74, *Bishwanath Das v. Keshab Gandhabanik*.
 (The charge for defamation should contain the particular occasion on which the defamation was committed.)

Section 222
Notes 3-4

Where it is impossible to specify the particular date on which the offence was committed, it will be sufficient to state two dates between which the offence was committed.²

As to the effect of error or omission in regard to this particular, see sections 225 and 232.

4. Person against whom offence was committed. — The charge should also state with sufficient clearness the *person*, if any, against whom the alleged offence was committed. Thus, in a case of theft, the charge should state the person whose property was stolen.¹ Similarly, in a charge of cheating, the name of the person cheated must be stated.² See also the undermentioned cases.³

- { '30 } AIR 1930 Sind 62 (63, 64) : 30 Cri L Jour 1073, *Ali Mahomed v. Emperor*.
(Number of instances in which the accused defamed the complainant — Charge should make clear which particular incident is being alluded to.)
- { '68 } 10 Suth W R Cr 37 (38) : 1 Beng L R A Cr 13, *Queen v. Futteali Biswas*.
(Charge under S. 193, Penal Code — The judicial proceedings and the particular stage of the judicial proceeding should be stated.)
- { '71 } 16 Suth W R Cr 47 (47, 48) : 7 Beng L R App 66, *Queen v. Moharaj Misser*.
(Charge of giving false evidence — The exact date in which, the Court or officer before whom, and the stage at which the evidence was given, should be alleged.)
- { '25 } AIR 1925 Mad 690 (691) : 26 Cr. L. J. 1513 : 49 Mad 74, *In re Mallu Dora*.
(Offence of waging war against the King — Single general charge without giving date held bad.)
2. { '24 } AIR 1924 Cal 616 (617) : 25 Cri L Jour 997 : 51 Cal 488, *Bhola Nath Mitter v. Emperor*. (Charge of adultery — Impossibility to specify the particular date when intercourse took place — It is sufficient to specify two dates between which the offence was committed.)
- { '15 } AIR 1915 Lah 16 (19, 48) : 16 Cri L Jour 354 (357, 388, 398) : 1915 Pun Re No. 17 Cr, *Bal Mokand v. Emperor*. (Conspiracy—Specification of exact date of inauguration not necessary as in most cases it would be impossible to give it.)
[See also { '26 } AIR 1926 Pat 347 (347) : 27 Cr. L. J. 909, *Farzand Ali v. Emperor*.
(Charge of cheating—Month only given—Held irregularity is cured by S. 537.)]

Note 4

1. (1865) 2 Suth W R Cr L 5 (5).
(1865) 2 Suth W R Cr L 15 (15). (Form of charge in cases of theft or breach of trust by a servant indicated.)
2. (1862-63) 1 Mad H C R 31 (34, 37) : 1 Weir 471, *Queen v. Williams*.
{ '24 } AIR 1924 Cal 18 (41) : 25 Cri L Jour 1313, *P. E. Billingham v. Emperor*.
(Charge under S. 420, Penal Code, should state the person or persons deceived and induced to issue a cheque.)
- { '04 } 1 Cr. L. J. 124 (129) : 8 C W N 278 (FB), *Hurjee Mull v. Imam Ali Sircar*.
(Attempt to cheat—Person intended to be cheated and manner of cheating should be set out in the charge.)
[See also { '24 } AIR 1924 Cal 495 (498) : 26 Cr. L. J. 330 : 51 Cal 250, *Legal Remembrancer of Bengal v. Manmatha Nath Bhuyan*. (Offence of cheating a corporation.)]
3. { '36 } 37 Cri L Jour 439 (440) : 63 Cal 18 : 161 Ind Cas 280, *Abinash Chandra v. Emperor*. (Charge under S. 405, Penal Code, not stating who made the alleged entrustment, or who suffered from the alleged breach of trust, offends against the provisions of S. 222 (1), Criminal P. C.)
- { '92 } 19 Cal 105 (110), *Ferasat v. Empress*. (Charge under S. 152, Penal Code—Particular public servant assaulted should be named.)
- { '66 } 5 Suth W R Cr L 6 (6). (Charge under S. 221, Penal Code, should state the names of the men suffered or ordered to escape—Charge for causing hurt should state the person to whom hurt was caused.)
- { 1863 } 1 Bom H C R 95 (96), *Reg. v. Siddu*. (Charge under S. 411, Penal Code—The name of the owner must be specified.)
- { '26 } AIR 1926 Sind 129 (129) : 27 Cr. L. J. 32 : 20 S L R 3, *Hyder v. Emperor*. (Do.)
- { '68 } 10 Suth W R Cr 63 (64) : 3 Beng L R App Cr 15n, *Empress v. Dina Sheikh*.
(Person hurt must be specified.)
- { '70 } 14 Suth W R Cr 13 (13), *Queen v. Parbutty*. (Charge under S. 403, Penal Code, should state the person whose property was dishonestly appropriated or converted.)

5. Thing in respect of which offence was committed. — Where the offence is committed in respect of any thing, the charge should specify the thing with sufficient particularity. For instances, see the undermentioned cases.¹

Section 222
Notes 5-6

6. Sub-section (2) — Charge of criminal breach of trust or dishonest misappropriation. — Prior to the enactment of sub-s. (2) in the Code of 1898 there was a conflict of decisions¹ as to whether, in a case of criminal breach of trust or dishonest misappropriation of money, it was necessary to frame a distinct charge in respect of each item of money misappropriated or whether it was sufficient to frame a charge in respect of the aggregate sum misappropriated though it might be composed of different items misappropriated on different occasions. This conflict is set at rest by the enactment of this sub-section. Where a person commits criminal breach of trust or dishonest misappropriation in respect of various sums at different times in the course of a single year, he may now be charged in respect of the total of all the sums as for a single offence without specifying the items of which it is composed or the dates on which they were misappropriated.²

(1865) 2 Suth W R Cr L 7 (7). (Person from whom money was extorted should be stated—The public servants to whom false information was given should be stated.)
(‘34) AIR 1934 Sind 57 (59): 28 S. L. R. 119 : 35 Cr. L. J. 1337, *Dur Mohammad v. Emperor*. (Charge of conspiracy—Defrauding public by deceitful means mentioned—Persons defrauded not specified—Charge not bad.)
(‘05) 2 Cri L Jour 381 (381): 15 M L J 224 : 2 Weir 231, *Anantha Goundan v. Emperor*. (Imputation of unchastity to a married woman — Charge stating husband as the person defamed — Not bad.)

Note 5

1. (‘90) 1890 Rat 529 (530), *Empress v. Nathu Lalji*. (Accused, having been summoned to answer a charge of storing wool under the City of Bombay Municipal Act of 1888, was convicted of storing cotton—*Held*, that the conviction was illegal, the accused having had no opportunity of meeting the latter charge.)
(‘06) 3 Cr. L. J. 153 (159): 33 Cal 295 : 2 C. L. J. 516, *Pares Nath v. Emperor*. (Charge under S. 147, Penal Code, should state the property in respect of which the riot is said to have taken place.)
(‘90) 15 Bom 189 (194), *Queen-Empress v. Abaji Ramchandra*. (Charge under S. 475, Penal Code—It should state the particular papers, bearing a counterfeit mark or device, which the accused had in his possession with the intent mentioned in the section.)
(‘35) AIR 1935 Oudh 475 (475, 476): 36 Cr. L. J. 1206, *Shakur v. Emperor*. (Charge under S. 411, Penal Code (receiving stolen property) must specify the articles alleged to be dishonestly received or retained.)

Note 6

1. Cases holding that for each item there must be a separate charge :
(‘71) 15 Suth W R Cr 5 (5), *In re C. A. Chettar*.
(‘97) 2 Cal W N 341 (346), *Eharam Ali v. Empress*.
(‘97) 24 Cal 193 (196), *Queen-Empress v. Pursotham Dass*.
(‘75) 7 N W P H C R 196 (199), *Queen v. Dukaram*.
(‘87) 14 Cal 128 (131, 132), *In the matter of Luchminarain*. (So assumed in this case.)
Cases holding that it was enough if the aggregate amount was specified :
(‘93) 1893 Rat 659 (665, 666, 667), *Queen-Empress v. Waman*.
(‘95) 18 All 116 (118): 1896 A W N 11, *Budhu v. Babulal*. (17 All 153, followed.)
(‘95) 17 All 153 (155): 1895 A W N 37, *Empress v. Kellie*.
2. (‘10) 11 Cr. L. J. 442 (443, 444): 7 I. C. 186 : 33 All 36, *Emperor v. Ebrahim Khan*.
(‘39) AIR 1939 Bom 129 (138): 40 Cr. L. J. 579, *Ramchandra Rango v. Emperor*.
(‘29) AIR 1929 Cal 175 (175): 30 Cri L Jour 706, *Anil Krista v. Badam Santra*.
(‘32) AIR 1932 Oudh 145 (147): 6 Luck 435 : 33 Cr. L. J. 343, *Shiam v. Emperor*.
(‘07) 5 Cri L Jour 133 (135): 29 Mad 558, *Thomas v. Emperor*.

Section 222
Note 6

The amendment has removed two difficulties which used to be felt under the old Code.³ Firstly, there was great difficulty in convicting an accused person where there was a running account between the parties and the prosecution was unable to specify the particular item in respect of which the offence was committed. This difficulty has been removed by the provision that it is not necessary to specify the items in respect of which the offence was committed and that it is enough to mention the *gross sum* in respect of which the offence was committed. The second difficulty was that under S. 234 more than three offences of the same kind could not be tried at the same trial. Hence, in the absence of any provision enabling the clubbing together of different items it was found impossible to try at one trial more than three acts of criminal breach of trust or dishonest misappropriation though committed in the course of the same year and by the same accused. The provision that a charge may be laid for the gross sum of which the different items (misappropriated in a single year) are composed and that such a charge constitutes only a charge for a *single* offence for the purpose of S. 234, has now removed this difficulty. Reading this section and S. 234, three separate charges of criminal breach of trust or criminal misappropriation in respect of three gross sums each made up of separate items, can be legally tried together provided the offences in respect of all the three gross sums are alleged to have been committed within a space of twelve months.^{3a}

Though the sub-section dispenses with the specification of particular items or the dates on which they were misappropriated, it requires the gross sum alleged to have been misappropriated and the dates between which the offence is alleged to have been committed to be specified in the charge; a charge which does not specify even these particulars will be bad.⁴ Similarly, the sub-section does not in any way affect

(‘05) 2 Cri L Jour 578 (580) : 30 Bom 49 : 7 Bom L R 633, *Emperor v. Datto Hanmant*. (Introduction of greater detail than is necessary, in no way affects the jurisdiction of the Court.)

(‘06) 3 Cr.L.J. 138 (139, 140) : 32 Cal 1085 : 10 C W N 51, *Sat Narain v. Emperor*.

(‘04) 1 Cr.L.J. 637 (638) : 27 All 69 : 1904 A W N 165, *Emperor v. Ishtiaq Ahmad*.

(‘04) 1 Cr.L.J. 791 (792, 793) : 31 Cal 928 : 8 C W N 807, *Samiruddin Sarkar v. Nibaran Chandra*.

(‘27) AIR 1927 Cal 409 (409) : 28 Cri L Jour 469, *Harendra Kumar v. Emperor*.

(‘02) 24 All 254 (255) : 1902 A W N 44, *Emperor v. Gulzari Lal*.

(‘31) AIR 1931 All 267 (268) : 52 All 941 : 32 Cr.L.J. 155, *Emperor v. Prem Narain*.

(‘08) 8 Cr. L. J. 160 (160) : 1 Sind L R 38, *Emperor v. Ali Bux*.

(‘34) AIR 1934 Pat 232 (233) : 13 Pat 170 : 35 Cr.L.J. 876, *Ramkishoon v. Emperor*.

(‘35) AIR 1935 Nag 178 (179) : 31 N L R 337 : 36 Cr.L.J. 1216, *G. S. Ramsheshan v. Emperor*.

(‘35) AIR 1935 Cal 312 (313) : 62 Cal 808, *Kashiram Jhunjhunwalla v. Hurdut Rai*. (Acts of misappropriation may be treated as constituting “same transaction” for purpose of S. 235.)

[See also (‘12) 13 Cr.L.J. 15 (16) : 13 I. C. 108 (Mad), *In re Theophilus Ramappa*. (Where person receives money for the express purpose of using it for his master’s benefit in a particular way, he is entrusted with money, and his appropriation of it to himself amounts to criminal breach of trust and not cheating.)]

3. (‘25) AIR 1925 Cal 260 (261) : 26 Cr. L. J. 532, *Khirode Kumar v. Emperor*.

(‘32) AIR 1932 Oudh 145 (147) : 6 Luck 435 : 33 Cr.L.J. 343, *Shiam Sundar v. Emperor*.

3a. (‘40) 44 C W N 175 (176, 177), *Madhusudan Mukherjee v. Emperor*.

4. (‘36) AIR 1936 Bom 379 (383) : 38 Cr. L. J. 9, *Baburao Tatyarao v. Emperor*. (Charge of criminal breach of trust not unfolding even approximately the dates

the principle that the accused must have a definite charge to answer; a charge which contains the gross sum and the dates as mentioned in this sub-section may yet be bad as being too vague.⁵ Nor does the section dispense with the necessity of a finding as to a definite sum having been misappropriated *before the accused can be convicted*.⁶

The sub-section does not *prohibit* the specification of particular items misappropriated where a gross sum is given as the subject-matter of the offence.⁷ So also, where a charge is laid under this section for a gross sum embezzled, the Court is not precluded from examining the evidence in respect of each item which went to make up the total amount entered in the charge-sheet.^{7a} Nor does the fact that particular items are specified in the charge detract from its character as a charge for a single offence and convert it into a charge for as many offences as there are items particularised.⁸

The sub-section only provides that if and when a charge is laid for a gross sum instead of for particular items, the charge is to be treated as a charge for a single offence irrespective of the number of items of which the gross sum is composed. It does not prohibit the framing of different charges in respect of different items,⁹ nor permit such charges when framed to be treated as a charge for a single offence.¹⁰ It applies not only to cases where there is a general deficiency and the prosecution is not able to specify particular items but also to cases where the particular items might have been, but are not specified.¹¹

The sub-section only applies to cases of criminal breach of trust or dishonest misappropriation in respect of *money*. Where the offence

between which accused dishonestly converted to his own use the property in question and referring only to the date on which the conversion was discovered, is bad for vagueness.)

(27) AIR 1927 Lah 109 (109) : 28 Cri L Jour 170, *Emperor v. Abdur Rahman*.

(35) AIR 1935 Oudh 273 (275) : 36 Cri L Jour 518, *Piary Lal v. Emperor*.

5. ('36) 37 Cr. L. J. 439 (440) : 63 Cal 18 : 161 I. C. 280, *Abinash Chandra v. Emperor*.

(07) 6 Cri L Jour 137 (138, 139) (Lah), *Mahommad Shah v. Emperor*.

6. ('20) AIR 1920 All 1274 (275) : 22 Cr. L. J. 84 : 42 All 522, *Mohan Singh v. Emperor*.

(25) AIR 1925 Cal 260 (261) : 26 Cri L Jour 532, *Khirode Kumar v. Emperor*.

[But see ('28) AIR 1928 Bom 148 (149) : 29 Cr. L. J. 407 : 52 Bom 280, *Emperor v. Byramji Jamestji*. (Accused can be convicted where prosecution establishes that some of the money mentioned in the charge has been misappropriated by him even though it may be uncertain what is the exact amount so misappropriated.)]

7. ('04) 1 Cri L. J. 791 (793) : 31 Cal 928 : 8 C W N 807, *Samiruddin v. Nibaran*.

(05) 2 Cr. L. J. 578 (580) : 30 Bom 49 : 7 Bom LR 633, *Emperor v. Datto Hanmant*.

(30) AIR 1930 Cal 717 (718) : 32 Cr. L. J. 321, *Rahim Bux Sarkar v. Emperor*.

(Giving of particulars does not embarrass the accused but is an advantage.)

(34) AIR 1934 Pat 232 (233) : 13 Pat 170 : 35 Cr. L. J. 876, *Ramkishoon v. Emperor*.

7a. ('36) AIR 1936 Oudh 376 (377) : 37 Cr. L. J. 941, *Krishna Priya v. Emperor*.

8. ('04) 27 All 69 (70) : 1904 A W N 165, *Emperor v. Ishtiaq Ahmad*.

(02) 24 All 254 (255) : 1902 A W N 44, *Emperor v. Gulzari Lal*.

9. ('30) AIR 1930 Mad 978 (980) : 32 Cri L Jour 223, *Kanakayya v. Emperor*.

(10) 11 Cr. L. J. 337 (338) : 5 I. C. 970 (Bom), *Emperor v. Kashinath Bagaji*.

10. ('33) AIR 1933 Nag 327 (327) : 34 Cr. L. J. 673, *Rameshwar Brijmohan v. Emperor*.

(26) AIR 1926 Bom 110 (113) : 49 Bom 892 : 27 Cr. L. J. 305, *Emperor v. Manant*.

(07) 5 Cr. L. J. 341 (342) : 30 Mad 328 : 17 M L J 141, *Kasi Viswanathan v. Emperor*.

[See ('31) AIR 1931 Rang 161 (162) : 32 Cr. L. J. 1068, *Sera Subramonian v. Emperor*.

(31) AIR 1931 Oudh 86 (87, 88) : 6 Luck 441 : 32 Cr. L. J. 540, *Dubri Misser v. Emperor*.]

11. ('07) 5 Cri L Jour 133 (135) : 29 Mad 558, *Thomas v. Emperor*.

Section 222
Note 6

has been committed in respect of any other property, the sub-section does not apply.¹²

The sub-section applies only to offences of *criminal breach of trust or dishonest misappropriation*.¹³ Thus, where the accused is alleged to have obtained on different occasions several sums from the complainant by false pretences, a single charge of cheating in respect of all the items is not tenable.¹⁴ So also, this sub-section does not apply to cases where the accused is charged with criminal breach of trust or criminal misappropriation *and* some other offence, such as falsification of accounts, cheating, etc. The provision enabling different items to be lumped together and be charged as a single offence in the case of a criminal breach of trust or dishonest misappropriation cannot be made use of to justify a joint trial of such offence with an offence of a different character.¹⁵

12. ('39) AIR 1939 Mad 575 (576) : 40 Cr. L. J. 851, *Public Prosecutor v. N. S. Sharma*. (S. 222 (2) applies to criminal breach of trust or dishonest misappropriation of money and not of goods—Single charge cannot be framed in respect of total cash and total value of goods misappropriated.)
- ('22) AIR 1922 Oudh 280 (280) : 26 Oudh Cas 4 : 24 Cr. L. J. 10, *Sarju Prasad v. Emperor*. (Charge for criminal breach of trust of some ornaments — Particular acts of breach of trust must be set out.)
- ('11) 12 Cr. L. J. 567 (567) : 12 I. C. 655 (Mad), *Raghavendra Rao v. Emperor*. (Does not apply to criminal appropriation of timber.)
- ('18) AIR 1918 Cal 233 (234) : 18 Cr. L. J. 310 (311), *Asrafulla Sarkar v. Emperor*. (Misappropriation of specific articles.)
- ('27) AIR 1927 All 223 (224) : 49 All 312 : 28 Cr. L. J. 171, *Raman Lal v. Emperor*. (Criminal breach of trust of ornaments.)
- [See ('28) AIR 1928 Bom 521 (521) : 30 Cr. L. J. 329, *Dwarkadas v. Emperor*. (Criminal breach of trust in respect of money — What is — Agent entrusted with goods for sale misappropriating the sale proceeds is within the section.)]
- [See also ('08) 7 Cr. L. J. 372 (374) : 12 C W N 577, *Bipra Das Giri v. Niradamoni Bewa*. (Charge under S. 406, I. P. C., in respect of some deeds not good.)]
13. ('31) AIR 1931 Pat 102 (103) : 32 Cr. L. J. 611, *Abdur Rahim v. Emperor*. (S. 222, sub-s. (2), has no application to charges of cheating.)
- ('26) AIR 1926 Bom 110 (113) : 49 Bom 892 : 27 Cr. L. J. 305, *Emperor v. Manant*. (Does not apply to the offences of falsification of accounts S. 477A, Penal Code.)
- ('15) AIR 1915 Cal 296 (296) : 15 Cr. L. J. 153 (154) : 41 Cal 722, *Raman v. Emperor*. (Do.)
- ('33) AIR 1933 Nag 327 (327) : 34 Cr. L. J. 673, *Rameshwar v. Emperor*. (Do.)
- ('12) 13 Cr. L. J. 21 (22) : 13 I. C. 213 (Mad), *Lakshminarain v. Emperor*. (Do.)
- ('07) 5 Cr. L. J. 341 (342) : 30 Mad 328 : 17 M L J 141, *Kasi v. Emperor*. (Do.)
- ('99) 26 Cal 560 (564) : 3 C W N 412, *Queen-Empress v. Mati Lal Lahiri*. (Do.)
- ('02) 4 Bom L R 433 (434), *Emperor v. Nathalal Bajuji*. (Do.)
- (1900) 10 Mad L Jour 147 (186) (FB), *Subramania Iyer v. Empress*. (Sub-s. (2) does not apply to the offence of bribery or extortion.)
14. ('04) 1 Cri L Jour 977 (978, 979) : 1 A L J 599, *Raja Khan v. Emperor*.
- ('31) AIR 1931 Pat 102 (103) : 32 Cri L Jour 611, *Abdur Rahim v. Emperor*.
15. ('39) AIR 1939 Bom 129 (143) : 40 Cri L Jour 579, *Ramchandra Rango v. Emperor*. (The section only says that the charge is to be treated as charge of one offence and not that there is only one offence in such a case — Hence not necessarily same transaction within S. 235—A I R 1935 Cal 312 dissented from.)
- ('36) AIR 1936 Bom 154 (159) : 60 Bom 148 : 37 Cri L Jour 688, *Shapurji Sorabji v. Emperor*. (Charge of misappropriation can be joined at one trial with charges of forgery and cheating only if the offences have been committed in course of same transaction.)
- ('07) 5 Cri L Jour 341 (342) : 30 Mad 328 : 17 M L J 141 : 2 M L T 177, *Kasi Viswanathan v. Emperor*.
- ('15) AIR 1915 All 462 (462) : 38 All 42 : 16 Cri L Jour 813, *Kalka Prasad v. Emperor*. (Offences under S. 477A, Penal Code.)
- ('26) AIR 1926 Bom 110 (113) : 49 Bom 892 : 27 Cr. L. J. 305, *Emperor v. Manant*.
- ('19) AIR 1919 Lah 440 (441) : 19 Cri L Jour 187, *Emperor v. Jagat Ram*.
- ('15) AIR 1915 Cal 296 (296) : 15 Cr. L. J. 153 : 41 Cal 722, *Raman Behary v. Emperor*.

The sub-section requires that the period during which the offence is alleged to have been committed should not exceed *one year*. Thus, where the dates of misappropriation of the various items extend over a period of more than one year, they cannot all be lumped together in the same charge.¹⁶

The provision enabling it to be stated that the offence was committed *between* certain dates (instead of *on* a certain date) applies not only to cases where different items are alleged to have been misappropriated on different occasions and a charge is framed in respect of the gross sum made up of the different items, but also to cases where a *specific sum* is alleged to have been the subject of the offence.¹⁷

Where a single charge is framed under this section in respect of the embezzlement of different sums, it is only a *single sentence* that can be passed on the accused; a separate sentence cannot be passed in respect of each of the items included in the charge.¹⁸

Under S. 181, sub-s.(2), a charge of criminal misappropriation or criminal breach of trust can be tried or inquired into either at the place where the offence was committed or at the place where any part of the property was received or retained by the accused. As this sub-section (of S. 222) enables any number of acts of misappropriation committed in the course of the same year to be combined in the same charge, jurisdiction to try the charge arises at any place where the offence was committed in respect of any of the items included in the charge or at any place where the money involved in the misappropriation of any of the items was received or retained by the accused.¹⁹

See also Note 9.

7. Applicability of sub-section (2) to cases where there are two or more accused persons. — There is a conflict of decisions as to the applicability of sub-s.(2) to cases where two or more persons are accused of criminal breach of trust or dishonest misappropriation so as to enable a single charge being framed in respect of the total sum misappropriated in a given period where such sum is made up of

(‘31) AIR 1931 Rang 161 (162) : 32 Cr. L. J. 1068, *Sera Subramonian v. Emperor*. (Offence under S. 420, Penal Code.)

(‘08) 8 Cri L Jour 4 (5) : 30 All 351 : 5 A L J 400 : 1908 A W N 152, *Emperor v. Mata Prasad*. (Offence of forgery.)

(‘17) AIR 1917 Mad 612 (612) : 17 Cr. L. J. 369 (369), *In re Krishnamurthi Ayyar*.

16. (‘36) 37 Cri L Jour 439 (440) : 63 Cal 18 : 161 I. C. 280, *Abinash v. Emperor*.

(‘13) 14 Cri L Jour 219 (223) : 19 I. C. 315 (Cal), *Promothanath Ray v. Emperor*.

(‘05) 2 Cr. L. J. 130 (131) : 1905 Pun Re No. 14 Cr., *Dhanjibhay v. Kaim Khan*.

(‘35) AIR 1935 Oudh 241 (244) : 36 Cri L Jour 477, *Munoo Lal v. Emperor*.

(Accused prejudiced — Conviction set aside.)

(‘34) AIR 1934 Pat 132 (133) : 35 Cri L Jour 693, *Deonarain Singh v. Emperor*.

(Conviction set aside as period exceeded one year.)

[See (‘24) AIR 1924 Cal 908 (909) : 25 Cri L Jour 1053, *Harry Jones v. Emperor*.

(*Quare*—Whether a charge under Penal Code, S. 409, is altogether bad as alleging an offence between two dates, the last of which is after the date of the complaint.)]

17. (‘28) AIR 1928 Bom 557(560) : 53 Bom 119 : 30 Cr. L. J. 185, *Vinayak v. Emperor*.

18. (‘31) AIR 1931 All 267 (268, 269) : 52 All 941 : 32 Cr. L. J. 155, *Emperor v. Prem Narain*.

19. (‘32) AIR 1932 All 26 (27, 28) : 33 Cri L Jour 127, *Sunder Lal v. Emperor*.

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Notes 7-8

several items misappropriated on different occasions. On the one hand, it has been held by the Calcutta High Court that the sub-section contemplates only cases in which there is only *one* accused person and that where there are two or more accused persons in a case, separate charges must be framed in respect of the several items as for different offences.¹ The Madras High Court has, on the other hand, held that there is no reason to restrict the scope of the sub-section in this way and even in cases where there are two or more accused persons in a case, it is open to the Court to lump together the different items misappropriated on different occasions and frame a single charge in respect of the total sum composed of the different items.² The Bombay High Court has also accepted the same view.³ But where the charge alleges that some of the accused took part in the misappropriation only in respect of *some* of the items of which the total sum is composed, the sub-section has no application and a single charge cannot be framed so as to cover the acts of all the accused.⁴

8. Charge under sub-section (2)—Whether trial for another item misappropriated during same period is barred.—Where an accused is charged under sub-s.(2) with criminal breach of trust in respect of a gross sum alleged to have been misappropriated by him between two given dates and is convicted or acquitted of such charge, he can be tried *again* in respect of another sum of money alleged to have been misappropriated by him during the same period but not included in the sum which was the subject-matter of the previous trial.¹ Such a trial is not barred under S. 403. The reason is that in such a case the subsequent trial is not for the same offence as formed the subject of previous trial. *A fortiori*, where the previous trial was not for a gross sum misappropriated between two dates but was for misappropriation of specific sums of money received on specific dates, a fresh trial for another offence in respect of a different sum of money said to have been misappropriated about the same time is not barred.²

Note 7

1. ('12) 13 Cri L Jour 506 (507) : 15 I. C. 650 (Cal), *Girwar Narain v. Emperor*. (It is impossible to hold that two persons can be guilty of misappropriation of the same parcel of money.)
[See also ('07) 6 Cr. L. J. 442 (444):6 C. L. J. 757, *Tilak Dhari Das v. Emperor*. (Two persons accused of different offences committed in different transactions relating to different persons should be tried separately.)]
2. ('17) AIR 1917 Mad 524 (525) : 17 Cri L Jour 30 (31), *In re Appadurai Ayyar*.
3. ('36) AIR 1936 Bom 379 (382) : 38 Cr. L. J. 9, *Baburao Tatyarao v. Emperor*. (Two accused — Lumping together the sums said to have been misappropriated held to be proper.)
4. ('31) AIR 1931 Rang 90 (93, 94):8 Rang 632:32 Cr. L. J. 930, *Meeriah v. Emperor*.

Note 8

1. ('23) AIR 1923 Cal 654 (656):50 Cal 632:25 Cr.L.J. 156, *Nagendra v. Emperor*. ('31) AIR 1931 All 209 (209):53 All 411 : 32 Cr.L.J. 376, *Brijivan Das v. Emperor*. ('10) 11 Cr. L. J. 337 (339) : 5 I. C. 970 (Bom), *Emperor v. Kashinath Bagaji Sali*.
[See also ('29) AIR 1929 Cal 457 (459) : 57 Cal 17 : 31 Cr. L. J. 747, *Sidh Nath v. Emperor*. (If a person misappropriates different sums of money he commits so many offences—But it is not proper that he should be tried as many times when he could have been tried for all of them at one trial.)]
[But see ('17) AIR 1917 Mad 524 (525): 17 Cr. L. J. 30 (32), *In re Appadurai Ayyar*.]
2. ('30) AIR 1930 Mad 978 (980) : 32 Cri L Jour 223, *Kanakayya v. Emperor*.
See also S. 403 Note 5.

9. Charge of criminal conspiracy. — In a charge of criminal conspiracy to commit an offence, the same certainty is not required in stating the object of the conspiracy as in a charge for the offence conspired to be committed. Thus, a charge of criminal conspiracy to commit a criminal breach of trust or criminal misappropriation is not bad for want of particulars as to dates, etc. of the alleged misappropriation.¹ Nor is such a charge bad because the period of the conspiracy is said to exceed one year.²

Section 222
Note 9

223.* When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

Section 223

When manner of committing offence must be stated.

Illustrations

(a) *A* is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) *A* is accused of cheating *B* at a given time and place. The charge must set out the manner in which *A* cheated *B*.

(c) *A* is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by *A* which is alleged to be false.

(d) *A* is accused of obstructing *B*, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which *A* obstructed *B* in the discharge of his functions.

(e) *A* is accused of the murder of *B* at a given time and place. The charge need not state the manner in which *A* murdered *B*.

(f) *A* is accused of disobeying a direction of the law with intent to save *B* from punishment. The charge must set out the disobedience charged and the law infringed.

Synopsis

- | | |
|---|---|
| 1. Scope of the section. | 10. Hurt, grievous hurt, etc. |
| 2. Mode of framing charge in various cases. See Notes 3 to 9. | 11. Forgery, etc. |
| 3. Offence of giving false evidence. | 12. Culpable homicide and murder. |
| 4. Rioting. | 13. Receiving stolen property. |
| 5. House-breaking, criminal trespass, etc. | 14. Kidnapping and abduction. |
| 6. Sedition, promoting class-hatred, etc. | 15. Extortion. |
| 7. Cheating. | 16. Unlawful assembly. |
| 8. Defamation. | 17. Other offences. |
| 9. Falsification of accounts. | 18. Act done by several persons in furtherance of a common intention. |

* 1882 : S. 223; 1872 : S. 441; 1861 : Nil.

Note 9

- (1938) AIR 1938 Cal 195 (199) : 39 Cr. L. J. 417, *Ramkrishna Sinha v. Emperor*.
- (1938) AIR 1938 Cal 195 (199) : 39 Cr. L. J. 417, *Ramkrishna Sinha v. Emperor*.
- (1938) AIR 1938 Sind 171 (173) : 39 Cr. L. J. 890 : I J. R. (1939) Kar 204, *Emperor v. Balumal Hotchand*.

Section 223
Note 1*Other Topics (miscellaneous)*

Notice of the charge. See Note 1.

Particulars as to the manner of commission. See Note 1.

Vague charges. See Note 1.

1. Scope of the section. — The description of offences in the Penal Code must of necessity be expressed in abstract terms, but the very object of the trial is to determine whether particular acts or omissions on the part of an accused fall or do not fall within the rule thus abstractedly stated.¹ Conformably to this principle, this section lays down that, in cases in which the particulars in ss. 221 and 222 are not sufficient to give the accused notice of the matters charged against him, the *manner* in which the offence was committed should also be stated in the charge.² The models of charges set forth in schedule v also contain or imply the setting forth with reasonable particularity of the matters alleged to constitute the offence. Thus, where an accused was charged that he "being a public servant knowingly disobeyed the direction of the law as to the way in which he had to conduct himself, etc.," it was held that the charge should set forth *what* the *direction* was, and what the conduct was, which contravened it.³

As has been seen in Notes to S. 221, the object of these sections is *firstly* to ensure that the accused has sufficient notice of the matter with which he is charged as otherwise he will be seriously prejudiced in his defence⁴ and *secondly* to enable the Court to keep in view the

Section 223 — Note 1

1. ('78) 2 Bom 142 (144), *Imperatrix v. Baban Khan*.
2. ('38) AIR 1938 Lah 828 (831) : 40 Cr. L. J. 371, *Gian Singh v. Emperor*.
[See ('35) AIR 1935 Sind 34 (37) : 28 Sind L R 301 : 36 Cri L Jour 598, *Ghousbuz Mahomed Aman Khan v. Emperor*.]
3. ('78) 2 Bom 142 (144), *Imperatrix v. Baban Khan*.
4. ('69) 1869 Pun Re No. 36 Cr. p. 65, *Mewa Singh v. Crown*.
('85) 11 Cal 106 (108), *Behari Mahaton v. Queen-Empress*. (Accused entitled to know with certainty and accuracy exact value of the charge brought against him. Unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases; but it is more especially true in cases where it is sought to implicate an accused person for acts not committed by himself but by others with whom he was in company.)
('90) 15 Bom 491 (503, 504), *Queen-Empress v. Fakirapa*.
('78) 2 Bom 142 (144), *Imperatrix v. Baban Khan*.
('67) 8 Suth W R Cr 95 (96), *In re Dowlat Moonshee*. (Charge of giving false evidence—Words and expressions uttered by the accused and alleged to be false should be given.)
('16) AIR 1916 Cal 188 (192) : 16 Cr. L. J. 497 (501) : 42 Cal 957, *Amritlal v. Emperor*.
('16) AIR 1916 All 60 (60) : 17 Cr. L. J. 411 (411), *Ram Chandar Sahai v. Emperor*. (It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him.)
('68) 10 Suth W R Cr 37 (38) : 1 Beng L R App Cr 13, *Empress v. Fatik Biswas*. (A charge not specifying the judicial proceedings in which accused is alleged to have made a false statement is defective.)
('18) AIR 1918 All 322 (323) : 19 Cr. L. J. 35, *Sital v. Emperor*. (In a case where it is doubtful what offence has been really committed by the accused, it is especially necessary that the charge should be clearly framed.)
('25) AIR 1925 Cal 603 (603, 604) : 26 Cr. L. J. 849, *Kedarnath Chakravarti v. Emperor*. (Necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure.)
('28) AIR 1928 Cal 675 (676) : 55 Cal 858 : 29 Cr. L. J. 1022, *Satya Narain v. Emperor*. (In order to convict a man of an offence, all the material facts which constitute the offence, and which are necessary to enable the parties to avail

real points in issue and to confine the evidence to such points.⁵

The section does not require that the manner in which the alleged offence was committed must be described in the charge in every case. When the nature of the case is such that the mere mention of the particulars specified in ss. 221 and 222 affords sufficient notice to the accused of the matter with which he is charged, this section does not apply and particulars as to the *manner of commission* of the alleged offence need not be given in the charge.⁶ No general rule, however, can be laid down as to in what cases such particulars will be necessary, the matter depending on the circumstances of each case.⁷

As to the *extent* to which particulars of the manner of commission of an offence should be given in a charge, no hard and fast rule can be laid down. Each case must depend on its own circumstances, regard being had to the question whether the particulars given are such as to give the accused *sufficient notice of the matter he has to meet*.⁸ Besides, the charge must allege all facts which are essential factors of the offence in question: see S. 221.⁹ But a charge should not be prolix

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themselves of the verdict and judgment, should the same charge be again brought forward, must be stated.)

('19) AIR 1919 Pat 27 (30) : 4 Pat L Jour 74 : 20 Cri L Jour 161 (FB), *Mt. Kesar v. Emperor*. (Charges to be precise in their scope and particular in their details.)

('22) AIR 1922 Pat 5 (7) : 23 Cr. L. J. 114, *Bal Kesar Singh v. Emperor*.

[See ('23) AIR 1923 All 325 (326) : 24 Cr. L. J. 197, *Abdul Wahid v. Abdullah*. (Order under S. 476, in the absence of accusation of perjury, is bad.)]

See also S. 221 Note 1, S. 255 Note 3, S. 286 Note 4, S. 476 Note 14 and S. 535 Note 3.

5. ('69) 1869 Pun Re No. 36 Cr, p. 65 (65), *Mewa Singh v. Crown*.

[See ('18) AIR 1918 Pat 448 (450, 451) : 19 Cr. L. J. 169, *Ramdhari Singh v. Emperor*.]

6. ('16) AIR 1916 All 60 (60) : 17 Cr. L. J. 411 (411), *Ram Chandar v. Emperor*. (Where a person by a single act of arson sets fire and destroys several stacks of several persons no particulars are necessary but it is otherwise in case of extortion practised on several persons.)

7. ('12) 13 Cr. L. J. 218 (219) : 14 I. C. 314 : 39 Cal 781, *Kudrutullah v. Emperor*.

8. ('25) AIR 1925 Cal 603 (604) : 26 Cr. L. J. 849, *Kedarnath v. Emperor*.

('70) 14 Suth W R Cr 13 (13), *Queen v. Parbutty Churn*. (Prisoner could be little prejudiced by the informal character of the charge if offence is stated in such a way that it cannot reasonably be mistaken.)

(1864) 1 Suth W R Cr L 13 (13, 14). (Charge should not be abbreviated by the use of words 'et ceteras'—Explicit and full statements such as can easily be intelligible to an accused are always requisite in charges.)

(1865) 2 Suth W R Cr L 5 (5). (Mere mention of section under which accused is charged is not enough.)

(1865) 2 Suth W R Cr L 11 (11). (Do.)

('33) AIR 1933 Cal 676 (677) : 60 Cal 1394 : 34 Cri L Jour 1219, *Rajabuddin Mondal v. Emperor*. (It is not sufficient merely to charge the accused in the bare words of a section of the Code.)

[See ('10) 11 Cri L Jour 274 (275) : 3 Ind Cas 344 (FB) (Mad), *In re Ganapathy Sastri*. (Charges against legal practitioner in proceedings under the Legal Practitioners Act must be precise and clear.)

('10) 11 Cri L Jour 303 (303) : 6 Ind Cas 269 (PC), *In re Chanda Singh*. (Do.)]

[See also ('93) 1893 Rat 659 (666, 667), *Queen-Empress v. Waman*. (If it is certain on the evidence, that there has been an offence the Code is sufficiently wide in its provisions to enable a charge of such offence to be framed and does not require the prosecution to furnish for such charge more particulars than under the circumstances it can reasonably be expected to know.)]

9. ('36) AIR 1936 Nag 275 (276) : 38 Cri L Jour 380 (381), *Vithal Sonaji v. Emperor*. (Offence under S. 228, Penal Code—Stress should be laid on the essential element, namely, that the Court was sitting in a judicial proceeding at the time when the insult was offered.)

('97) 1897 Rat 921 (921), *Queen-Empress v. Punya Sakharam*. (Under S. 398, Penal Code, the carrying of arms must be distinctly alleged in the charge.)

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Notes 1-3

and rambling and should not contain unnecessary allegations.¹⁰

As to the effect of error or omission in regard to the statement of the particulars required by this section, see Ss. 225, 232 and 537 and Notes thereunder.

2. Mode of framing charge in various cases. — See Notes 3 to 9.

3. Offence of giving false evidence. — A charge of giving false evidence should be very carefully drawn up and must contain full particulars of the *manner* in which the offence was committed.¹ It should specify the *particular statements* which are alleged to be false.²

(1864) 1 Suth W R Cr L 9 (9). (Charge under S. 109, Penal Code, should state that the act abetted was committed in consequence of the abetment.)

(1864) 1 Suth W R Cr L 13 (13). (Do.)

(1865) 2 Suth W R Cr L 19 (19, 20). (Charge under S. 471 and, if as would seem to be the case, S. 468 is alluded to with a view to specify the punishment, to which liability is incurred, the charge should have contained the words "punishable under S. 471 coupled with S. 468" and should contain the description of the document.)

(1862) 3 Suth W R Cr L 7 (7). (To bring charge under S. 467 the document forged should have been one of those described in that section and this should be stated in the charge.)

(1865) 3 Suth W R Cr L 8 (8). (Charge under S. 149, Penal Code, read with another section—Charge should state that an offence was committed "in prosecution of the common object," and not while the accused was a "member" of the unlawful assembly.)

('70) 14 Suth W R Cr L 13 (14), *Queen v. Parbutty Churn*. (Where fraud or dishonesty is an ingredient of an offence, charge should specifically refer to fraud or dishonesty and name of the person defrauded.)

('71) 16 Suth W R Cr L 53 (54), *Queen v. Mehar Dowalia*. (Charge under S. 451, Penal Code, should be for trespass with intent to commit some specific offence punishable with imprisonment — If this is omitted then nothing remains but a charge for house-trespass.)

('67) 8 Suth W R Cr L 30 (30), *Queen v. Durbarro Polic*. (Charge under S. 436, Penal Code, charge of mischief by fire, with intent to cause destruction of dwelling house, should state the intent as an intent to cause the destruction, not of a house simply, but of a house used as a human dwelling.)

('11) 12 Cri L Jour 483 (483) : 12 Ind Cas 91 (Lah), *Lala v. Emperor*. (Charge did not set out the motive of the house-breaking—Charge does not come within the provisions of S. 457.)

(1865-67) 3 Bom H C R App 1 (25), *Vithoba Malhari v. A. K. Corfield*. (Charge under Bombay Regulation 1 of 1814 against servant absenting himself should set out that the accused left his employer's service without giving the required warning and without lawful excuse.)

10. ('26) AIR 1926 Oudh 245 (247, 248) : 27 Cri L Jour 57, *Bhulan v. Emperor*.

('66-67) 4 Bom H C R 17 (22), *Reg. v. Francis Cassidy*. (Unnecessary allegations in a charge may be rejected as surplusage.)

Note 3

1. ('06) 4 Cri L Jour 227 (229) : 10 C W N 1099 : 4 C. L. J. 558, *Hiranand Ojha v. Emperor*. (Charge should not be vague.)

('68) 10 Suth W R Cr L 37 (38) : 1 Beng L R App Cr 13, *Empress v. Fatik Biswas*.

('68) 9 Suth W R Cr L 54 (56), *Queen v. Kali Churn*.

('06) 3 All L Jour 110n (110n, 111n), *Naurang v. Emperor*.

('71) 3 N W P H C R 314 (314, 315), *Queen v. Sheo Churn*.

2. ('24) AIR 1924 Cal 104 (109) : 25 Cr L J 177, *Oates v. Emperor*.

('17) AIR 1917 Pat 639 (639) : 18 Cr. L. J. 1039, *Bansi Pande v. Emperor*. (Contradictory statements which the accused was alleged to have made must be set out in the charge.)

('66) 5 Suth W R Cr L 3, p. 2.

(1865) 4 Suth W R Cr L 3 (4).

('67) 8 Suth W R Cr L 95 (96), *In re Dowlut Moonshee*.

('75) 7 N W P H C R 137 (145), *Queen v. Jamurha*. (The alleged false evidence, and not its assumed substance and purport should be set out in the charge.)

('06) 3 All L Jour 110n (110n, 111n), *Naurang v. Emperor*.

Merely setting out the *entire deposition* without specifying what portions thereof are false is not enough.³ Where a person is accused of giving false evidence on *several occasions*, each occasion should form the subject of a distinct head of the charge.⁴ The offence of giving false evidence is one with a specific name within the meaning of S. 221; it is therefore not necessary to state that the charge falls within a particular part of the section.⁵ Nor is it necessary to state that the

- (‘69) 1869 Pun Re No. 36 Cr, p. 65, *Mewa Singh v. Crown*.
 (1900-02) 1 Low Bur Rul 268 (269), *Crown v. Mi Shwe Kc.* (Exact words recorded to have been spoken by the accused should be set forth and not a paraphrase.)
 (‘71) 16 Suth W R Cr 47 (47) : 7 Beng L R App 66, *Queen v. Maharaj Misser*.
 (‘72) 17 Suth W R Cr 32 (32, 33), *Queen v. Boodhun Ahir*. (Precise words spoken by the accused and not their effect is to be set out in the charge-sheet.)
 (‘90) 1890 Rat 511 (514), *Queen-Empress v. Bhikaji Rao*.
 (‘75) 23 Suth W R Cr 28 (30), *Queen v. Mungal Dass*.
 (‘89) 1899 Rat 488 (490), *Queen-Empress v. Kalidas*.
 (‘01) 28 Cal 434 (437) : 5 C W N 609, *Reily v. Emperor*.
 (‘82) 5 All 17 (22, 23) : 1882 A W N 161, *Empress v. Niaz Ali*.
 (‘99) 21 All 159 (162) : 1899 A W N 5, *Queen-Empress v. Zakir Husain*.
 (‘97) 1897 Rat 925 (926), *Queen-Empress v. Daulata Dhondi*.
 (‘65) 2 Suth W R Cr 51 (51), *Queen v. Bhutto Lalljee*. (Omission to specify the statement alleged to be false is not material if the accused were aware what statements they were charged with having made falsely.)
 (‘66) 5 Suth W R Cr 71 (71), *Queen v. Fazul Meeah*.
 2 Shome L R 38, *In re Purushottam Lall Khattri*.
 (‘76) 25 Suth W R Cr 46 (47), *Queen v. Udit Singh*.
 (‘68) 9 Suth W R Cr 54 (56), *Queen v. Kali Churn*.
 (‘68) 9 Suth W R Cr 14 (14), *Queen v. Feojdar Roy*.
 (‘68) 9 Suth W R Cr 25 (26, 27), *Queen v. Soonder Mohooree*.
 (‘09) 10 Cri L Jour 150 (153) : 36 Cal 808 : 2 I. C. 697, *Rakhalchandra Laha v. Emperor*. (Order sanctioning did not, but charge did specify particular statements alleged to be false — Conviction was not set aside.)
 (‘71) 3 N WPH C R 314 (314, 315), *Queen v. Sheo Churn*. (Charge that accused “on or about 15th April 1871 gave false evidence” is not enough.)
 (‘01) 5 Cal W N 615 (616), *Mohim Chunder v. Emperor*.
 (1900) 28 Cal 348 (352) : 5 C W N 65, *Isab Mandal v. Queen-Empress*.
 [See (‘23) AIR 1923 All 325 (326) : 24 Cri L Jour 197, *Abdul Wahid Khan v. Abdullah Khan*. (Order purporting to be under S. 476, Cr. P. C., is bad in law if it does not contain arraignments of perjury.)
 (‘18) AIR 1918 Pat 448 (450, 451) : 19 Cri L Jour 169, *Ramadhari Singh v. Emperor*. (Order under S. 476 should specify the statements alleged to be false.)
 (‘94) 19 Bom 362 (363) : 1894 Rat 693, *In re Jivan Ambaidas*. (Sanction to prosecute for giving false evidence should specify clearly the statement alleged to be false.)
 (‘84) 6 All 105 (106, 107), *In the matter of Har Dial*. (Sanction to prosecute.)
 (‘96) 18 All 203 (205) : 1896 A W N 31, *Balwant Singh v. Umed Singh*. (Application for sanction to prosecute.)
 (1900) 27 Cal 985 (987, 988) : 5 C W N 131, *Durga Das v. Umesh Chandra*. (Complaint by Court.)
 [See however (‘10) 11 Cr. L. J. 277 (279) : 4 I. C. 539 (P C), *In the matter of Lai Hing Firm*. (Whole evidence of witness, a tissue of falsehood — Charge not admitting of being formulated in a series of specific allegations of perjury—Gist of accusation sufficiently clear to the accused — Accused not prejudiced by the charge — Charge held as proper.)]

See also S. 476 Note 14.

3. (‘68) 9 Suth W R Cr 25 (26), *Queen v. Soonder Mohooree*.
 (‘24) AIR 1924 Cal 104 (106, 109) : 25 Cr. L. J. 177, *R. H. E. Oates v. Emperor*.
 (‘76) 25 Suth W R Cr 46 (47), *Queen v. Udit Singh*.
 4. (‘12) 13 Cr. L. J. 62 (63) : 13 I. C. 398 (Cal), *Jang Bahadur Lal v. Emperor*.
 (‘68) 9 Suth W R Cr 14 (14), *Queen v. Feojdar Roy*.
 5. (‘21) AIR 1921 Bom 3 (13) : 45 Bom 834 : 22 Cr. L. J. 241 (FB), *Purshottam v. Emperor*.

Section 223
Notes 3-4

subject of the false statement is material to the result of the inquiry.⁶ Where there are several false statements in the same deposition, there should only be a *single* charge for all such statements.⁷

As to the mode of framing a charge where the accused has made two contradictory statements but it is doubtful which of them is false, see S. 236 and Notes thereunder.

4. Rioting. — “Rioting” is an offence with a specific name and, under sub-s.(2) of S. 221, may be described by its name only.¹ When a person is charged with “rioting” it means that the prosecution alleges that all the necessary ingredients constituting the offence of rioting are present; it is not necessary to set out what those ingredients are.² There is, however, a conflict of opinions as to whether the *common object* of the unlawful assembly is necessary to be mentioned in the charge. On the one hand it has been held that the common object does not come within the particulars mentioned in Ss. 221 and 222, nor within S. 223 as a *manner* in which the offence is committed and that therefore it is not necessary to be stated in the charge though it would be *desirable* to do so.³ In *Kudrutullah v. Emperor*⁴ it was held that the offence of rioting “can be legally described by its specific name and the question whether any further particulars are *necessary under section 223*, Criminal Procedure Code, must be a question of discretion according to the circumstances of each case.” This seems to suggest that the common object may be considered as the *manner* in which the offence was committed. It is apparently in this view that it has been held in a number of cases that the common object must be stated in a charge of rioting.⁵

6. (1862) 1 Weir 146 (151) : 1 Mad H C R 38, *Queen v. Aidrus Sahib*.

7. ('71) 1 Weir 160 (161).

Note 4

1. ('12) 13 Cr. L. J. 218 (219) : 39 Cal 781 : 14 I. C. 314, *Kudrutullah v. Emperor*.

('28) AIR 1928 Cal 732 (734) : 55 Cal 879 : 29 Cr. L. J. 823, *Emperor v. Ramchandra*.

2. ('36) AIR 1936 Pat 627 (628) : 38 Cri L Jour 87, *Suraj Dusadh v. Emperor*.

(Charge need not include the words “by force or by show of force” as the suggestion of force is contained in the word ‘rioting.’)

('28) AIR 1928 Cal 732 (733, 734) : 55 Cal 879 : 29 Cr. L. J. 823, *Emperor v. Ramchandra*. (Allegation that there were five or more persons actuated by common object is not necessary.)

3. ('33) AIR 1933 Oudh 19 (20) : 8 Luck 199 : 34 Cr. L. J. 393, *Ghaziuddin Khan v. Emperor*. (In this case there was also a charge under S. 149, Penal Code.)

('15) AIR 1915 Lah 418 (422) : 16 Cri L Jour 689 (693) : 1915 Pun Re No. 16 Cr, *Dhian Singh v. Emperor*. (Do.)

4. ('12) 13 Cri L Jour 218 (219) : 39 Cal 781 : 14 Ind Cas 314.

5. ('85) 11 Cal 106 (108), *Behari Mahaton v. Empress*.

('94) 21 Cal 955 (968, 969), *Wafadar Khan v. Empress*.

('99) 26 Cal 630 (633), *Tafazzul Ahmed Choudury v. Empress*.

('94) 22 Cal 276 (285), *Sabir v. Empress*.

('05) 2 Cr. L. J. 275 (277) : 9 C W N 599, *Budhu v. Mt. Lachminia*.

('07) 6 Cr. L. J. 446 (448, 449) (Lah), *Gowardhan Das v. Emperor*. (But omission to state common object is not fatal to conviction if accused is not prejudiced.)

(1865) 4 Suth W R Cr 9 (9, 10), *Queen v. Hurlpaul*.

('94) 21 Cal 827 (831), *Basireddi v. Empress*.

('16) AIR 1916 Mad 834 (834) : 16 Cr. L. J. 809 (809), *In re Ramaswamy Naidu*.

('21) AIR 1921 Cal 605 (606) : 25 Cri L Jour 524, *Kashi v. Damu*.

('25) AIR 1925 Cal 913 (913) : 26 Cr. L. J. 827, *Anirudda Mana v. Emperor*.

('34) AIR 1934 Sind 164 (169) : 36 Cr. L. J. 231, *Allahrakhio v. Emperor*. (Charge under S. 148.)

5. House-breaking, criminal trespass, etc. — A charge of house-breaking or lurking house-trespass under S. 457, Penal Code, or an offence under S. 451 of the Penal Code is not an offence with a *specific name* and therefore so much of the definition of the offence as is necessary to give notice to the accused of the matter charged must be set out under S. 221. Thus, it must specify the intention with which the accused is alleged to have committed the trespass.¹ Where the charge does not specify any intention of the kind mentioned in the section, the accused cannot be convicted under it,² unless it is quite certain that he has not in any way been misled or prejudiced in his defence by the defect in the charge: see S. 225. Similarly, it is not open to a Court to convict an accused under S. 457, Penal Code, when the intention found to have been entertained by him is different from that specified in the charge,³ unless the accused has not been misled by the defect in the charge.⁴ But where the intention specified in the charge under S. 457 is not established, it is open to the Court to convict him under S. 456⁵: see S. 238 Note 1.

See also the undermentioned cases.⁶

For a conviction under S. 447 which is an offence with a specific name, it is not necessary to specify the ulterior offence the accused intended to commit.⁷

6. Sedition, promoting class-hatred, etc. — In a charge under S. 124A, Penal Code (sedition) or S. 153A, Penal Code (promoting class-

- (‘24) AIR 1924 Lah 667 (668) : 25 Cr. L. J. 43, *Allah Dad v. Emperor*.
 (‘28) AIR 1928 Pat 405 (408):29 Cr.L.J. 390, *Aklu v. Emperor*. (Charge should mention the principal and prominent common object and not incidental happenings.)
 (‘08) 8 Cr. L. J. 41 (46) (Kathiawar), *In re Koli Moli Hari*.
 [See (‘24) AIR 1924 Mad 584 (584, 585) : 25 Cr. L. J. 396, *In re Kottoora Thevan*. (Offence under S. 395 read with S. 149 — Charge should contain count that common object was to commit dacoity.)
 (‘08) 8 Cr. L. Jour 129 (130, 131) : 36 Cal 158 : 1 I. C. 794, *Dasarathi v. Raghu*. (Where the common object is set out in the charge the conviction is not bad merely because there is no express finding as to the common object.)]

Note 5

1. (‘94) 22 Cal 391 (403), *Balmakand Ram v. Ghansamran*. (1864) 1 Suth W R Cr L 13 (13).
- (‘71) 16 Suth W R Cr 53(54), *Queen v. Mehar*. (Charge under S. 451).
 [See also (‘16) AIR 1916 Mad 571 (572) : 16 Cr. L. Jour 298 (299), *In re Mala Mekala Kati Subbadu*. (A charge under S. 457 is defective if it does not mention the article stolen or the name of person whose house was broken into.)]
2. (‘11) 12 Cr. L. Jour 483 (483) : 12 I. C. 91 (Lah), *Lala v. Emperor*.
3. (‘22) AIR 1922 Pat 5 (7, 8) : 23 Cr. L. Jour 114, *Bal Kesar Singh v. Emperor*. (Conviction under S. 457 with intent to commit adultery on a charge thereunder alleging intent to steal was held bad where the accused was prejudiced.)
 (‘12) 13 Cr. L. Jour 224 (224) : 14 Ind Cas 320 (Cal), *Jharu Sheikh v. Emperor*.
 (‘23) 24 Cr. L. Jour 119 (119) : 71 Ind Cas 247 (Cal), *Hajari Sonar v. Emperor*.
4. [See (‘01) 23 All 82 (83, 84) : 1900 A W N 208, *Queen-Empress v. Kangla*. (Conviction of different intent, e. g., to commit adultery, on a complaint alleging an intent to commit theft.)]
5. (‘17) AIR 1917 Cal 824 (826) : 17 Cr. L. J. 424 : 44 Cal 358, *Karali v. Emperor*.
6. (‘03) 16 C P L R 182 (183), *Emperor v. Mullu Teli*. (Charge under S. 451—It is not necessary that the husband shall bring a specific charge of adultery.)
 (‘11) 12 Cr. L. J. 453 (454) : 11 I. C. 797 (798) (Mad), *In re Kurnam Seshayya*.
 [See (‘06) 4 Cr. L. J. 293 (328) : 1906 Pun Re No. 12 Cr., *Ram Saran v. Emperor*.]
 [But see (‘96) 19 Mad 240 (241) : 1 Weir 537, *Queen-Empress v. Rayapadayachi*. (Intention should be specified.)]

Section 223
Notes 6-7

hatred), it has been held that it is not necessary to set out the offending passages of the speech or writing in question where the case for the prosecution is that the speech or writing in question taken as a whole comes within the mischief of the law.¹ The requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged.²

7. Cheating. — As the illustration to S. 223 shows, in a case of cheating the charge must set out the *manner* in which the offence was committed so as to give the accused sufficient notice of the matter with which he is charged.¹ Whether the manner set out is reasonably sufficient to give the accused such notice depends upon the facts and circumstances of each case. Where the manner was described in the charge as follows: "by deceiving with false representations and promises as well as by conduct," it was held that the expression used was too vague and indefinite.^{1a} Where the charge is for an offence under the first portion of S. 415, Penal Code, it is not necessary to state that any loss was caused by the inducement² though it should be stated that the property induced to be delivered was that of the prosecutor.³ But where the charge is under the second portion of S. 415, it is necessary to state in what way the complainant would be a loser as a result of the inducement.⁴ The reason is that the term 'manner' in this section includes, with reference to an offence of cheating, every ingredient by virtue of which the act ceases to be one of mere

Note 6

1. ('08) 8 Cr. L. J. 272 (279) : 33 Bom 77 : 1 I. C. 641, *Emperor v. Tribuwandas*. ('09) 9 Cri L Jour 140 (141) : 1 Ind Cas 42 (Mad), *In re Chidambaram Pillai*. ('10) 11 Cri L Jour 583 (587) : 4 Sind L R 55 : 8 Ind Cas 203, *Emperor v. Virumal*. (Case under S. 153-A.)
- ('09) 9 Cri L Jour 456 (460) : 32 Mad 384 : 2 Ind Cas 33, *In re Krishnaswami*. [See also ('31) AIR 1931 Lah 186 (187) : 32 Cr. L. J. 1202, *Chint Ram v. Emperor*. (Charge under S. 124-A, I. P. C., substance of the speech should be specified.)]
- [But see ('09) 9 Cri L Jour 108 (112) : 32 Mad 3 : 3 Ind Cas 22, *In re Subramania Siva*. (A charge of sedition is defective if it does not set out the speeches or the passages in the speeches which the prosecution alleges to be seditious, but this defect does not necessarily vitiate the charge.)]
2. See cases in foot-note (1).

Note 7

1. ('25) AIR 1925 Cal 603 (604) : 26 Cri L Jour 849, *Kedar Nath v. Emperor*. ('04) 1 Cri L Jour 124 (129) : 8 C W N 278 (FB), *Hurjee Mull v. Inam Ali Sircar*. (Charge of attempt to cheat.)
- ('33) AIR 1933 Sind 169 (171) : 34 Cr. L. J. 1049, *Varumal Lahrumal v. Emperor*. (Charge should contain allegation that accused acted dishonestly or that he deceived the complainant.)
- ('18) AIR 1918 Nag 22 (26) : 19 Cri L Jour 657, *Jangilal v. Emperor*. (Omission to state the manner is not material if the accused is not misled.)
- ('17) AIR 1917 All 108 (108) : 18 Cri L Jour 131 (131), *Meghraj v. Emperor*.
- ('25) AIR 1925 Cal 674 (675) : 26 Cri L Jour 906, *Gokul Khatik v. Emperor*. (Charge should correctly set out the facts of the case for prosecution upon which it is founded.)
- ('22) AIR 1922 Lah 424 (424) : 23 Cri L Jour 595, *Janaki Das v. Emperor*.
- 1a. ('25) AIR 1925 Cal 603 (604) : 26 Cri L Jour 849, *Kedar Nath v. Emperor*.
2. ('30) AIR 1930 Lah 407 (408) : 32 Cri L Jour 299, *Fateh Haidar v. Emperor*.
3. (1862) 1 Weir 471 (472, 475) : 1 Mad H C R 31, *Queen v. Williams*.
4. ('38) A I R 1938 Lah 828 (831) : 40 Cr. L. J. 371, *Gian Singh v. Emperor*.
- ('17) AIR 1917 All 108 (108) : 18 Cri L Jour 131 (131), *Meghraj v. Emperor*.

non-criminal deception and becomes one of cheating within the meaning of S. 415, Penal Code, and the effect of the deception upon the victim's body, mind, reputation or property would thus be a part of the manner of cheating.⁵ A charge of an attempt to cheat should state the persons upon whom the attempt was made and the manner in which he was induced.⁶

Section 223
Notes 7-11

8. Defamation. — A charge of defamation should set out the words alleged to be defamatory.¹ But where the charge is clear and unambiguous and such that the accused cannot be misled in any way, the mere fact that the exact defamatory words are not reproduced does not vitiate the charge.² Where defamatory words are alleged to have been uttered by the accused on several occasions, the charge must give particulars of the various occasions.³

9. Falsification of accounts. — A charge of falsification of accounts under S. 477A, Penal Code, must specify the entries alleged to be falsified.¹

10. Hurt, grievous hurt, etc. — A charge under S. 324, Penal Code, should follow the wording of the definition of the offence¹ inasmuch as it is not an offence with a specific name, but it need not deny that the hurt was caused on grave and sudden provocation.² Where two persons commit an affray and also cause hurt to each other, the charge must be for the more serious offence of hurt.³ Where the accused is alleged to have caused several hurts, a general charge covering all the hurts without particularising the details will be bad.⁴

11. Forgery, etc. — A charge of forgery should contain a description of the document forged. It is not sufficient to say merely that the accused committed forgery by signing the name of a certain person (specified) on a document.¹ See also the undermentioned cases.²

5. ('38) AIR 1938 Lah 828 (831) : 40 Cr. L. J. 371, *Gian Singh v. Emperor*.

6. ('04) 1 Cr. L. J. 124 (129) : 8 C W N 278 (FB), *Hurjee Mull v. Inam Ali Sircar*.

Note 8

1. ('25) AIR 1925 Cal 1121 (1125) : 26 Cr. L. J. 1539, *Pratab Chandra v. Emperor*.

2. ('32) AIR 1932 Nag 158 (159) : 34 Cri L Jour 154, *Samrathmal v. Emperor*.

3. ('30) AIR 1930 Sind 62 (63, 64) : 30 Cr. L. J. 1073, *Ali Mahomed v. Emperor*.

Note 9

1. ('12) 13 Cri L Jour 251 (251) : 14 Ind Cas 603 (Mad), *Aiyagiri Venkataramiah v. Emperor*. (Accused had no doubt about the substance of the charge against him — Conviction was therefore upheld.)

[See also ('99) 26 Cal 560 (563) : 3 C W N 412, *Empress v. Mati Lal Lahiri*. (Particular registers and returns alleged to be falsified.)]

Note 10

1. ('97-01) 1 Upp Bur Rul 318 (318), *Queen-Empress v. Nya Seik*.

2. ('68) 4 Mad H C R App 5 (5). (Where Legislature provides an example of the indictment to be used that form must be held to be sufficient.)

3. ('08) 7 Cri L Jour 498 (499) : 4 Low Bur Rul 237, *Emperor v. Nga Ywe*.

4. ('90) 15 Bom 491 (503, 504), *Queen-Empress v. Fakirapa*.

Note 11

1. (1865) 4 Suth W R Cri L 4 (4).

2. ('13) 14 Cri L Jour 129 (130) : 18 Ind Cas 881 (Cal), *Haidar Ali Pradhania v. Emperor*. (Charge under S. 467, Penal Code—Intention must be specified.)

('69) 6 Bom H C R 43 (44), *Reg. v. Gangaram Malji*. (Charge under S. 471—If sentence is to be on footing of the document being one of the kind mentioned in S. 467, the charge should specify the nature of the document.)

Section 223
Notes 12-14

12. Culpable homicide and murder. — Illustration (c) to this section shows that the charge for murder need not set out the manner in which *A* murdered *B*. But as has been seen in the Notes to S. 221, where the charge does give details it must be fully and correctly given. Thus, it should follow the definition and language of S. 300 of the Code.¹ Where the murder is alleged to have been effected by blows, it should set out that the blows were inflicted with the intention of causing death or that they were sufficient in the ordinary course of nature to cause death and that they were intentionally inflicted.^{1a} It should mention the fact of death having been caused² and in cases of wilful murder the words "culpable homicide amounting to murder" must be used.³ Section 34 of the Penal Code cannot be used in a charge under the second part of S. 304 of that Code.⁴ See also the under-mentioned cases.⁵

13. Receiving stolen property. — A charge of *receiving stolen property* should state that the accused dishonestly retained or received stolen property knowing or having reason to believe that it had been stolen.¹ It should also mention the name of the person to whom the property belonged.²

14. Kidnapping and abduction. — In a charge of *kidnapping* under S. 366, Penal Code, it should appear clearly whether the accused

(1864) 1 Suth W R Cr L 9 (9).

(1865) 2 Suth W R Cr L 19 (19, 20).

('66) 3 Suth W R Cr L 8 (8).

(1864) 1 Suth W R Cr L 10 (10).

Note 12

1. ('26) AIR 1926 Oudh 148 (149) : 27 Cri L Jour 62, *Shco Shankar v. Emperor*.

1a. ('26) AIR 1926 Oudh 148 (149) : 27 Cri L Jour 62, *Shco Shankar v. Emperor*.

('82) 8 Cal 211 (213) : 10 C. L. R. 11, *In re Samiruddin*. (Charge is inexact and defective if the words used are 'in the course of nature' instead of 'in the ordinary course of nature'.)

('93-1900) 1893-1900 Low Bur Rul 328 (328), *Nga Nge v. Queen-Empress*.

(1865) 3 Suth W R Cr L 3 (3). (Culpable homicide not amounting to murder — Intention or knowledge in S. 299, Penal Code, should be specified.)

('66) 5 Suth W R (Recorders' References) 1 (2), *Government v. Ramaswamy*. (Objections to charges on the ground of want of specification of details should be taken before conclusion of trial.)

2. (1865) 2 Suth W R Cr L 17 (17).

3. (1864) 1 Suth W R Cr L 9 (9). (This decision under Code of 1861 says that the charge should deny the special exceptions in S. 300, Penal Code — But now sub-s. (5) removes that necessity.)

(1864) 1 Suth W R Cr L 10 (12). (Do.)

(1864) 1 Suth W R Cr L 13 (13). (Do.)

4. ('25) AIR 1925 Cal 913 (915) : 26 Cr. L. J. 827, *Anirudha Mana v. Emperor*. (This is so because second part of S. 304, Penal Code, expressly excludes intention.)

5. ('35) AIR 1935 Rang 299 (300) : 36 Cr. L. J. 1380, *Nga Tha Aye v. Emperor*. (The question of intention or knowledge should never be mentioned in a charge of homicide.)

('35) AIR 1935 Sind 23 (23) : 28 Sind L R 295 : 36 Cr. L. J. 504, *Ditto v. Emperor*. (Charge under S. 304, I. P. C., should indicate under which part of the section accused is charged.)

Note 13

1. ('98) 1898 A W N 70 (70), *Empress v. Gadlu*. (Charge under S. 411, Penal Code.) ('65) 4 Suth W R Cr L 11 (11).

2. (1863) 1 Bom H C R 95 (96), *Reg. v. Siddu Balnath*.

persons are being charged with kidnapping or with abduction, and similarly whether the intent alleged was an intent to compel the victim to marry against her will or whether the kidnapping or abduction was with the knowledge that it was likely that the victim would be forced or seduced to illicit intercourse.¹ It is always wise where a charge is made, in respect of the same occurrence, both of kidnapping and abducting, that two heads should be made. But it is not illegal to make the two charges under one head. The point to be seen in each case is whether the accused person was prejudiced thereby.² See also the case cited below.³

Section 223
Notes 14-16

15. Extortion. — Where the offence charged involves consequences which may be stated in a general form such as may arise in a case of arson, where a man may by one act of arson set fire and destroy several stacks of several persons, no particulars are required, the nature of the offence being sufficiently stated by the date, time and place of setting of fire; but a charge for extortion or for obtaining money from persons by unlawful means should state with accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person.¹ See also the undermentioned cases.²

16. Unlawful assembly. — In a charge for the offence of being a member of an unlawful assembly, what is necessary is that the accused shall have reasonably distinct notice of the common object¹ imputed to the assembly and of the manner in which that common object is to be brought within the language of S. 141. The charge of unlawful assembly with the common object of "harassing Hindus" is not too general or unfair or unjust to the accused.²

Note 14

1. ('33) AIR 1933 Cal 194 (195) : 34 Cr. L. J. 1107, *Mahomed Ali v. Emperor*. ('29) 30 Cr. L. J. 857 (858) : 117 I. C. 862 (Cal), *Fedu Sheikh v. Emperor*. (Notice of charge of kidnapping under S. 366 is not a fair, proper or sufficient notice of a charge of abduction under the same section.)
2. ('38) AIR 1938 Cal 460 (462) : 39 Cr. L. J. 674, *Ebadi Khan v. Emperor*. (A I R 1927 Cal 644 dissented from.)
3. ('19) AIR 1919 Pat 27 (30) : 20 Cr. L. J. 161 : 4 Pat L J 74 (FB), *Mt. Kesar v. Emperor*. (Charge under S. 366, Penal Code, must specify that the kidnapping was from custody of some mentioned persons. So also charge under S. 368.)

Note 15

1. ('16) AIR 1916 All 60 (60) : 17 Cr. L. J. 411 (411), *Ram Chander v. Emperor*.
2. ('16) AIR 1916 All 60 (60) : 17 Cr. L. J. 411, *Ram Chander v. Emperor*. (Extortion—Approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person should be specified.)
3. ('66) 5 Suth W R Cr L 4 (4). (Charge should state nature of extortion, and the offence punishable with which accused threatened a person.)

Note 16

1. ('23) AIR 1923 Pat 1 (4) : 2 Pat 134 : 23 Cr. L. J. 625 (SB), *Emperor v. Abdul Hamid*. (Charge under S. 145 — Common object must be specified.)
2. ('99) 4 Cal W N 190 (192, 193), *Jagat v. Rakhal*. (Where the common object is to assert a *bona fide* belief in his right to some interest in the land, Magistrates would do well to charge under S. 143, I. P. C., stating as the common object, the object of enforcing a right or supposed right to the property.)
3. ('24) AIR 1924 Mad 376 (377) : 24 Cr. L. J. 852, *In re Parakushiyil Ayamad*.

Section 223
Note 1717. Other offences. — See the undermentioned cases.¹

Note 17

1. Abetment of offences.

- ('38) AIR 1938 Cal 125 (126) : 39 Cri L Jour 395, *Harendra Kumar v. Emperor*. (It is open to the prosecution to charge abetment generally—The charge will amount to notice to the accused that they have to meet a case of abetment in one or more of the different ways indicated in S. 107, I. P. C.)
- ('25) AIR 1925 Cal 341 (345) : 52 Cal 253 : 26 Cr.L.J. 487, *Alimuddi v. Emperor*. (Abetment of offence under S. 114, Penal Code — Specific charge to that effect necessary.)
- (1865) 2 Suth W R Cr L 7 (7). (Charge of abetment under Ss. 109 and 114 should state that abettor was present at the offence and the act abetted was committed in consequence of abetment.)
- (1865) 3 Suth W R Cr L 5 (5). (Charge should state that the act abetted was in consequence of abetment of the accused.)
- ('25) AIR 1925 Mad 364 (364) : 25 Cr. L. J. 1254, *Annavi v. Emperor*. (Charge of abetment by being present at offence of mischief—No particulars as to any act before the offence — Charge bad.)
- (1865) 3 Suth W R Cr L 9 (9).
- ('66) 5 Suth W R Cr L 6 (6). (Charge for instigating another to commit an offence should specify the offence instigated.)
- ('01) 25 Bom 90 (100) : 2 Bom L R 653, *Empress v. Anant Puranik*. (A general charge of instigating various persons to commit dacoities is bad ; separate acts of abetment must be distinctly specified.)
- ('01) 24 Mad 523 (546) : 2 Weir 340 : 11 M L J 241, *Emperor v. Tirumal Reddi*. (Charge of abetment by conspiracy not alleging an overt act in pursuance, is bad.)
- ('22) AIR 1922 Oudh 250 (251) : 25 Oudh Cas 151 : 23 Cr. L. J. 687, *Girja Dayal v. Emperor*. (Charge-sheet which does not specify which accused is charged for abetment and which accused for the principal offence is defective.)
- (1865) 2 Suth W R Cr L 9 (10). (Abetment should be charged as a separate head.)
- ('66) 5 Suth W R Cr L 5 (5). (A mere charge of abetment is not enough ; the particular kind should be specified.)
- (1865) 3 Suth W R Cr L 17 (17). (Mere charge of abetment is not enough.)
- Robbery and Dacoity.**
- ('12) 13 Cr. L. J. 125 (126) : 13 Ind Cas 781 (Mad), *Mandi Ghasi v. Emperor*. (If the charge for dacoity does not set out or indicate which particular dacoity an accused is tried for, the conviction must be set aside.)
- ('11) 12 Cr. L. J. 193 (195) : 10 Ind Cas 684 (Cal), *Rashidazzaman v. Emperor*. (Dacoity—It is not necessary that the charge should in such cases specify that other persons besides those convicted and acquitted took part in the dacoity or that they should be referred to in the charge.)
- ('71) 1871 Rat 55 (56), *Reg. v. Mukta Manka*. (Charge under Penal Code, S. 397 —Aggravating circumstances to be set forth.)
- (1865) 2 Suth W R Cr L 11 (11). (Charge of robbery is sufficient, but if the nature of the violence is described, the language of S. 390 should be adopted.)
- (1864) 1 Suth W R Cr L 10 (11). (Where the charge did not state that the robbery was committed 'on the high way' the charge was held to be defective.)
- ('97) 1897 Rat 921 (921), *Queen-Empress v. Punya Sakharam*. (Charge under S. 398—Carrying of arms must be distinctly alleged.)
- ('33) AIR 1933 Cal 294 (295) : 34 Cr. L. J. 524, *Madhusingh Kaivaria v. Emperor*. (Although charge under S. 396 has an incidental reference to a charge of murder there should be no conviction for murder without a specific charge under S. 302, Penal Code.)
- ('25) AIR 1925 Lah 337 (337) : 6 Lah 24 : 26 Cri L Jour 1153, *Labh Singh v. Emperor*. (If a dacoit commits murder during the dacoity, he should be charged under S. 396, Penal Code, and not under Ss. 304, 395, Penal Code.)
- ('77) 1 Weir 447 (448), *In re Muttirulappan*. (Proper charge—"That you committed dacoity and that, in commission of such dacoity, murder was committed by one of the members, and that you have thereby committed an offence punishable under S. 396, Penal Code".)
- ('26) AIR 1926 Oudh 245 (247, 248) : 27 Cr. L. J. 57, *Bhulan v. Emperor*. (Dacoity with murder—A charge should never contain more than what it is necessary for the prosecution to prove.)
- ('11) 12 Cr. L. J. 468 (468) : 11 I. C. 1004 (LB), *Chan Hok v. Emperor*. (Robbery — Substantive S. 393 should be mentioned in the charge.)

- (1865) 4 Suth W R Cr L 1 (1). (Dacoity with grievous hurt—Charge under S. 397 should also cite S. 395.)
- (‘06) 28 All 401n (406n), *Queen-Empress v. Senta*. (Charge in case of persons using deadly weapons should be under S. 392 or S. 395 read with S. 397 — No charge sheet can be drawn under S. 397 as that section creates no substantive offence.)
- (‘66) 2 Suth W R Cr L 1 (1). (In a charge of dacoity the words ‘conjointly with five or more persons’ are redundant.)
- (‘24) AIR 1924 Mad 584 (584) : 25 Cr. L. J. 396, *In re Kottoora Thiran*. (Conviction for dacoity founded on a common object not charged is not sustainable.)
[See also (‘24) AIR 1924 Cal 613 (614) : 51 Cal 265 : 25 Cr. L. J. 1024, *Emperor v. Ali Mirza*. (Ss. 397, 398 do not create any offence, but merely limit the minimum of punishment which may be awarded if certain facts are proved.)
- (‘25) AIR 1925 All 305 (305) : 47 All 59 : 26 Cr. L. J. 570, *Dulla v. Emperor*. (Conviction in case of dacoity should be under S. 395 read with S. 397, Penal Code.)
- Theft.**
- (‘69) 5 M.H.C.R App xxxvii (xxxvii). (Charge did not allege the essential ingredient of taking out of possession of some person dishonestly—Charge held defective.)
- (‘21) AIR 1921 Cal 605 (606) : 25 Cr. L. J. 524, *Kashi Pramanik v. Damu Pramanik*. (Charge of stealing paddy from a certain land must contain an accurate description of the land from which the paddy was stolen.)
- Criminal conspiracy.**
- (‘16) AIR 1916 Cal 188 (194) : 16 Cri L Jour 497 (502) : 42 Cal 957, *Amritlal Hazra v. Emperor*. (Indictment must in the first place charge the conspiracy.)
- (‘33) AIR 1933 All 498 (501) : 35 Cri L Jour 768, *Manabendra Nath v. Emperor*. (Charge need not contain names of all other conspirators.)
- (‘11) 12 Cri L Jour 2 (2) : 8 Ind Cas 1059 (Cal), *Emperor v. Lalit Mohan Chakravarti*. (In a conspiracy case the accused can be charged with conspiracy with persons unknown, but if they are charged with conspiring with persons known then such persons must be named in the charge.)
- (‘26) AIR 1926 Oudh 161 (165) : 26 Cr. L. J. 1602, *Dichambhar Nath v. Emperor*. (In the nature of things a charge of conspiracy would be vague if the defence expects the proof of the conspiracy to be included in the charge.)
- (‘26) AIR 1926 Sind 171 (173) : 20 Sind L R 18 : 27 Cr. L. J. 243, *Kishan Chand v. Emperor*. (Charge of conspiracy in respect of an agreement between several accused persons to cheat such members of the public as they could defraud by deceitful means is not bad.)
- (‘24) 26 Cri L Jour 33 (40) : 83 Ind Cas 513 (Cal), *Kali Das v. Emperor*. (Accused may legally be charged merely with the offence of criminal conspiracy.)
- (‘28) AIR 1928 Rang 118 (123, 124) : 6 Rang 6 : 29 Cri L Jour 555, *Htin Gyaw v. Emperor*. (Charge need not state in all its details the actual specific acts that the conspirators are alleged to have agreed to do or cause to be done—In most conspiracies the agreement amongst the conspirators is of a general nature.)
- (‘27) AIR 1927 Sind 161 (163) : 28 Cri L Jour 426 : 22 Sind L R 91, *Haji Samo v. Emperor*. (Gist of the offence of criminal conspiracy is the agreement itself and where the object of the agreement is to do an unlawful act and not to do a lawful act by an unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object.)
- (‘09) 10 Cri L Jour 125 (127) : 2 Ind Cas 691 (Cal), *Jogjiban Ghose v. Emperor*. (Statement only that A “conspired” is defective.)
- (‘15) AIR 1915 Lah 16 (47, 48) : 16 Cri L Jour 354 (357) : 1915 Pun Re No. 17 Cr, *Balmokand v. Emperor*. (Charge need not mention the exact date on which conspirators entered into conspiracy.)
- (‘34) AIR 1934 Sind 57 (59, 61) : 28 Sind L R 119 : 35 Cr. L. J. 1337, *Dur Mahomed v. Emperor*. (Approximate dates as to when the conspiracy began and ended will be enough—Exact dates not necessary—No objection to acts done by conspirators in pursuance of the conspiracy being enumerated.)
- [See (‘12) 13 Cri L Jour 609 (650) : 16 Ind Cas 257 (Cal), *Pulin Behary Das v. Emperor*. (Indictment or information for conspiracy must contain concise statement of facts relied upon as constituting the offence.)]
- Offences relating to coins.**
- (1865) 3 Suth W R Cr L 13 (13). (Under S. 239, Penal Code, the nature of the counterfeit coin delivered as genuine should be mentioned.)
- (1865) 2 Suth W R Cr L 11 (11). (Under Ss. 248, 249, Penal Code, the precise offence committed as to the coin viz., that an operation was performed on the coin altering its appearance should be stated.)

Section 223
Note 17

(1865) 2 Suth W R Cr L 5 (5). (Offence which had been committed in respect of the coin of which the accused was said to be in possession should be expressly stated.)

Offences against public justice.

('66) 5 Suth W R Cr L 6 (6). (Charge under S. 205, Penal Code—Nature of the admission or statement made by the accused in the assumed character should be fully stated.)

('66) 5 Suth W R Cr L 8 (8). (S. 202, Penal Code—The nature of the office held by the accused so as to make them public servants should be stated in a charge for knowing commission of offence and negligent omission to give any information.)

('66) 5 Suth W R Cr L 1 (1). (Under S. 224, Penal Code, the charge should state the offence for which the prisoner was lawfully detained when he escaped from custody.)

('92) 16 Bom 414 (424), *Empress v. Vajiram*. (Under S. 206, Penal Code, the specification of the fraudulent transfer is necessary.)

('77) 2 Bom 142 (144, 145), *Imperatrix v. Baban Khan*. (Charge under S. 217, Penal Code, that accused being a public servant knowingly disobeyed the direction of law as to the way in which he had to conduct himself as such public servant with respect to the property found in an investigation of theft. What the direction was and what the conduct was which contravened it the accused was not informed. *Held*, the charge was bad.)

('67) 8 Suth W R Cr 37 (38), *Queen v. Moosubro*. (Ss. 202, 203, Penal Code—A charge in a case of omission to give information of offence should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false; and it should appear precisely what his duty was in the matter.)

('74) 22 Suth W R Cr 42 (42), *Queen v. Ahmed Ali*. (Do.)

Miscellaneous.

('32) AIR 1932 Cal 651 (652, 653) : 33 Cr. L. J. 771 : 60 Cal 201, *Kailash Chandra v. Emperor*. (Charge under S. 292, I. P. C. — Some attempt should be made to indicate in the charge in what respect exactly the book was obscene.)

('26) AIR 1926 Rang 188 (190) : 4 Rang 257 : 27 Cri L Jour 1241, *Ebrahim Mammojee v. Emperor*. (Contempt of court—Formal charge is necessary.)

('76) 1 Cal 356 (358), *Queen v. Upendra Nath Doss*. (A charge under S. 292 should be made specific in regard to the representations alleged to have been exhibited.)

('66) 5 Suth W R Cri L 6 (6). (S. 221, I. P. C.—Charge should specify the office held by the accused so as to make him liable as a public servant.)

('72-92) 1872-92 L B R 262 (262), *Queen-Empress v. Mi Min Si*. (Charge under Ss. 292 and 294, I. P. C.—Obscene words or representations used must be set out.)

('91) 15 Bom 189 (194), *Queen-Empress v. Abaji Ramchandra*. (Charge under S. 475, I. P. C., should distinctly specify the particular papers bearing a counterfeit mark or device which it was alleged the accused had in his possession with the intent mentioned in the section.)

('20) AIR 1920 Cal 624 (629) : 21 Cri L Jour 481, *Lucas v. Official Assignee of Bengal*. (Charge of preferring a creditor under the Presidency Towns Insolvency Act—The fraud practised and the name of the creditor preferred must be alleged.)

(1865) 3 Suth W R Cr L 5 (5). (Under S. 312, I. P. C., the description of the act by which the accused intended to prevent the child being born alive, and further that it was not caused in good faith to save the mother's life, should be stated in the charge.)

(1865) 3 Suth W R Cr 69 (70), *Queen v. Setul Chunder Bagchee*. (Charge of attempting to obtain gratification for influencing a public servant in the exercise of his public functions is illegal as disclosing no legal offence, when it omits to state the person or persons for whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions.)

('16) AIR 1916 Cal 188 (192) : 16 Cr. L. J. 497 (501) : 42 Cal 957, *Amritlal Hazra v. Emperor*. (Charge under S. 4 (b) of Act VI of 1908 (Explosive Substances Act) omitted to state that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously" and secondly that it was the intent of the accused to endanger life in British India — *Held* defect did not vitiate trial.)

('92) 5 C P L R Cr 18 (19), *Empress v. Jhengria*. (Mischief by fire — Charge of an offence under the Penal Code should be drawn up in the words of the section defining the offence.)

('67) 8 Suth W R Cr 30 (30), *Queen v. Durbaroo Polie*. (Do.)

18. Act done by several persons in furtherance of a common intention. — See the undermentioned case.¹

Section 223.
Note 18

224.* In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Words in charge
taken in sense of law
under which offence
is punishable.

Section 224.

225.† No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Section 225.

Illustrations

(a) *A* is charged under section 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that *A* was in fact misled by this omission, the error shall not be regarded as material.

(b) *A* is charged with cheating *B*, and the manner in which he cheated *B* is not set out in the charge, or is set out incorrectly. *A* defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) *A* is charged with cheating *B*, and the manner in which he cheated *B* is not set out in the charge. There were many transactions between *A* and *B* and *A* had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) *A* is charged with the murder of Khoda Baksh on the 21st January 1882. In fact, the murdered person's name was Haidar Baksh, and the date of

* Code of 1882 : S. 224 — Same as above.
Codes of 1872 and 1861 — Nil.

† Code of 1882 : S. 225

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission.

(Illustrations — Same as in 1898 Code).

Code of 1872 : S. 443 — Substantially the same as 1882 Code.
Code of 1861 — Nil.

(70) 14 Suth W R Cr 13 (13) *Queen v. Parbutty Churn Chuckerbutty*. (Criminal misappropriation—Charge should specify the person whose property was converted or appropriated.)

Note 18

1. ('35) AIR 1935 Rang 304 (308) : 36 Cr. L. J. 1393, *Nga Tha Htin v. Emperor*. (It is not essential that the words of S. 34, I. P. C., should be incorporated in the charge, although it is desirable that some reference should be made to the common intention alleged against the accused and their confederates.)

Section 225 Note 1

the murder was the 20th January 1882. *A* was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that *A* was not misled and that the error in the charge was immaterial.

(*c*) *A* was charged with murdering Haidar Baksh on the 20th January 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that *A* was misled, and that the error was material.

1. Scope of the section. — This section and S. 537 deal with cases where a *charge is framed* but there are errors, omissions or irregularities in the charge. This section provides that no error or omission in the statement of the offence or the particulars required to be stated in the charge is *to be regarded as material at any stage* unless the accused has been misled thereby and it has, in fact, occasioned a failure of justice;¹ while S. 537 provides that no finding,

Section 225 — Note 1

1. Where accused is not misled, defect in charge not material.

- (138) AIR 1938 Cal 195 (200) : 39 Cri L Jour 417, *Ram Krishna v. Emperor*. (Accused charged with conspiracy for agreeing with each other or with others unknown — Use of word "or" cannot make charge one in alternative — Defect if any, in charge, is not material and accused held could not have been misled.)
- (138) AIR 1938 Nag 445 (446) : 39 Cr. L. J. 895 : ILR (1939) Nag 180, *Provincial Government v. Shankar Gopal*. (Criminal misappropriation — Charge erroneous in respect of date and place of payment — Correct date mentioned to accused in examination under S. 364 — Accused not raising any dispute as to place — No prejudice to accused resulting — Held, trial was not vitiated by omission.)
- (137) 1937 M W N 1331 (1334), *Palani Goundan v. Emperor*.
- (135) AIR 1935 Oudh 488 (489) : 36 Cri L Jour 1198 : 11 Luck 343, *Bishnath v. Emperor*. (Charge under S. 147, Penal Code — Failure to specify common object — Accused not misled by omission — Omission held not fatal.)
- (1900) 27 Cal 776 (779) : 4 C W N 423, *Anookool Chundar Nundy v. Queen-Empress*.
- (194) 1894 Rat 710 (713), *Queen-Empress v. Abdul Razak*.
- (103) 7 Cal W N 663 (665), *Shoshi Bhushan v. Gobind Chandra*.
- (109) 8 Cr. L. J. 272 (276) : 33 Bom 77 : 1 I. C. 641, *Emperor v. Tribhuvandas*.
- (107) 5 Cr. L. J. 309 (321) : 31 Bom 335 : 9 Bom LR 331, *Emperor v. Bhagvandas*.
- (109) 9 Cri L Jour 108 (112) : 32 Mad 3 : 3 Ind Cas 22, *In re Subramania Siva*.
- (109) 9 Cr. L. J. 456 (489) : 2 Ind Cas 33 : 32 Mad 384, *In re Krishnaswamy*. (Per Wallis J.—Offence under S. 124A, I. P. C. — It is enough if the substance of the words used is set out in the charge and it is enough if the substance of the words proved to have been used is the same as that of the words set out in the charge.)
- (110) 11 Cri L Jour 597 (598) : 8 Ind Cas 229 (Lah), *Wasava Singh v. Emperor*.
- (115) AIR 1915 Lah 16 (47, 48) : 16 Cr. L. J. 354 (357) : 1915 Pun Re No. 17 Cr, *Balmokand v. Emperor*.
- (116) AIR 1916 Cal 188 (192) : 16 Cr. L. J. 497 : 42 Cal 957, *Amritlal Hazra v. Emperor*.
- (115) AIR 1915 Lah 418 (422) : 16 Cr. L. J. 689 : 1915 P. R. No. 16 Cr, *Dhian v. Emperor*.
- (132) AIR 1932 All 73 (75) : 33 Cri L Jour 373, *Mahomed Yakub v. Emperor*.
- (125) AIR 1925 Cal 603 (603, 604) : 26 Cri L Jour 849, *Kedarnath v. Emperor*.
- (119) AIR 1919 Pat 27 (30) : 4 Pat LJ 74 : 20 Cr. L. J. 161 (FB), *Mt. Kesar v. Emperor*.
- (130) AIR 1930 Rang 114 (117) : 7 Rang 821 : 31 Cr. L. J. 387, *Maung Ba v. Emperor*.
- (125) AIR 1925 Nag 147 (149) : 25 Cri L Jour 1152, *Gangadhar v. Bhangi Sao*.

Where accused is prejudiced, defect is material.

- (138) AIR 1938 Lah 828 (832) : 40 Cri L Jour 371, *Gian Singh v. Emperor*. (*P* charged and convicted under S. 419, Penal Code—Charge not making clear as to by virtue of which of the consequences referred to in S. 415, Penal Code, *P* was guilty of offence of cheating—Held that charge was defective and defect in charge was material irregularity which could not be cured by S. 225.)
- (104) 8 Cal W N 278 (285) (FB), *Hurjee Mull v. Imam Ali*.
- (102) 15 C P L R 112 (113), *Emperor v. Vinayak Jageshwar*.
- (112) 13 Cri L Jour 125 (126) : 13 Ind Cas 781 (Mad), *Mandi Ghasi v. Emperor*.

sentence or order in the case shall be *reversed or altered under chapter 27 or on appeal or revision* on account of any error, omission or irregularity in a charge unless it has occasioned a failure of justice. Section 535 deals with cases where *no charge has been framed at all*, and provides that no finding or sentence in the case should be deemed invalid in appeal or revision unless the Court considers that a failure of justice has been occasioned thereby.

Section 225
Note 1

In *Babulal Chaukhani v. King-Emperor*^{1a} their Lordships of the Privy Council held that the irregularity of charging together different offences instead of charging them separately was curable under this section and S. 537 if the accused was not prejudiced. This seems to suggest that joining together in the same charge several offences which must be separately charged is an 'error' in stating the offence.

It is for the Court to decide in each case whether the defect in the charge has misled the accused.² In considering the question whether the accused has been prejudiced in his defence by the defect in the charge, regard must be had to the fact that the objection to the frame of the charge was not raised till a late stage in the proceedings.³ See also S. 537, Explanation.

The section is aimed, among other things, at objections on the ground of variance between the charge and the evidence.⁴ But the fundamental principle in all criminal charges is that the accused should not be prejudiced in his defence and, therefore, where a charge expressed in vague terms has been understood in a certain sense and proceedings have gone on, on such basis, it is not thereafter open to the prosecution to contend that the charge means something else.⁵ The object of the section is that technical defects in the charge should not be allowed to defeat the ends of justice. Hence, where the guilt of the accused has been proved, he can be convicted notwithstanding

1a. ('38) AIR 1938 PC 130 (135): 39 Cr. L. J. 452 : 65 I. A. 158 : 32 S. L. R. 476 : I L R (1938) 2 Cal 295 (PC).

[See also ('40) AIR 1940 Pat 603 (604): 41 Cri L Jour 523, *Chandra v. Emperor*. (Lumping together of three cases of cheating in charge under S. 420, Penal Code—But no prejudice caused to accused by irregularity. Ss. 225 and 537 cure defect.)]

2. ('29) AIR 1929 Pat 712 (714): 30 Cr. L. J. 891 : 9 Pat 642, *Mallu Gope v. Emperor*.

3. ('35) AIR 1935 Oudh 489 (488): 36 Cr. L. J. 1198: 11 Luck 343, *Bishnath v. Emperor*. ('09) 9 Cr. L. J. 108 (112, 113): 32 Mad 3 : 3 I. C. 22 *In re Subramania Siva*.

(('16) AIR 1916 Cal 188 (192) : 16 Cr. L. J. 497 : 42 Cal 957, *Amritlal v. Emperor*.

(('33) AIR 1933 Pat 488 (491) : 34 Cr. L. J. 892, *Sachidanand v. Emperor*.

[See also ('88) 1 Weir 471 (475) : 1 M H C R 31, *Queen-Empress v. Williams*. (Case bearing on S. 41 of Act 18 of 1862—Held that the indictment for cheating, which was defective for uncertainty was one to be objected to, if at all, before the jury was sworn.)]

4. ('09) 9 Cr. L. J. 456 (484, 485) : 32 Mad 384 : 2 I. C. 33, *In re Krishnaswami*. [But see ('16) AIR 1916 All 60 (60) : 17 Cr. L. J. 411 (411), *Ram Chandar Sahai v. Emperor*. (It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him. The object of Ss. 221, 222 and 223 is clearly to enable him to know the substantive charges which he will have to meet and to be ready for them before the evidence is given.)]

5. ('78) 2 Bom 142 (145), *Imperatrix v. Baban Khan*. (When accused has been convicted on a charge expressed in vague terms, the prosecution on appeal should be limited to the particular sense in which the charge has been understood at the trial.)

Section 225
Notes 1-2

that the charge contains unnecessary allegations which the prosecution has not proved.⁶

This section lays down what errors and omissions in the charge should be regarded as material. Section 232 provides for the procedure to be followed in cases where an appellate or revisional Court considers that the defect in the charge is a material one. See also Notes under sections 535 and 537.

2. Charge in cases of rioting, unlawful assembly, etc. —

Under S. 223, a charge of an offence of rioting (or connected offences) should specify the common object of the unlawful assembly. An error or omission in this respect will vitiate the trial if the accused has been prejudiced in his defence by reason of such defect in the charge.¹ But, if the accused has not been prejudiced by reason of such error or omission, the defect is not a material one.² Even in cases, where the charge is to the effect that the accused is liable *constructively* under S. 149 of the Penal Code for the acts of his companions, the trial is not necessarily vitiated because the charge does not specify or states

6. ('67) 4 Bom H C R Cr 17 (22), *Reg. v. Francis Cassidy*.

Note 2

1. ('95) 22 Cal 276 (285), *Sabir v. Queen-Empress*.

('85) 11 Cal 106 (109), *Behari Mchlon v. Queen-Empress*.

('07) 6 Cri L Jour 446 (448, 449) (Lah), *Gowardhan Das v. Emperor*.

('06) 3 Cr. L. J. 153 (159); 33 Cal 295; 2 C.L.J. 516, *Paresnath Sirkar v. Emperor*.

('22) AIR 1922 Cal 191 (191) : 24 Cr. L. J. 355, *Aminulla v. Emperor*.

[See ('24) AIR 1924 Mad 584 (584) : 25 Cri L Jour 396, *In re Kottoora Thevan*. (Conviction for dacoity founded on a common object not charged is not sustainable.)]

2. ('35) AIR 1935 Oudh 488 (488) : 36 Cri L Jour 1198 : 11 Luck 343, *Bisnath v. Emperor*. (Omission to specify common object—Accused not misled by such omission — Omission is cured by S. 225.)

('94) 21 Cal 827 (831, 832), *Basi Reddi v. Queen-Empress*.

('06) 4 Cal W N 196 (199), *Rahamat Ali v. Empress*.

('05) 2 Cri L Jour 275 (277, 278) : 9 C W N 599, *Buddhu v. Mt. Lachminia*.

('16) AIR 1916 Cal 693 (705, 706) : 16 Cr. L. J. 641 (646), *Ram Subhag v. Emperor*.

('26) AIR 1926 Bom 314 (314, 315) : 27 Cri L Jour 744, *Emperor v. Yeshwant*.

('18) AIR 1918 Mad 350 (350) : 19 Cri L Jour 200, *Dakshinamurti v. Emperor*.

('17) AIR 1917 Pat 453 (453) : 2 Pat L J 541 : 18 Cr. L. J. 911, *Harinder Singh v. Emperor*. (Want of specific allegation of common object in the charge does not vitiate conviction if from the evidence it is clear what the common object is.)

('26) AIR 1926 Cal 439 (439, 440) : 26 Cr. L. J. 567, *Chhakari Shaik v. Emperor*.

('18) AIR 1918 Pat 257 (258) : 3 Pat L J 565 : 19 Cr. L. J. 735, *Mahangu v. Emperor*.

('27) AIR 1927 Pat 398 (400) : 6 Pat 832 : 28 Cri L Jour 769, *Chhanka Dhanuk v. Emperor*. (Charge of being a member of an unlawful assembly with the common object of committing assault is the usual form of charge when the common object is to do violence to some person—It is immaterial whether the offence, to commit which there was a common object, was assault, simple hurt or grievous hurt.)

('18) AIR 1918 Nag 64 (65) : 20 Cri L Jour 760, *Maharaj Singh v. Emperor*.

('33) AIR 1933 Oudh 19 (20) : 8 Luck 199 : 34 Cr. L. J. 393, *Ghazuddin Khan v. Emperor*. (Charge under Ss. 147 and 149, Penal Code—Omission to state common object is mere irregularity specially when charge has been framed after the whole prosecution evidence is recorded and the accused are fully cognizant of the case against them.)

('35) AIR 1935 Oudh 488 (488) : 11 Luck 343 : 36 Cr. L. J. 1198, *Bishnath v. Emperor*.

('08) 7 Cr. L. J. 374 (377) : 35 Cal 384 : 12 C W N 579, *Maniruddin v. Emperor*.

('09) 10 Cr. L. J. 471 (472) : 36 Cal 865 : 4 I. C. 19, *Sitajit Mahoto v. Emperor*.

(Charge under S. 147 — Question in each case is whether common object established agrees in essential particulars with common object as stated in charge — In this case there was no such agreement — Conviction under S. 147 quashed.)

('10) 11 Cr. L. J. 121 (122) : 37 Cal 340 : 5 I. C. 365, *Babbon Shaikh v. Emperor*.

erroneously the common object, in pursuance of which the act is alleged to have been done.³

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3. Charges in other cases. — The undermentioned cases¹ are instances in which the error or omission in the charge was considered material. For cases in which the defect in the charge was considered *not* material, see the undermentioned decisions.²

- (16) AIR 1916 Cal 355 (355) : 17 Cr. L. J. 92 (93), *Abdul Shaikh v. Emperor*.
 (30) AIR 1930 Mad 188 (189) : 31 Cri L Jour 347, *Venkadu v. Emperor*.
 (28) AIR 1928 Bom 286 (287) : 30 Cri L Jour 467, *Hasan Ali v. Emperor*.
 (31) AIR 1931 Bom 520(522); 55 Bom 725:33 Cr.L.J. 64, *Ramachandra v. Emperor*.
 3. ('15) AIR 1915 Lah 418 (422) : 16 Cr. L. J. 689 (693) : 1915 Pun Re No. 16 Cr, *Dhian Singh v. Emperor*.
 [But see ('12) 13 Cr. L. J. 218 (219) : 39 Cal 781 : 14 Ind Cas 314, *Kudrutullah v. Emperor*. (Submitted not correct.)]

Note 3

1. ('38) AIR 1938 Lah 828 (832) : 40 Cri L Jour 371, *Gian Singh v. Emperor*. (Charge of cheating defective by reason of Magistrate's failure to set out particular consequences by virtue of which the deception became offence—Defect being material irregularity not curable under S. 225.)
- ('35) AIR 1935 Pat 431(432, 433) : 36 Cr. L. J. 1506, *Sat Narain Lal v. Emperor*. (Accused charged under S. 304, Penal Code, but tried under S. 302—*Held*, illegality could not be cured under S. 537, Cr. P. C.)
- ('67) 8 Suth W R Cr 95 (96), *In re Dowlat Moonshce*. (S. 193, Penal Code — Charge under—Exact words not stated.)
- ('68) 9 Suth W R Cr 14 (14, 15), *Queen v. Feojdar Roy*. (Do.)
- ('68) 9 Suth W R Cr 25 (26, 27), *Empress v. Soonder Mohoorce*. (Do.)
- ('16) AIR 1916 All 60(60) : 17 Cr.L.J. 411, *Ramachandra v. Emperor*. (Extortion — Charge of—Charge must state the amount alleged to have been obtained from each person and the nature of the extortion used against each—Conviction quashed.)
- ('25) AIR 1925 Mad 690 (691) : 49 Mad 74 : 26 Cr. L. J. 1513, *In re Mallu Dora*. (Charges under Ss. 397 and 395—*Held* that the charges did not give the accused sufficient particulars of what they had to meet.)
- ('12) 13 Cri L Jour 504(504) : 15 Ind Cas 648 (Mad), *Govinda Reddi v. Emperor*. (Charge framed under R. 8, S. 26, Madras Forest Act, must clearly state that the place from where the accused cut a tree was a "reserved forest" — Omission to state this is material defect which vitiates the trial.)
- ('18) 14 Cr. L. J. 212 (213) : 19 I. C. 308 (Cal), *Sital Chandra v. Emperor*. (In one charge two persons were charged with causing hurt to three others with a dao; but there was no case of hurt with a dao by one of the accused and he was convicted under S. 352 for using lathi against two of the complainants—*Held*, that this was an irregularity which might have prejudiced the accused in their trial.)
- ('24) AIR 1924 Lah 616 (617) : 25 Cr. L. J. 471, *Jalaluddin v. Emperor*. (Where accused is charged with having beaten the complainant at a particular place and at a particular time and the prosecution fails to establish that charge, the accused cannot on that evidence be convicted of having beaten the complainant at a different place on a different occasion.)
- ('25) AIR 1925 Cal 603 (604) : 26 Cr. L. J. 849, *Kedar Nath v. Emperor*. (In case of cheating, charge must set out the manner in which the offence was committed — The omission to set out manner is material or not, according to the accused having or not having been misled — Charge *held* to be too vague and indefinite.)
- ('61) 2 Weir 266 (266), *In re Yippaka Daligadu*. (Accused charged with previous convictions — It is not sufficient to state in the charge that the accused is an old offender — Charge *held* irregular.)
 [See also ('35) AIR 1935 Pat 431 (431, 432) : 36 Cr. L. J. 1506, *Satnarain Lal v. Emperor*. (Accused charged under S. 304, but tried under S. 302, Penal Code — Trial is illegal — S. 537, Cr. P. C., cannot cure illegality—Charge for minor offence and conviction for major offence are illegal.)]
2. ('38) AIR 1938 P C 130 (135) : 39 Cr. L. J. 452 : 65 I. A. 158 : 32 S. L. R. 476 : ILR (1938) 2 Cal 295 (P C), *Babulal v. Emperor*. (Misjoinder of charges — Specific offences satisfactorily proved and corroborated—No miscarriage of justice—*Held*

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- irregularity was such that it could be, and was, cured under Ss. 225 and 537 by the finding that the accused had not been prejudiced.)
- ('38) AIR 1938 Cal 195 (200) : 39 Cr. L. J. 417, *Ram Krishna v. Emperor*. (Charge of conspiracy containing words that accused agreed with each other "or" with others unknown to commit offence—*Held* accused could not have been misled and defect if any was not such as could not be sufficiently met by S. 225 or S. 537.)
- ('38) AIR 1938 Nag 445 (446) : 39 Cr. L. J. 895 : ILR (1939) Nag 180, *Provincial Government v. Shankar Gopal*. (Charge under S. 409, Penal Code, erroneous in respect of the date as well as place of payment — Nothing in case to show that accused was misled — No prejudice having resulted to the accused, error in the charge is immaterial and cannot affect legality of trial.)
- ('37) 1937 M W N 1331 (1334), *Palani Goundan v. Emperor*. (Mistake or doubt as to particular weapons used does not entitle accused to absolute acquittal—Conviction for lesser offence instead of more serious offence is sustainable.)
- ('36) AIR 1936 Pat 358 (360) : 37 Cri L Jour 862, *Nanhkoo Mahton v. Emperor*. (Offence under S. 211, Penal Code, committed at two places but only one stated — Accused not misled in defence — His conviction is unaffected.)
- ('35) AIR 1935 Oudh 475 (475, 476) : 36 Cri L Jour 1206, *Shakur v. Emperor*. (Charge under S. 411, Penal Code, not specifying particular articles possessed—But accused not prejudiced by this — Defect is cured by S. 537.)
- ('73) 10 Bom H C R 373 (374), *Queen v. Rakhma*. (Omission of the word "dishonestly" in a charge under S. 411, Penal Code, is not a ground for reversing conviction when the accused has not been prejudiced by the omission.)
- (1865) 2 Suth W R Cr 51 (51), *Queen v. Bhutto Laljee*. (Though charge does not distinctly specify the false statement on which the evidence of perjury is attempted to be established the omission is not material if the accused has not been prejudiced thereby.)
- ('76) 8 Suth W R Cr 30 (30), *Empress v. Durbarro Polie*. (Charge under S. 436, Penal Code, should state that the house was used as a dwelling house and it is not enough if the charge merely refers to a house—But conviction upheld in the particular circumstances of the case.)
- ('05) 2 Cri L Jour 381 (381) : 15 M L J 224 : 2 Weir 231, *Anantha Goundan v. Emperor*. (Imputation of unchastity to married woman — Error in stating that the defamation was of the complainant, the husband, and not of the wife—*Held*, that it was an error or irregularity in the charge which had not prejudiced the accused or occasioned a failure of justice.)
- ('10) 11 Cr. L. J. 597 (598) : 8 I. C. 229 (Lah), *Wasawa Singh v. Emperor*. (Charge under S. 411, Penal Code, was as follows: "That you on or about . . . at L were found in possession of 2 boxes and some clothes etc., which property you knew or had reason to believe to be stolen"—It was urged that there was no such offence as being in possession, the offence defined in the Code being one of dishonest receipt or dishonest retention—*Held*, that though the plea was correct the accused was not misled and he knew what charge he had to meet.)
- ('12) 13 Cr. L. J. 251 (251) : 14 Ind Cas 603 (Mad), *Aiyagiri Venkataramiah v. Emperor*. (Charge under S. 477A, Penal Code—Non-specification of alleged false entries in the charge did not vitiate the trial as the accused knew the subject of the charge and was not prejudiced in his defence and did not object to it in the Court of Session.)
- ('16) AIR 1916 Cal 693 (698) : 16 Cr. L. J. 641 (646), *Ram Subhag Singh v. Emperor*. (Charge under Ss. 147 and 323—Omission to state the name of the person against whom the offence was committed or to specify the common object — Defects are cured by Ss. 537 and 225 — Per Beachcroft, J.)
- ('24) AIR 1924 Cal 18 (41) : 25 Cr. L. J. 1313, *Billinghurst v. Emperor*. (Charge under S. 420, I. P. C., should contain an allegation of the person or persons who were alleged to have been deceived and induced to issue a cheque—The omission cannot however be regarded as fatal if the accused is not misled.)
- ('16) AIR 1916 Cal 188 (192) : 16 Cr. L. J. 497 (501) : 42 Cal 957, *Amritlal Hazra v. Emperor*. (Charge under S. 4(b), Explosive Substances Act (VI of 1908)—Omission to make mention of possession of explosives and of intention of endangering life does not vitiate charge.)
- ('15) AIR 1915 Lah 16 (19) : 16 Cr. L. Jour 354 (357) : 1915 Pun Re No. 17 Cr, *Balmokand v. Emperor*. (Charge of criminal conspiracy to commit murder—*Held* that omissions to specify in charge the date agreed upon to commit murder, the places where the accused were said to have so agreed and the persons whom they were alleged to have agreed to murder, did not prejudice the accused.)

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- ('32) AIR 1932 Cal 651 (651, 652) : 33 Cr. L. J. 771 : 60 Cal 201, *Kailash Chandra v. Emperor*. (Charge under S. 292, I. P. C.—It is better to indicate exactly in what respects the book is obscene—But if the accused is not prejudiced in his defence and the prosecution maintains that the whole book is obscene, mere failure to mention particular passages is not sufficient reason to interfere in revision.)
- ('33) AIR 1933 Cal 481 (482) : 34 Cr. L. J. 526, *Montajaddin v. Emperor*. (Registration Act (16 of 1908), S. 82—Charge not specifying abetment—No failure of justice—Accused not misled—Omission is immaterial.)
- ('27) AIR 1927 Lah 702 (704) : 28 Cr. L. J. 821 : 9 Lah 280, *Shankar Lal v. Emperor*. (In prosecution under S. 504, Penal Code, if the accused is aware of the words complained of but the Magistrate does not specifically mention the objectionable words in the charge the accused not being misled by the technical defect in the charge, his conviction is not vitiated.)
- ('31) AIR 1931 Lah 186 (187) : 32 Cr. L. J. 1202, *Chint'Ram v. Emperor*. (Omission to state the substance of speeches in a charge under S. 124A held not to have prejudiced accused.)
- ('27) AIR 1927 Lah 432 (432) : 28 Cri L Jour 419, *Allah Din v. Emperor*. (In a charge under S. 498 if the accused are not charged with knowledge that abducted woman was married one but the accused knew what they were charged with, the defect is not fatal.)
- ('25) AIR 1925 Cal 674 (675, 676) : 26 Cri L Jour 906, *Gokul Khatik v. Emperor*. (Manner of cheating—Misdescription—Defect, although material, held not to have prejudiced the accused.)
- ('30) AIR 1930 Cal 708 (708) : 58 Cal 580 : 32 Cr. L. J. 228, *Nababali v. Emperor*. (The word "or" by mistake used for word "and" between two charges framed under Ss. 221 and 342, Penal Code—Accused not prejudiced—Held conviction in respect of both charges was not bad.)
- ('32) AIR 1932 Cal 461 (462) : 59 Cal 113 : 33 Cri L Jour 549, *H. B. Spicers v. Jakiuddin*. (Wrong sections quoted in charge—Mistake held not to have prejudiced the accused as he knew full well what charge he had to meet.)
- ('26) AIR 1926 Pat 347 (347) : 27 Cr. L. J. 909, *Farzand Ali v. Emperor*. (Charge of cheating giving month in which offence was committed but not the exact date—Held conviction could not be set aside unless accused was shown to have been materially prejudiced.)
- ('18) AIR 1918 Nag 22 (26) : 19 Cri L Jour 657, *Jangilal v. Emperor*. (Omission to state manner of cheating held not material as it had not misled the accused.)
- ('28) 29 Cri L Jour 287 (288) : 107 I. C. 826 (Pat), *Jamuna Prasad v. Emperor*. (Setting out the details of the charges in one comprehensive sentence instead of stating the substance in separate sentences held not to have prejudiced accused.)
- ('32) AIR 1932 Nag 158 (159) : 34 Cri L Jour 154, *Samrath Mal v. Emperor*. (Accused in complaint for defamation is not prejudiced although the exact words used are not given in the charge where the charge was clear and unambiguous and the accused was not liable to be misled by the charge as framed.)
- ('27) AIR 1927 Sind 58 (59) : 27 Cr. L. J. 947, *Tikamdas Mulchand v. Emperor*. (Defamation—Plea that though there was publication, there was no publication to the person mentioned in the charge is a highly technical plea and the defect in the charge is curable under S. 537.)
- ('34) AIR 1934 Lah 227 (228) : 35 Cr. L. J. 1386, *Nura v. Emperor*. (Omission to mention S. 34, Penal Code, by the application of which accused was convicted, held, not to have caused any failure of justice.)
- ('09) 9 Cr. L. J. 456 (460) : 32 Mad 384 : 2 I. C. 33, *In re Krishnaswami*. (Offence under S. 124A, Penal Code—Charge stating words used with substantial though not absolute accuracy—Failure to enter in the charge the words or substance of the words used amounts only to an irregularity.)
- ('09) 9 Cr. L. J. 108 (112, 113) : 32 Mad 3 : 3 I. C. 22, *In re Subramania Siva*. (Do.)
- ('25) AIR 1925 Mad 106 (107) : 25 Cri L Jour 401, *In re Narayana Menon*. (Do.)
- ('09) 9 Cr. L. J. 140 (141) : 1 I. C. 42 (Mad), *In re Chidambaram Pillai*. (Do.)
- ('18) AIR 1918 Lah 397 (400) : 18 Cr. L. J. 875 (878) : 1917 Pun Re No. 29 Cr, *Bisakhi v. Emperor*. (Omission to specify previous conviction held not to have caused failure of justice or prejudiced the accused.)
- ('81) 1881 All W N 32 (32), *Empress v. Raghib Ali*. (Do.)
- [See also ('10) 11 Cr. L. J. 303 (303, 304) : 6 I. C. 269 (P C), *In re Chanda Singh*. (Proceedings against pleader under Legal Practitioners Act—Charges of misconduct against pleader not formally drawn up—Their substance understood by pleader—Proceedings good and the latter deliberately admitted them—Order passed by the Judge is not ultra vires.)]

Section 226

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

Procedure on commitment without charge or with imperfect charge.

Illustrations

1. A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted.
2. A is charged with forging a valuable security under S. 467 of the Indian Penal Code. A charge of fabricating false evidence under S. 193 may be added.
3. A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under S. 235 of the Indian Penal Code cannot be added.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "Without a charge."
4. "With an imperfect or erroneous charge."

Other Topics (miscellaneous)

Altogether different offence. See Note 2. New charge need not be related to original charge. See Note 2.
 Amendment of charges. See Note 2. Prior dismissal by Magistrate for offence. See Note 2.
 Charge from original evidence itself. See Note 2. Quashing conviction. See S. 232.
 Charges not to be based on additional evidence. See Note 2. Stages in which charges are to be amended. See Note 2.
 New charges at re-trials. See Note 2.

1. Legislative changes.*Difference between the Codes of 1861 and 1872 :*

There was no corresponding section in the Code of 1861. This section was first enacted in the Code of 1872 as S. 446. But even under the Code of 1861 it was held that the Sessions Court had power under S. 244 (now S. 227) to amend the charge framed by the committing Magistrate.¹

* **Code of 1882 : S. 226** — Same as above ; but illustrations were added in 1898.

Code of 1872 : S. 446.

446. If a prisoner is committed to the Court of Session, either without any charge at all or upon a charge which the Court, upon reference to the proceedings before the committing Magistrate, considers improper the Court of Session may draw up a charge for any offence which it considers to be proved by the evidence taken before the committing Magistrate. A copy of such charge shall be given to the accused person.

Code of 1861 — Nil.

Section 226 — Note 1

1. ('67) 7 Suth W R Cr 8 (8), *In re Kalaram Singh*.
 ('70) 7 Bom H C R Cr 81 (82), *Reg. v. Bapu Parbat*. (Ordering new commitment on corrected charge is illegal.)
 (1864) 1 Suth W R Cr L 2 (2).

Changes made in 1882 :

- (1) The words "at all" which occurred after the words "without any charge" in S. 446 of the Code of 1872 were omitted.
- (2) The words "or with an imperfect or erroneous charge" were substituted for the words "or upon a charge which the Court, upon reference to the proceedings before the committing Magistrate considers improper" which occurred in the Code of 1872.
- (3) The words "may draw up a charge" which occurred in the Code of 1872, were substituted by the words "may frame a charge or add to or otherwise alter the charge."²
- (4) The words requiring a copy of the new charge to be given to the accused were omitted.

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Changes made in 1898 :

The illustrations to the section were added.

2. Scope of the section. — Section 193, sub-s.(1) provides that except as otherwise expressly provided by the Code or by any other law for the time being in force, no Court of Session can take cognizance of a case as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf. Similarly, under S. 194 the High Court is empowered to take cognizance of offences as a Court of original jurisdiction "upon a commitment made to it in manner hereinafter provided." The present section is by way of an exception to these sections.¹ It enables the High Court or the Sessions Court to amend or add to the charge on which an accused has been committed to it for trial. It also enables the High Court or the Sessions Court to frame a suitable charge in cases in which an accused has been committed without a charge. But the power is strictly limited to the cases specified in the section, *viz.*, cases in which a person is committed for trial without a charge or with an imperfect or erroneous charge.²

It is competent to the Sessions Judge to amend the charge even after the commencement of the trial (see S. 227). But it is his duty before the commencement of the trial to scrutinize the charges and to amend them if necessary under this section.³ When the Sessions Judge finds the charges framed by the committing Magistrate imperfect in

2. ('81) 7 Cal L R 143 (143), *Empress v. Poresholla Sheikh*. (Case under Code of 1872—*Held* that the Sessions Judge had no power to expunge the charge framed by the committing Magistrate.)

Note 2

1. ('15) AIR 1915 Sind 50 (50, 51) : 16 Cr. L. J. 573 (573) : 9 Sind L R 37, *Dodo v. Emperor*. (The combined effect of Ss. 226 to 231 is to confer a very wide jurisdiction upon the Court of Session.)

2. ('25) AIR 1925 Oudh 158 (160) : 25 Cr.L.J. 1162, *Surat Bahadur v. Emperor*. (Committing Magistrate framing charge under S. 471, Penal Code—As sanction of Court was necessary under Criminal Procedure Code, Sessions Judge converting it into charge under S. 474 though charge was not imperfect in form and though offence committed by accused fell under S. 471 and not S. 474—*Held* that he acted without jurisdiction.)

3. ('18) AIR 1918 Mad 821 (822), 18 Cr.L.J. 346, *Karuppa Goundan v. Emperor*. ('26) AIR 1926 Oudh 245 (248) : 27 Cr L Jour 57, *Bhulan v. Emperor*. (Any amendment which is made in the charge-sheet should be made so far as possible, by using the words of the section.)

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any way, it is his duty to amend them under this section and not acquit the accused.⁴

The Sessions Judge has power under the section to "frame a charge or add to or otherwise alter the charge as the case may be." He can totally reject a charge framed by the Magistrate and substitute a new charge in its place.⁵ (See illustration 1.) He can also add a charge to that framed by the committing Magistrate.⁶ (See illustration 2.)

The added charge need not be related to the original charge.⁷ But it is on the facts disclosed on the evidence before the committing Magistrate *and on those facts alone* that any action under this section can be taken.⁸ Further, the section refers to a case where the charge is defective *at the time of commitment*. Hence, an amendment or

[See ('92) 16 Bom 414 (426), *Queen v. Vajiram*. (Application for framing additional charge in respect of another offence disclosed on the evidence recorded by the committing Magistrate—Decision on application—Postponement till a later stage of the proceedings is objectionable—Application must be disposed of at the very commencement of the trial.)]

4. ('82) 8 Cal 450 (453) : 10 Cal L R 421, *Empress v. Sreenath Kur*.

[See however ('28) AIR 1928 Bom 475 (476) : 30 Cr. L. J. 191, *Emperor v. Mohanlal Aditram*. (Accused committed to the High Court Sessions for kidnapping minor girl in Bombay and also of abetting rape on her committed at Ahmedabad under Ss. 376 and 114, Penal Code — Prosecution seeking to amend the second charge of abetment of rape by omitting S. 114, Penal Code, and by substituting in its place S. 109, Penal Code — Leave to amend the charge was refused on the ground that the proposed amendment would materially alter the nature of the case the accused had to meet at a late stage of the case and the second charge was therefore withdrawn from the jury.)]

5. ('82) 1882 All W N 165 (165), *Empress v. Ram Bakhsh*. (Magistrate on the evidence before him ought to have committed on a charge of rape and not adultery — Sessions Judge can substitute a charge of rape.)

[See however ('37) 66 C L J 575 (576, 577), *Khidir v. Emperor*. (Depriving accused of right to trial by jury by manoeuvre of substituting a new charge is bad.)]

6. ('15) AIR 1915 Sind 50 (51, 52) : 16 Cr. L. J. 573 : 9 Sind L R 37, *Dodo v. Emperor*. (Charge means a whole series of counts or heads of charges of various offences so that even the word "alter" gives power to add additional counts to the charge.)

('24) AIR 1924 Cal 625 (626) : 26 Cri L Jour 5, *Hassenullah Shaikh v. Emperor*.

('24) AIR 1924 Lah 413 (414) : 24 Cri L Jour 177, *Mula Singh v. Emperor*.

('33) AIR 1933 Oudh 375 (377) : 35 Cr. L. J. 63, *Gulzari v. Emperor*.

[See also ('84) 8 Bom 200 (210), *Queen-Empress v. Appa Subhana*. ("Charge" refers to a statement of a specific offence and not a whole series of counts or heads of charges — But the expression "without a charge" covers cases where the Magistrate has not framed a charge for such offence as the Sessions Court may think the prisoner ought to be tried for.)]

[But see ('86) 8 All 665 (667) : 1886 A W N 254, *Queen-Empress v. Kharga*. (Submitted not good law.)]

7. ('15) AIR 1915 Sind 50 (51) : 16 Cr. L. J. 573 : 9 Sind L R 37, *Dodo v. Emperor*.

('33) AIR 1933 Oudh 375 (377) : 35 Cr. L. J. 63, *Gulzari v. Emperor*. (Original charge under S. 147 and S. 148 altered to one under S. 395 read with 397, I. P. C.)

[But see ('04) 1 Cri L Jour 794 (797) : 32 Cal 22 : 8 C W N 784, *Bircendra Lal Bhaduri v. Emperor*. (Sessions Court is not a Court of original jurisdiction and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal, and not with regard to a matter, not covered by the indictment.)]

('20) AIR 1920 Mad 131 (132) : 21 Cr. L. J. 57, *Muthu Goundan v. Emperor*. (Do.)]

8. ('24) AIR 1924 Lah 413 (414) : 24 Cr. L. J. 177, *Mula Singh v. Emperor*.

('15) AIR 1915 Sind 50 (51) : 16 Cr. L. J. 573 (574) : 9 Sind L R 37, *Dodo v. Emperor*.

('81) 3 Mad 351 (353) : 2 Weir 269, *Rama Varma Raja v. Queen*.

[See also ('31) AIR 1931 Cal 524 (526) : 32 Cri L Jour 1135, *Abdul Aziz Shah v. Emperor*. (Illustrations to the section show that the only new charges or additions or alterations which may be made are those which can be supported by the evidence which is relevant to the charge already made.)]

addition cannot be made under this section on the basis of additional evidence taken by the committing Magistrate under S. 219 *after commitment*.⁹

The power of the Sessions Judge to frame a charge under this section is not fettered by the fact that a complaint in respect of the offence for which he proposes to frame a charge has been dismissed by the Magistrate.¹⁰ But he cannot substitute a charge of adultery for one of rape framed by the Magistrate, the reason being that under S. 199 a charge of adultery cannot be taken cognizance of by any Court except upon a complaint of the husband or other persons mentioned therein.¹¹ (Compare S. 230.) The Sessions Judge has no power under the section to order the Magistrate to re-draw the charges.¹²

Where a case was remanded to a Court of Session by the High Court for trial on certain charges, it was held that the High Court did not intend to fetter the discretion of the Sessions Judge to amend the charges in any way he might think necessary.¹³

The fact that additional charges are framed by the Sessions Court does not make the questions at issue in the Sessions trial and in the preliminary inquiry substantially different and under S. 33 of the Evidence Act the evidence of witnesses who gave evidence in the preliminary inquiry and subsequently died may be admitted in the sessions trial.¹⁴

3. "Without a charge." — This section applies *inter alia* to cases in which a person is committed for trial without a charge. For instance, a commitment under S. 437 or S. 526 may be made without framing a charge.¹ In such cases, the Court of Session may itself frame a charge. It has been held that the expression applies not only to cases in which no charge has been framed *at all* by the committing Magistrate but also to cases in which a charge has been framed by him but there is no charge in respect of the offence which the *Sessions Judge* may think the prisoner ought to be tried for.²

4. "With an imperfect or erroneous charge." — The word "imperfect" implies defect in form.¹ The expression covers an imperfection due to a misjoinder of charges.² In the undermentioned case³

9. ('33) AIR 1933 Mad 247 (250) : 34 Cr. L. J. 278, *In re Bhogi Reddy Ankamma*. See also S. 219 Note 2.

10. ('92) 16 Bom 414 (424, 427), *Queen v. Vaji Ram*.

11. ('02) 29 Cal 415 (416) : 6 C W N 677, *Chemon Garo v. Emperor*. (Husband's appearance as a witness for prosecution cannot be regarded as amounting to complaint for adultery.)

See also S. 227 Note 4.

12. ('76) 25 Suth W R Cr 17 (17), *In re Ramdhone Acharjee*.

13. ('04) 1 Cr. L. J. 794 (796) : 32 Cal 22:8 C W N 784, *Birendra Lal v. Emperor*.

14. ('81) 7 Cal 42 (44) : 8 Cal L R 278, *Empress v. Rochia Mohato*.

Note 3

1. ('04) 1 Cr. L. J. 275 (277) : 27 Mad 54 : 2 Weir 227, *In re Kalagava Bapiah*.

2. ('84) 8 Bom 200 (210), *Queen-Empress v. Appa Subhana*.

[But see ('86) 8 All 665 (667) : 1886 A W N 254, *Queen-Empress v. Kharga*.]

Note 4

1. ('25) AIR 1925 Oudh 158 (160) : 25 Cr. L. J. 1162, *Surat Bahadur v. Emperor*.

2. ('82) 8 Cal 450 (453) : 10 Cal L R 421, *Empress v. Sreenath Kur*.

3. ('86) 8 All 665 (667) : 1886 A W N 254, *Queen-Empress v. Kharga*.

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Note 4

it was held by the Allahabad High Court that the fact that the evidence recorded by the committing Magistrate is such as to justify an additional head of charge being included does not make the charge as framed imperfect or erroneous and that the Sessions Court has no power under the section to *add* a charge. But this view, it is submitted, is not correct. See under Note 2.

Section 227

227.* (1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused.

Synopsis

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| 1. Legislative changes. | 8. Application for alteration of charges. |
| 2. Scope of the section. | 9. Amendment — How made. |
| 3. "Or add to." | 10. Examination of accused after amendment. |
| 4. "May"—Discretion of Court. | 11. Sub-section (2). |
| 5. Record of reasons. | 12. Appeal. |
| 6. Time for alteration of or addition to charge. | 13. Revision. |
| 7. Amendment of charge after remand. | 14. Accused, when can be convicted without charge. See S. 237. |
| 7a. Amendment by Court of Session. | |

Other Topics (miscellaneous)

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| 'Alter', whether includes 'withdrawal.' See Notes 2 and 4. | Curing illegality. See Note 4. |
| Alteration after compromise petition. See Note 4. | Limits of power of amendment. See Note 4. |
| Alteration after verdict. See Note 6. | Omission to read and explain, effect of. See Note 11. |
| Amendment should not prejudice the accused. See Note 4. | Powers of Sessions Court. See Note 2. |

1. Legislative changes. — The words "or add to" in sub-s.(1) were for the first time introduced in the present Code.

2. Scope of the section.—Section 226 applies to *Sessions Courts and High Courts* and is intended to apply to alterations or additions to the charge, at the *commencement of the trial*. This section applies to *all Courts* and is intended to apply to alterations or additions to the charge *during the course of the trial*.¹ In either case, however, the alterations or additions must be based on the facts disclosed by

* Code of 1882 : S. 227 — Same, except the addition noted in Note 1.
1872 : Ss. 444 and 445 ; 1861 : S. 244.

Section 227 — Note 2

1. ('33) AIR 1933 Mad 247 (250) : 34 Cr. L. J. 278, *In re Bhogi Redde Ankamma*. (S. 227 read with S. 237 can only apply after some evidence has been taken at the trial.)

the evidence recorded,² the materials on which the Court acts under S. 226 being the evidence recorded before the committing Magistrate, and those on which the Court acts under this section being the evidence recorded before itself.³

There are certain cases in which it is not necessary to amend the charge and the accused can be convicted of an offence though he was not charged with it.⁴ See Ss. 237 and 238.

The word "alter" in the section includes a power to *withdraw* a charge.⁵ See also Note 4.

3. "Or add to."—These words were absent in the corresponding sections of the old Codes, and there was a conflict of opinions as to whether the word "alter" included the addition of a new charge.¹ It is now clear that a new charge may be added to the original charge even if it be unconnected in any way with the latter.² In the latter case, however, the trial cannot proceed forthwith but the Court should proceed under S. 229.

4. "May" — Discretion of Court. — The word "may" shows that the Court has a large discretion to alter or add to a charge framed under the Code.¹ In fact, the Magistrate must be ever ready, as the

2. See foot-note 3.

3. ('15) AIR 1915 Sind 50 (51): 16 Cr. L. J. 573: 9 S. L. R. 37, *Dodo v. Emperor*.

4. ('35) AIR 1935 All 935 (937): 37 Cr. L. J. 247, *Samuel John v. Emperor*. (Case under S. 238 (2), Cr. P. C.)

5. ('90) 1890 All W N 178 (178), *Ram Dai v. Parbati*.

See also S. 227 Note 4.

Note 3

1. ('84) 8 Bom 200 (210, 211), *Queen-Empress v. Appa Subhana*. (New charge cannot be framed.)

('79) 1879 Pun Re No. 21 Cr, p. 60 (64), *Empress v. Sultani*. (Alteration does not include addition.)

('71) 3 N W P H C R 337 (337, 338), *Queen v. Waris Ali*. (Cannot add an entirely new charge, which is not even cognate to the charge on which the accused was committed.)

('94) 21 Cal 97 (103), *Empress v. Sukee Raur*. (In a case committed under S. 372, I. P. C., Court refused to add a charge of abetment of rape on the evidence recorded in the Sessions Court.)

('87) 10 All 58 (60): 1887 A W N 274, *Empress v. Wazir Jan*. (New charges may be added.)

('87) 9 All 525 (527): 1887 A W N 155, *Queen-Empress v. Gordon* ("Alter" includes addition of new charge.)

('97-01) 1 Upp Bur Rul 64 (65), *Nga O v. Queen-Empress*. (Cancelling of charge under one section and substitution of another not warranted by law.)

[See also ('97) 10 C P L R Cr 13 (14), *Empress v. Baliram*. ("Alter" does not include expunging a charge and framing another in its place.)]

2. ('15) AIR 1915 Sind 50 (51): 16 Cr. L. J. 573: 9 S. L. R. 37, *Dodo v. Emperor*.

('24) AIR 1924 Cal 625 (626): 26 Cri L Jour 5, *Hassenulla Sheikh v. Emperor*.

[But see ('27) AIR 1927 Sind 28 (34): 21 Sind L R 55: 27 Cr. L. J. 1217, *Emperor v. Stewart*. (The doubt expressed in this case based on 3 Mad 351, a decision under the old Code, does not seem to have any basis.)]

Note 4

1. See the following cases:

('37) AIR 1937 Bom 260 (261): ILR (1937) Bom 369: 38 Cr. L. J. 850, *Emperor v. Yeshwant Vilhu*. (There is nothing in the Code or in the Bombay High Court Rules that limits the powers of the Court to alter the charge.)

('26) AIR 1926 Bom 255 (255): 27 Cri L Jour 496, *Framji v. Emperor*. (A charge under S. 122 of Bombay City Police Act was altered into one under S. 352, Penal Code.)

('71) 16 Suth W R Cr 63 (63), *Queen v. Firman Ali*.

Section 227
Note 4

facts of the case are disclosed, to either alter or add to the charge, or to refer the case under S. 347.² It often happens that in the course of the evidence an offence more aggravated than the one complained of is discovered, and in such cases it is the duty of the Court to charge the accused with the more aggravated offence.³ The discretion is, however, a *judicial* one and must not be exercised *arbitrarily*.

The powers of the Court under this section are very wide and can be exercised even if the alteration of the charge leads necessarily to the discharge of the jury which has already been sworn in and empanelled.^{3a}

The section does not warrant the striking out of a charge for the purpose of *curing an illegality which had already been committed* and does not enable the Court to proceed on those charges only that have been legally joined.⁴ Thus, where the accused was charged with more than three offences committed in the course of a year, it was held that the trial was in contravention of S. 234 and that the illegality could not be cured by striking out the charges so as to reduce the number to three.⁵

Where, however, a charge is *properly* framed but it is found after taking evidence that it is groundless, it has been held that the Court is not prevented from striking out such charge.⁶

(1863) 7 Suth W R Cr S (8), *In re Kalaram Singh*.

(195) 1895 Rat 773 (774), *Queen-Empress v. Abdul Husen*.

(172) 4 N W P H C R 16 (20), *Queen v. Bheebekkee*.

(193) 17 Bom 369 (372, 373), *Queen-Empress v. Khoda Uma*.

(31) AIR 1931 Oudh 73 (73, 74) : 32 Cr. L. J. 330, *Sachchidanand v. Emperor*. (A charge under S. 341, I. P. C. can be converted to one under Ss. 341 and 506, I. P. C.)

(14) AIR 1914 Low Bur 65 (123) : 15 Cri L Jour 80 : 7 Low Bur Rul 143 (FB), *G. S. Clifford v. Emperor*. (A charge of cheating by issuing false balance sheet was altered by adding words regarding subsequent conduct of the bank.)

2. (27) AIR 1927 Mad 307 (308) : 28 Cri L Jour 164, *Kattuva v. Suppan*.

(10) 11 Cri L Jour 154 (154, 155) : 4 Ind Cas 1039 (Mad), *Public Prosecutor v. Thavaslandi Thevan*. (A charge under S. 211 was altered into one under S. 182-A, Penal Code.)

(24) AIR 1924 Lah 718 (718) : 26 Cr. L. J. 420, *Gokal v. Phuman Singh*. (Case under S. 363, Penal Code, of kidnapping from lawful guardianship, a minor girl—On finding that the girl was not under 16 years of age, Magistrate must examine and decide the question whether the accused could be charged with an offence under S. 366, Penal Code.)

3. (29) AIR 1929 Lah 838 (839) : 30 Cri L Jour 957, *Mangal Sen v. Emperor*.

3a. (37) AIR 1937 Bom 260 (261) : ILR (1937) Bom 369 : 38 Cr. L. J. 850, *Emperor v. Yeshwant Vithu*.

4. (07) 5 Cri L Jour 94 (95, 96) : 29 Mad 569 : 1 M L T 409, *Manavala Chetty v. Emperor*. (Accused charged and tried under four offences—Magistrate striking out one charge.)

(25) AIR 1925 Mad 1065 (1066) : 26 Cri L Jour 1618, *Krishnamurthi Aiyar v. Narayanaswami Aiyar*. (Charge under Ss. 352 and 504, Penal Code—Discovery at the time of judgment that the offences could not be tried together—Striking out charge and framing new charge under S. 504, Penal Code.)

[But see (37) AIR 1937 Sind 1 (2) : 30 Sind L R 391 : 38 Cr. L. J. 324, *Emperor v. Md. Ismail*. (Section is not limited in its operation to mere irregularities — 29 Mad 569, Dissented from.)]

5. (22) AIR 1922 Cal 401 (401) : 49 Cal 555 : 24 Cr. L. J. 86, *Chetto v. Emperor*.

(26) AIR 1926 Lah 193 (194) : 27 Cri L Jour 793, *Fitzmaurice v. Emperor*.

See also S. 234 Note 7.

6. (90) 12 All 551 (552) : 1890 All W N 178, *Dwarka Lal v. Mahadeo Rai*. (Word 'alter' includes withdrawal of charge added by Sessions Judge.)

(82) 11 Cal 85 (90), *Queen-Empress v. Jacquiet*.

The alteration or addition of a charge must be for an offence made out by the evidence recorded in the course of the trial before the Court.⁷ In *Birendra Lal Bhaduri v. Emperor*⁸ it was observed :

"The Sessions Court is not a Court of original jurisdiction and, though vested with large powers of amending and adding to charges, can only do so with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment."

See also the undermentioned cases.⁹

Where an offence cannot be taken cognizance of without a complaint as required by ss. 198 and 199 of the Code, the Court cannot under S. 238 convict a person for such offence where there is no such complaint. It follows that in the absence of a complaint a charge cannot be altered into a charge for an offence which requires such complaint.¹⁰

It will not be a sound exercise of discretion under this section to add a serious charge after the defence evidence is heard and proceed with the case without allowing further time to the accused.¹¹ Again, where the charge is of a compoundable offence and the parties file a compromise, the Court should stay further proceedings and not frame charges subsequent to the application for leave to compromise.¹²

5. Record of reasons. — Where a Sessions Judge altered a charge under S. 395, Penal Code, to one of robbery, without assigning

('39) AIR 1939 Pat 35 (36) : 39 Cr. L. J. 997 : 18 Pat 82, *Emperor v. Sadashibo Majhi*. (Charge not to be withdrawn prematurely before there is time to consider if the evidence is sufficient.)

[See also ('90) 1890 All W N 178 (178), *Ram Dai v. Parbati*. (The word 'alter' includes a power to withdraw a charge.)

('29) AIR 1929 Pat 275 (284) : 8 Pat 289 : 30 Cr. L. J. 675, *Kunja Subhudhi v. Emperor*. (Once a charge has been framed it should not be dropped until the conclusion of the trial unless on the face of it, it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges.)]

See also Note 2.

7. ('29) AIR 1929 Sind 250 (251, 252) : 30 Cr. L. J. 1121, *Wahid Bux v. Emperor*. (Fact that prosecutor might have examined witness is no ground to add charge of conspiracy to a charge under S. 314, Penal Code.)

('25) AIR 1925 Cal 579 (580) : 26 Cri L Jour 302, *Birao Sardar v. Ariff*. (Summons to accused under one section—Evidence disclosing another offence—Amendment of charge.)

[See ('81) 3 Mad 351 (352, 353) : 2 Weir 269, *Rama Varma Raja v. Queen*.]

8. ('04) 1 Cri L Jour 794 (797) : 32 Cal 22 : 8 C W N 784.

See also Note 7a.

9. ('20) AIR 1920 Mad 131 (132) : 21 Cri L Jour 57, *Muthu Goundan v. Emperor*.

('10) 11 Cri L Jour 131 (133) : 4 I. C. 993 (Lah), *Shah Din v. Emperor*. (Persons committed for murder of A — Sessions Judge acquitting them cannot add and convict on a charge of causing grievous hurt to B.)

('69) 5 Mad H C R App xiii (xiv).

10. ('02) 29 Cal 415 (416) : 6 C W N 677, *Chemon Garo v. Emperor*. (Original charge of rape—A charge of adultery was added—Held addition was illegal.)

[See also ('25) AIR 1925 Lah 631 (632) : 6 Lah 375 : 27 Cri L Jour 769, *Mt. Naurati v. Emperor*. (Condition of S. 198 satisfied—Charge can be added.)]

See also S. 226 Note. 2.

11. ('02) 6 Cal W N 72 (78), *King-Emperor v. Mathura Thakur*.

('07) 5 Cri L Jour 164 (167) : 31 Bom 218, *Emperor v. Isap Mahmud*.

('09) 9 Cri L Jour 226 (231) : 33 Bom 221 : 2 Ind Cas 277, *In re Bal Gangadhar Tilak*. (Addition of a charge of previous conviction after the close of the case is not contemplated by the Code.)

[See also ('71) 3 N W P H C R 271 (272), *Queen v. Chotey Lal*.]

12. ('14) AIR 1914 Lah 561 (563) : 16 Cri L Jour 81 (82) : 1914 Pun Re No. 29 Cr (FB), *Hasta v. Emperor*.

('99) 3 Cal W N 548 (550), *Mahomed Ismail v. Faizuddin*.

Section 227
Notes 5-7a

any reason, it was held by the High Court of Calcutta that this should not have been done.¹

6. Time for alteration of or addition to charge. — A charge can be amended or altered or added to at any time —

(1) before judgment is pronounced, and

(2) in trials before the Court of Session or High Court before the verdict of the jury is returned, or the opinion of the assessors is expressed.¹

The words "return of the verdict" in the section mean the return of the *final* verdict which the Judge is finally bound to record.² The Judge has a discretion under S. 303 to question the jury as to the grounds of their verdict and no verdict can be said to be returned and finally recorded until the last of the questions has been answered.³ See also S. 304 Note 3.

7. Amendment of charge after remand. — It was held in the undermentioned cases¹ that the Court could, after remand by the superior Court, amend the charge, and that the remand order could not be intended to fetter this power.

7a. Amendment by Court of Session. — A Sessions Court is not a Court of original jurisdiction, and though it is vested with large powers for amending and adding to charges, it can only do so with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment.¹ See

Note 5

1. ('12) 13 Cri L Jour 127 (128) : 13 Ind Cas 783 (Cal), *Paimullah v. Emperor*.

Note 6

1. ('26) AIR 1926 Oudh 161 (163) : 26 Cr.L.J. 1602, *Bishambhar Nath v. Emperor*.
('38) AIR 1938 Oudh 247 (248) : 39 Cr. L. J. 849, *Gajju v. Emperor*. (Magistrate to whom case is transferred can add to charge.)
('37) AIR 1937 Sind 1 (2) : 30 S L R 391 : 38 Cr.L.J. 324, *Emperor v. Md. Ismail*. (Section not confined in its operation to any particular stage of the case before the pronouncement of judgment by Court or return of verdict by jury.)
('31) AIR 1931 Mad 439 (440) : 32 Cr. L. J. 756, *Subramania Aiyar v. Emperor*.
('88) 1888 All W N 116 (117), *Empress v. Karim Baksh*.
(1862) 1 M H C R 31 (36) : 1 Weir 471, *Queen v. Williams*.
(1864) 1 Suth W R Cr 39 (39), *Queen v. Dhurmonarain*.
('68) 5 Bom H C R Cr 9 (10), *Reg. v. Shek Ali*. (No power to alter after verdict.)
('16) AIR 1916 Lah 52 (53) : 17 Cri L Jour 454 (455) : 1916 Pun Re No. 33 Cr, *Harbans v. Emperor*. (No power after assessors' express opinion.)
(1864) 1 Suth W R Cr 40 (40, 41), *Queen v. Dyce Bhola*. (Do.)
[See however ('07) 5 Cr. L. J. 94 (95, 96) : 29 Mad 569 : 1 M L T 409, *Manavala Chetty v. Emperor*. (Accused charged with four offences — After close of case and before judgment Magistrate striking out charge relating to one offence — Held Magistrate could not at that stage strike out the charge in respect of one offence in order to cure an illegality which had already been committed.)]

2. ('84) 8 Bom 200 (211), *Queen-Empress v. Appa Subhana*.

('74) 21 Suth W R Cr 1 (2), *Queen v. Sustiram Mandal*.

3. See cases cited in foot-note (2).

Note 7

1. ('04) 1 Cr.L.J. 794 (796) : 32 Cal 22 : 8 C W N 784, *Birendra Lal v. Emperor*.
('99) 26 Cal 560 (563), *Queen-Empress v. Mati Lal Lahiri*.

Note 7a

1. ('04) 1 Cr.L.J. 794 (797) : 32 Cal 22 : 8 C W N 784, *Birendra Lal v. Emperor*.
See also Note 4.

also the undermentioned case.² See also Notes to S. 226.

Section 227
Notes 7a-11

8. Application for alteration of charges. — An application for the alteration of or addition to the charge should be made as early as possible¹ and, in jury cases, before the jury is chosen.² Orders on such applications should be passed at the same time and not be postponed.³ The Court may refuse to entertain an application for amendment of a charge if made at a very late stage of the case.⁴ It may also be noted that in determining whether any error or omission in a charge has occasioned a failure of justice within the meaning of S. 537, the Court should have regard to the fact whether the objection could or should have been taken at an earlier stage in the proceedings.

9. Amendment—How made.— Amendments in a charge ought to be made formally, and should appear on the face of the record.¹ When a Magistrate amends a charge, he should not write over the original charge but should leave it on the file for reference if necessary and should write the new charge separately and correctly date it.²

10. Examination of accused after amendment. — It is not incumbent on the Court to re-examine the accused after the alteration of the charge under this section since the trial does not commence *de novo* so that if the accused has already been called on to enter on his defence there is no further obligation to examine him,¹ although some of the witnesses have been recalled under S. 231 subsequent to the alteration of the charge.²

11. Sub-section (2). — For similar provisions requiring the charge to be read and explained, see Ss. 210, 255 and 271.

This section deals with the alteration and addition of charges. The alterations must be read and explained to the accused who must know what he is charged with and what offence he has to answer. If the alteration is not read and explained to the accused and he is prejudiced in his defence, the conviction is illegal.¹ But where the accused

2. ('26) AIR 1926 Pat 253 (254): 5 Pat 238 : 27 Cr. L. J. 512, *Ramsunder Isser v. Emperor*. (It is not a proper exercise of discretion to withdraw the charge which the committing Magistrate thought to be proved and put the accused under disadvantage by substituting another (triable with aid of assessors) so that he might be deprived of the right of trial by jury.)

Note 8

1. ('33) AIR 1933 Cal 598 (598): 34 Cr.L.J. 836, *Davis Hewlet & Co. v. Emperor*. (Application to amend in writing allowed at early stage—No prejudice to the accused.)
2. (1862) 1 Weir 471 (475) : 1 M H C R 31, *Queen v. Williams*.
3. ('92) 16 Bom 414 (426), *Empress v. Vajiram*.
4. ('28) AIR 1928 Bom 475 (476): 30 Cr.L.J. 191, *Emperor v. Mohanlal Aditram*.

Note 9

1. ('68) 9 Suth W R Cr 14 (15), *Queen v. Feojdar Roy*.
2. ('15) AIR 1915 Low Bur 102 (103) : 16 Cr.L.J. 2 (3), *Nga Pan Hlaing v. Emperor*.

Note 10

1. ('23) AIR 1923 Mad 609 (615) : 46 Mad 449 : 24 Cri L Jour 547 (FB), *Varisai Rowther v. Emperor*.
- (22) AIR 1922 Pat 393 (394) : 1 Pat 54 : 23 Cr. L. J. 146, *Shamlal v. Emperor*.
2. ('22) AIR 1922 Pat 393 (394) : 1 Pat 54 : 23 Cr. L. J. 146, *Shamlal v. Emperor*.

Note 11

1. ('26) AIR 1926 All 227 (227) : 27 Cr.L.J. 152, *Raghunath Kandu v. Emperor*. (A Court cannot convict an accused person of an offence of which he has not been told anything.)

Section 227
Notes 11-14

was defended by a counsel who was asked whether he wanted a new trial and the latter did not want it, it was held that the accused was not prejudiced by the omission of the judge to read and explain the alteration in the charge.² Since the object of the provision is that the accused should have notice of any charge that he has to meet, he should not be called upon to meet additional charges without notice nor should he be convicted under charges different from those which he was called upon to meet.³

12. Appeal. — As to whether it is open to the Government to prefer an appeal against an order of the Sessions Judge refusing to amend or add new charges, see S. 417 Note 7.

13. Revision. — As has been seen already, the section confers a discretion on the Court to allow amendment of a charge. A Court of appeal or revision would always be slow to interfere with the exercise of such discretion unless it has been exercised perversely or arbitrarily. Thus, where the trial Court refused to alter the charge on the ground that the re-casting of charges would embarrass the jury and possibly prejudice the accused in his trial, it was held that it could not be said that such reason was capricious or involved any disregard of legal principles and that therefore the High Court would refuse to interfere with such discretion in appeal or revision.¹ Where an alteration in the charges occasions a failure of justice, the Court of revision may interfere.²

14. Accused, when can be convicted without charge. — See S. 237.

(175) 23 Suth W R Cr 59 (59), *Queen v. Salamut Ali*.

2. (184) 8 Bom 200 (212), *Queen-Empress v. Appa Subhana*.

3. (182) 8 Cal 195 (197), *Empress v. Radoinath Shaha*. (Case under Excise Act, (Bengal Act VII of 1878).)

(101) 3 Bom L R 675 (676), *King-Emperor v. Luis Mingel Fonccca*.

(1900) 27 Cal 660 (661, 662), *Jatu Singh v. Mahabir Singh*. (Person charged of theft cannot be convicted in appeal under S. 147, I. P. C., without a charge.)

(114) AIR 1914 Cal 663 (663) : 41 Cal 743 : 15 Cr. L. J. 190, *Mahomed Hossein v. Emperor*. (Notice must be given of the amendment of charge as to the intention with which the offence of house-breaking was committed.)

(1900) 27 Cal 990 (991) : 5 C W N 31, *Rahimuddi v. Asgar Ali*. (Conviction cannot be confirmed on a different common object of unlawful assembly while the object originally charged has failed.)

(129) AIR 1929 Rang 256 (256) : 30 Cr. L. J. 990 : 7 Rang 316, *Emperor v. Nga Po Saik*. (Conviction under S. 30 (a) of Burma Excise Act cannot be altered to one under S. 37 if accused is not called to answer.)

(123) 24 Cr.L.J. 119 (119, 120) : 71 I. C. 247 (Cal), *Hajari v. Emperor*. (There cannot be a conviction under S. 456, I. P. C., where the charge was only under S. 457.)

(121) AIR 1921 Pat 496 (497) : 22 Cr. L. J. 485, *Mayadhar Mahanty v. Danardan Kund*. (Conviction of theft cannot be changed by appellate Court into one of assault, on theft not being proved.)

[See (132) AIR 1932 Pat 215 (216) : 33 Cr. L. J. 864 : 11 Pat 523, *Ghyasuddin Ahmad v. Emperor*. (The Court should see if the accused has notice.)

(1900) 3 Oudh Cas 314 (315, 316), *Girwar v. Empress*. (Person charged and convicted of a non-compoundable offence cannot in appeal be convicted of a compoundable offence without giving him an opportunity to compound the offence.)]

Note 13

1. (127) AIR 1927 Sind 28 (30, 35) : 21 S L R 55 : 27 Cr.L.J. 1217, *Emperor v. Stewart*.

2. (131) AIR 1931 Mad 439 (440) : 32 Cr.L.J. 756, *Subramania Ayyar v. Emperor*.

228.* If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge. Section 228

When trial may proceed immediately after alteration.

1. Scope of the section. — Sections 228 to 231 provide that the accused or the prosecution shall not be embarrassed or prejudiced by the alteration of the charge under the previous section.¹ This section provides that if the amendment of the charge is of such a nature that proceeding immediately with the case is not likely to prejudice the prosecution or the defence, the trial may be proceeded with immediately. For instance, where the amended charge is closely related to the original charge, there is no objection to proceeding with the trial immediately.² In such a case, the section provides that the trial may be proceeded with "as if the new or altered charge had been the original charge." Hence, where originally different charges were laid against the two accused in a case and subsequently the charges were amended so that the two accused were charged with the same offence, it was held that the two accused could be said to be tried for the same offence within S. 30 of the Evidence Act and that, under that section, the confession of one of the co-accused could be taken into consideration against the other.³

229.† If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either Section 229

When new trial may be directed, or trial suspended.

* Code of 1882 : S. 228 — The words 'or addition' were inserted after the word 'alteration' in 1898. Otherwise the section was the same.

Code of 1872 : S. 447 and Code of 1861 : S. 245 — Materially the same.

† Code of 1882 : S. 229.

The words "or added" were inserted after the word "altered" in 1898. Otherwise the section was the same.

1872 : S. 448 ; 1861 : S. 246.

Section 228 — Note 1

1. ('37) AIR 1937 Sind 1 (2) : 30 Sind L R 391 : 38 Cri L Jour 324, *Emperor v. Muhammad Ismail*.
2. ('74) 11 Bom H C R 278 (279, 280), *Reg. v. Gobind Babli Raul*. (Joint trial—A for murder, B for abetment of murder — Confession by A used against him—Charge against A altered to abetment of murder — A's confession used against both — Conviction — No illegality.)
3. ('74) 11 Bom H C R 278 (279, 280), *Reg. v. Govind Babli Raul*.

Section 229
Note 1

direct a new trial or adjourn the trial for such period as may be necessary.

1. Scope of the section. — The previous section provides for the procedure to be followed when the amendment of a charge is of such a nature that proceeding with the trial immediately will not prejudice the accused or the prosecution. This section provides for the procedure to be followed in cases in which the amendment of the charge is of such a nature that proceeding immediately with the trial of the case will prejudice the prosecution or the accused. It provides that in such a case the trial should be adjourned or a retrial should be held.¹ Such re-trial can be directed by the trying Court itself and there is no need to refer the case to the High Court for this purpose.² Where it is doubtful whether proceeding immediately with the trial will prejudice the accused, the Court must lean in favour of holding that such procedure will prejudice the accused.³ Where the accused has not been given a proper opportunity of defending himself against the altered charge, the proceedings can be set aside and a retrial ordered.⁴

Section 230

230.* If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

1. Scope of the section.—There are some cases in which, before an offence can be taken cognizance of by a Court, it is necessary to obtain the sanction of the Provincial Government or of some other

* **Code of 1882 : S. 230** — The words "or added" were inserted after the word "altered" in 1898. Otherwise the section was the same.

1872 : S. 450 ; 1861 — Nil.

Section 229 — Note 1

1. (1865) 3 Suth W R Cr 40 (41), *Queen v. Mahomed Elim*. (Charge of culpable homicide not amounting to murder—Proof of offence of murder—Retrial ordered after amending the charge.)
- (1902) 6 Cal W N 72 (78), *Emperor v. Mathura Thakur*. (Grave charge of dacoity added at a late stage of the trial after conclusion of the case for defence and trial continued without adjournment.)
2. ('37) AIR 1937 Sind 1 (2) : 30 S. L. R. 391 : 38 Cr. L. J. 324, *Emperor v. Muhammad Ismail*. (Where evidence relating to six charges has gone on the record while there should be evidence only as to three, the Magistrate will be exercising a wise and just discretion in directing a new trial under S. 229.)
[See also ('38) AIR 1938 Cal 258 (261) : 1 L R (1938) 1 Cal 588 : 39 Cr. L. J. 596, *Akhil Bandhu Ray v. Emperor*.]
3. ('69) 6 Bom H C R Cr Cas 76 (81), *Reg. v. Govindas Haridas*. (Case bearing on S. 1 of Criminal Law Amendment Act, 18 of 1862.)
4. ('99) 1899 All W N 39 (40), *Queen-Empress v. Puran*. (Alternative charge under second part of S. 193, Penal Code.)

authority. (See for instance, Ss. 196, 196A and 197.) Hence, where a charge is amended or a new charge is framed and the new or altered charge relates to an offence, for the prosecution of which previous sanction is necessary, the trial cannot be proceeded with till such sanction is obtained.¹ But if sanction has already been obtained for a prosecution on the same facts as those on which the new or altered charge is founded, fresh sanction is not necessary.² If, however, the facts on which the new or altered charge is founded are not the same as those on which the sanction was based, a fresh sanction is necessary.³

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231.* Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

Section 231

1. Scope of the section. — This section provides that when a charge is altered or added to after the commencement of a trial, the prosecution and the accused should be allowed to re-call and examine, with reference to such alteration or addition, any witness who may have been already examined and also to call any further witness whom

* 1882 : S. 231; 1872 : S. 449; 1861 : S. 247.

Section 230 — Note 1

1. ('23) AIR 1923 Lah 260 (261) : 3 Lah 440 : 23 Cr. L. J. 709, *Arjan Mal v. Emperor*. (Original charge under S. 189, Penal Code—Altered charge under S. 176 read with S. 109, Penal Code — Case under S. 195, Cr. P. C., before amendment of 1923.)
2. ('03) 30 Cal 905 (908) : 7 C W N 494, *Profulla Chandra Sen v. Emperor*. (Sanction to prosecute for a substantive offence under S. 468, Penal Code—No fresh sanction necessary to prosecute on charge of abetting the offence, as the latter charge was founded on the same facts as those, on which the original sanction, was given.)
- ('20) AIR 1920 Lah 367 (369, 370) : 1919 Pan Re No. 31 Cr : 21 Cr. L. J. 230, *Amar Singh v. Emperor*. (Explosive Substances Act (1908), S. 7—Proper course to adopt under S. 7 is to state briefly facts constituting offence and to give consent to trial upon those facts as constituting offence under one or other of sections—Court may alter charge but fresh consent is not necessary — S. 230, Cr. P. C., makes full provision for such contingency.)
- ('79) 4 Cal 712 (713), *Empress v. Nipcha*. (Ss. 211, 192, Penal Code — Case before the amendment of 1923.)
3. ('26) AIR 1926 Rang 169 (171) : 4 Rang 131 : 27 Cr. L. J. 1075, *U Nyan Nein Da v. Emperor*. (Sanction to prosecute for conspiracy to wage war against King (S. 121A, Penal Code) — Order of sanction not referring to facts on which it is based but merely stating that the accused at diverse times had conspired to wage war against the King — Conversion of charge into one of sedition — Fresh sanction necessary.)
- ('24) AIR 1924 Pat 377 (379) : 24 Cr. L. J. 478, *Rahim v. Emperor*. (Bengal Municipal Act 1884, Byelaw No. 80—Where sanction was given to prosecute for the offence of "singing with a high sounding instrument" a conviction for the offence of "playing on a drum" was held illegal.)

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the Court may think material.¹ The section is *mandatory* and the Court is *bound* to allow the prosecution and the accused to re-call and examine any witness who may have been already examined.² The prosecution and the accused are entitled to re-call and examine *any* witness who may have been examined; the right is not confined to the witnesses on whose evidence the alteration in or addition to the charge may be based.³ The right of the prosecution and the accused in this respect is an *absolute* one and does not depend on the question whether the examination of the witnesses is necessary to avoid prejudice in the conduct of the case.⁴ But the Court is not bound to *ask* the accused or the prosecution if it is desired to re-call and examine any witness. If no application is made for the re-calling of any witnesses and their examination, it cannot be subsequently complained that the examination contemplated by the section was not allowed.⁵

A request to summon a *fresh witness* under this section can only be refused on the ground that the evidence of the witness is not thought by the Court to be material.⁶

The section applies to all cases where a charge is altered or added to after the commencement of a *trial*. Thus, even where a charge is amended under the directions of the High Court, the Court is bound to allow the examination mentioned in the section.⁷ But where in the course of a trial the Magistrate alters the charge and decides to commit the case to the sessions under section 347, the proceedings before the Magistrate should be only treated as commitment proceedings and not as a *trial* and the provisions of this section do not apply to them.⁸

Section 231 — Note 1

1. ('40) AIR 1940 Pat 355(359):1940 P W N 83(90):19 Pat 413, *Musahru v. Emperor*. ('16) AIR 1916 Lah 52 (53): 17 Cr. L. J. 454 (455): 1916 Pun Re No. 33 Cr, *Harbans v. Emperor*. (Original charge under S. 460, Penal Code—Altered charge under Ss. 460, 302, Penal Code.)
- ('30) 31 Cr. L. J. 455 (456, 457): 122 Ind Cas 785 (Mad), *Ramalinga Udayar v. Ramaswami Mudaliar*. (Accused is entitled to have his new witnesses examined, unless for reasons mentioned in S. 257, the Magistrate thinks that application for the examination of such witnesses is made for the purpose of vexation or delay or for defeating the ends of justice in which case it is essential that he must record the grounds.)
2. ('32) AIR 1932 Cal 486 (487): 33 Cr. L. J. 265, *Nagendra Nath v. Emperor*. ('27) AIR 1927 Pat 398 (400): 6 Pat 832: 28 Cr. L. J. 769, *Chhanka v. Emperor*. ('24) AIR 1924 All 665 (665, 666): 25 Cr. L. J. 798, *Mohan Lal v. Emperor*. (Original charge under S. 324, Penal Code — Charge altered under S. 307, Penal Code.)
3. ('26) AIR 1926 Lah 60 (61): 26 Cr. L. J. 1497, *Hazara Singh v. Emperor*. (All that the Court can do is to restrict the examination of the witnesses to the alteration or amendment in the charge.)
4. ('29) AIR 1929 Mad 200(201):52 Mad 346:30 Cr. L. J. 223, *Ramalinga v. Emperor*. ('32) AIR 1932 Cal 486 (486, 487): 33 Cr. L. J. 265, *Nagendra Nath v. Emperor*. (S. 231 is mandatory and as Magistrate had acted in violation of S. 231 the trial was illegal irrespective of the question whether the accused was prejudiced or not.)
5. ('40) AIR 1940 Pat 355 (359): 1940 P W N 83 (90): 19 Pat 413, *Musahru v. Emperor*. (In such a case no prejudice is caused to the accused.) ('30) AIR 1930 All 215 (216): 52 All 455: 32 Cr. L. J. 22, *Konmal v. Emperor*. (Compare S. 256, Cr. P. C.)
6. ('40) AIR 1940 Pat 355(359):1940 P W N 83(90):19 Pat 413, *Musahru v. Emperor*.
7. ('21) AIR 1921 Cal 605 (606): 25 Cr. L. J. 524, *Kashi Pramanick v. Danu Pramanick*. (Ss. 143, 379, Penal Code.)
8. ('31) AIR 1931 All 434 (435): 53 All 692: 32 Cr. L. J. 849, *Ram Ghulam v. Emperor*. (Offence under S. 363, Penal Code.)

232.* (1) If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration

A is convicted of an offence, under S. 196 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but, if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

1. Scope of the section.— This section provides for the procedure to be followed in cases where a person is *convicted of an offence*, and the Appellate Court or the High Court is of the opinion that he has been misled in his defence by the absence of a charge or by an error in the charge. The section provides that in such cases a re-trial may be ordered on an amended charge.¹ Thus, where an accused is charged with one offence and convicted of a different offence without a charge being framed in respect of it, a re-trial can be ordered if it is found that he has been misled in his defence by the absence of a charge.² Similarly, where a charge is framed in the alternative form

* Code of 1882 : S. 232 — Same.

Code of 1872 : S. 451 — Materially the same.

Code of 1861 — Nil.

Section 232 — Note 1

1. ('16) AIR 1916 Lah 52 (53) : 17 Cri L Jour 454 (455) : 1916 Pun Re No. 33 Cr, *Harbans v. Emperor*. (In this case, however, High Court upheld conviction of the original charge under S. 460, Penal Code.)
- ('02) 7 Cal WN 301 (303, 304), *Sarat Chandra Shah v. Emperor*. (Error in the charge.)
- ('22) AIR 1922 Lah 135 (136, 137) : 23 Cri L Jour 5, *Girdhara Singh v. Emperor*. (Charge scored out by the trial Court—Conviction on such charge—Illegality.)
- ('02) 29 Cal 481 (482) : 6 C W N 599, *Hossain Sardar v. Kalu Sardar*. (Offences under Ss. 379, 143, Penal Code—Charge framed under S. 379 only— Conviction of offence under S. 143 only without any charge thereunder — Illegality.)
- [See ('16) AIR 1916 Mad 1222 (1222) : 16 Cri L Jour 737 (738), *In re Mukka Muthirian*. (A charge under S. 143, Penal Code, cannot be added by the Appellate Court to charges under Ss. 426, 451, Penal Code.)]
- [See also ('23) AIR 1923 Pat 1 (4) : 23 Cr. L. J. 625 : 2 Pat 134 (SB), *Emperor v. Abdul Hamid*. (Common object of unlawful assembly.)]
2. ('40) 44 C WN 400 (401), *Surajmull v. Sheo Pujan*. (Charge under Ss. 427 and 417, Penal Code—Conviction under S. 323 without charge being framed—Accused is not entitled to acquittal on appeal merely on the ground that no charge had been framed—Appellate Court should order new trial on charge properly framed.)

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in a case in which the Code does not authorize the charge to be framed in such a form and the accused is thereby misled into pleading guilty to one of the offences instead of pleading not guilty to both the charges, a re-trial may be ordered.³ So also, section 221, sub-section (7) requires that where a previous conviction of the accused is intended to be used for the purpose of enhancing the sentence, the charge should specifically allege the previous conviction. If the charge omits to do so and, notwithstanding the omission, the accused, on conviction, is awarded higher punishment, the sentence is liable to be reduced on appeal.⁴

But where the accused has not been misled in his defence by the absence of the charge or the error in the charge, this section does not apply and the defect in the proceedings does not afford sufficient ground for ordering a re-trial.⁵ The fact that the accused was defended by a

- (1900) 5 Cal W N 567 (568), *In the matter of Chinibas Pal*. (Absence of charge.)
 ('01) 28 Cal 63 (64, 65) : 5 C W N 819, *Gobinda Pershad Pandey v. G. L. Garth*.
 ('02) 30 Cal 288 (290), *Yakub Ali v. Leihu Thakur*. (Conviction of rioting—Acquittal on appeal but conviction of house trespass and hurt without any charge—Illegal.)
 ('75) 23 Suth W R Cr 59 (59), *Queen v. Salamut Ali*. (Accused charged with dacoity and riot and acquitted cannot be convicted of house trespass without reading out or explaining the charge thereunder.)
 ('01) 5 Cal W N 296 (297), *Rameshwar v. Jogi Sahoo*. (Conviction of an offence which did not form the subject-matter of the complaint is illegal.)
 ('15) AIR 1915 Cal 181 (182) : 16 Cr. L. J. 42 (43), *Harnarain Sardar v. Emperor*. (Appellate Court setting aside conviction under S. 147, Penal Code, cannot convict under S. 353, Penal Code, without any charge—Re-trial ordered.)
 ('12) 13 Cri L Jour 593 (594) : 40 Cal 168 : 16 I. C. 161, *Sita Ahir v. Emperor*.
 ('13) 14 Cr. L. J. 212 (213) : 19 I. C. 308 (Cal), *Sital Chandra Maitra v. Emperor*. (Two persons charged with causing hurt to three—One charge—No case of hurt by one of the accused—Prejudice to accused—Retrial by another Magistrate ordered.)
 ('24) AIR 1924 Mad 584 (584, 585) : 25 Cri L Jour 396, *In re Kottoora Thevan*.
 ('15) AIR 1915 Cal 219 (219) : 15 Cri L Jour 704 (705), *Genu Manjhi v. Emperor*. (Charge and conviction of offence under S. 147, Penal Code—Conviction set aside on appeal but conviction of offence under S. 323, Penal Code, without charge—Illegal.)
 ('14) AIR 1914 Cal 663 (663) : 41 Cal 743 : 15 Cri L Jour 190, *Mahomed Hossein v. Emperor*. (Charge of house-breaking with intent to commit theft—Proof of different object—Accused must be given notice of this object.)
 ('09) 9 Cri L Jour 406 (406) : 1 Ind Cas 867 (Mad), *In re Subramania Ayyar*. (Accused convicted of criminal breach of trust cannot be convicted of cheating also without any charge in respect of it.)
 ('27) AIR 1927 All 75 (75, 76) : 27 Cri L Jour 1351, *Achhut Rai v. Emperor*.
 ('08) 7 Cr. L. J. 372 (374) : 12 C W N 577, *Bipra Das Giri v. Niradamoni Bewa*.
 ('27) AIR 1927 Rang 32 (32) : 4 Rang 355 : 27 Cri L Jour 1360, *Nga Shwe Zon v. Emperor*. (Conviction of offence under S. 19(e) of the Arms Act without charge substituted for conviction under S. 452, Penal Code, on appeal illegal.)
 ('90) 1890 Rat 529 (530), *Empress v. Nathoo Lalji*. (Offence under S. 394, Bombay Municipal Act, 1888.)
 ('88) 1888 Rat 386 (386), *Queen-Empress v. Sarwel*.
 3. ('86) 10 Bom 124 (129, 130), *Queen-Empress v. Ramaji*. (Accused was "entangled in a logical snare" — Per Jackson, J.)
 4. ('11) 12 Cri L Jour 233 (234) : 10 Ind Cas 241 (Lah), *Dungri v. Emperor*.
 5. ('17) AIR 1917 Mad 687 (688) : 17 Cr. L. J. 384 (386), *In re Mannar Kishnan*.
 ('29) AIR 1929 Pat 712 (714) : 9 Pat 642 : 30 Cri L Jour 891, *Mallu Gope v. Emperor*. (Accused misled in defence — Retrial should be ordered even where conviction is in compliance with law as well as when irregular.)
 ('32) AIR 1932 Pat 215 (216) : 11 Pat 523 : 33 Cr. L. J. 864, *Ghyasuddin v. Emperor*.
 ('24) AIR 1924 Bom 502 (503) : 49 Bom 84 : 26 Cr. L. J. 1000, *Emperor v. Ran-chhod Sursang*. (Accused charged with substantive offence can be rightly convicted of that offence read with S. 114, Penal Code, although not charged with it.)
 ('29) AIR 1929 Lah 867 (867) : 30 Cr. L. J. 702, *Mohamad Sadiq v. Delhi Electric Supply & Traction Co.* (Error in charge but no prejudice.)

pleader who did not raise any objection to the proceedings is a factor to be considered while determining the question of prejudice to the accused.⁶

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Where a re-trial is ordered under this section, it must be from the point at which the irregularity occurred and not from the very beginning.⁷

The power of ordering a re-trial is not confined to this section. Such a power is also conferred by S. 423. This section refers to cases in which the accused has been *convicted*, while under S. 423 a re-trial can be ordered even in cases where the accused has been *acquitted*.⁸ Similarly, under S. 423 a re-trial can be ordered on grounds wider than those mentioned in this section. Thus, under S. 423 a re-trial can be ordered on the ground that the accused had no proper opportunity of defending himself⁹ (though the charge may be unexceptionable).

Sub-section (2) provides that the Appellate Court or the High Court, as the case may be, shall quash the conviction when it comes to the conclusion that, on the facts proved, no criminal charge can be laid against the accused.¹⁰ See also the undermentioned case,¹¹ where the Court declined to make an order for re-trial on the ground that the punishment already suffered by the accused was sufficient.

See also sections 225, 423, 535 and 537 and Notes thereunder.

(32) AIR 1932 Cal 461 (462) : 59 Cal 113 : 33 Cr. L. J. 549, *Spicers v. Johiuddin*. (Motor Vehicles Act, 1914—Wrong reference to sections but accused not misled in defence.)

(18) AIR 1918 Lah 397 (400) : 1917 Pun Re No. 29 Cr : 18 Cr. L. J. 875, *Bisakhi v. Emperor*. (Defect is curable under Ss. 535 and 537, where the accused has not been prejudiced or misled.)

(31) AIR 1931 Mad 225 (227) : 32 Cr. L. J. 753, *Sambasiva Mudali v. Emperor*. (Defects in form of charge are immaterial unless they lead to failure of justice.)

(14) AIR 1914 Lah 101 (101) : 15 Cri L Jour 524, *Lal Khan v. Emperor*. (Defect in charge not prejudicial.)

(31) AIR 1931 Cal 410 (413) : 58 Cal 1303 : 32 Cr.L.J. 844, *Ramendra v. Emperor*.

(75) 24 Suth W R Cr 3 (3), *Queen v. Digambur Shaha*.

(82) 8 Cal 450 (454, 455) : 10 C. L. R. 421, *Empress v. Sreenath Kur*.

See also S. 535 Note 3.

6. (86) 8 All 665 (668) : 1886 A W N 254, *Empress v. Kharga*.

(20) AIR 1920 All 72 (73) : 21 Cr. L. J. 410, *Jagdeo Parshad v. Emperor*.

(15) AIR 1915 Sind 50 (52) : 16 Cr.L.J. 573 (574, 575) : 9 S L R 37, *Dodo v. Emperor*.

7. (25) AIR 1925 Nag 147 (149) : 25 Cr. L. J. 1152, *Gangadhar v. Bhanqi Sao*.

8. (99) 1899 All W N 39 (39, 40), *Queen-Empress v. Puran*.

9. (99) 1899 All W N 39 (39, 40), *Queen-Empress v. Puran*.

(07) 5 Cr. L. J. 420 (421) : 3 L. B. R. 283, *Mimo Dha v. Emperor*.

(07) 5 Cr.L.J. 164 (167) : 31 Bom 218 : 9 Bom L R 148, *Emperor v. Isap Mahamad*.

10. (12) 13 Cr. L. J. 127 (128) : 13 Ind Cas 783 (Cal), *Paimullah v. Emperor*.

(30) AIR 1930 Cal 138 (139) : 31 Cr.L.J. 697, *Sunnat Mandal v. Makar Sheikh*. (Very scanty nature of evidence against accused—Retrial not ordered on amended charge.)

(11) 12 Cr. L. J. 66 (67) : 9 Ind Cas 361 (Cal), *Lal Behary Singh v. Emperor*.

(75) 23 Suth W R Cr 59 (59), *Queen v. Salamut Ali*.

(01) 28 Cal 63 (65), *Govinda Pershad v. Garth*.

(85) 10 Bom 124 (130), *Empress v. Ramji Sajoba Rao*.

11. (02) 29 Cal 481 (482), *Hossein Sardar v. Kalu Sardar*.

Joinder of charges.

Section 233

233.* For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

Illustration

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

Synopsis

- | | |
|---|-------------------------------------|
| 1. Joinder of charges and joint trials. | 4. Separate charges. |
| 2. Scope and object of the section. | 5. Non-compliance with the section. |
| 3. Distinct offences — Illustration. | 6. Counter-cases. |

Other Topics (miscellaneous)

- | | |
|--|---|
| Applicability to appeals. See Note 2. | Offences against several persons. See Note 3. |
| Applicability to summons cases. See Note 1. | Offences not distinct. See Note 3. |
| Bribery. See Note 3. | Offences of same kind. See Note 3. |
| Cases and counter-cases. See Note 6. | Offences under different sections. See Note 3. |
| Charges in the alternative. See Note 3. See also S. 236. | Offences under same section on different occasions. See Note 3. |
| Defects whether cured by S. 537. See Note 5. | Powers of Appellate Courts in joint trials. See Note 2. |
| General rule—Exceptions to the section. See Notes 1 and 2. | Receiving of stolen properties of several persons. See Note 3. |
| Joint committal not prohibited. See Note 1. | Separate trial. See Note 1. |
| Joint enquiry under S. 107 not prohibited. See Note 1. | Several dacoities. See S. 235 Note 2. |
| Misappropriation of distinct sums of money. See Note 3. | Theft. See Note 3. |
| Objection even in appeal. See Note 5. | Two false statements in a single deposition. See Note 3. |
| | Using forged documents—Only one user. See Note 3. |

1. Joinder of charges and joint trials. — The law on the subject of joinder of charges and joint trials is contained in Ss. 233 to 239. Before the Code of 1872 there were no provisions corresponding to these, and the strict rules of the English Common Law as to the joinder of charges and joint trials were being followed. By Ss. 452 to 458 of the Code of 1872, which are reproduced with slight modifications in the present Code as sections 233 to 239, the Legislature considerably widened the powers of the Court as regards joinder of charges and joinder of defendants.¹

* **Code of 1882 : S. 233** — Same as that of 1898 Code.

Code of 1872 : S. 452 — Substantially same.

Code of 1861 : S. 241.

241. When it appears to the Magistrate that the facts which can be established in evidence show the commission of two or more offences falling within the same section of the Indian Penal Code, the charge shall contain two or more heads charging such offences respectively.

Section 233 — Note 1

1. ('08) 8 Cr. L. J. 191 (194, 195) ; 1 S L R 73, *Emperor v. Ghulam*.

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Section 233 lays down a general rule, viz., that for every distinct offence, of which any person is accused, there shall be a separate charge, and that every such charge shall be tried separately. To this rule ss. 234 to 239 are exceptions.² The object of making such exceptions is to avoid the necessity of the same witnesses giving the same evidence two or three times over in different trials, and to join in one trial those offences with regard to which the evidence would overlap.³ The sections are, however, so framed as to minimise the danger of prejudice to the

2. ('10) 11 Cr.L.J. 337 (337) : 5 I.C. 970 (Bom), *Emperor v. Kashinath Dagaji Sali*. ('84) 7 All 174 (177) : 1884 A W N 321 (FB), *Queen-Empress v. Juala Prasad*. ('86) 9 All 452 (457) : 1887 A W N 111, *Queen-Empress v. Abdul Kadir*. ('98) 1898 All W N 205 (207) : 21 All 127, *Queen-Empress v. Mathura Prasad*. ('10) 11 Cr. L. J. 285 (285) : 32 All 219 : 5 I. C. 896, *Sheo Saran Lal v. Emperor*. ('13) 14 Cr. L. J. 116 (117) : 18 I. C. 676 (All), *Shanker v. Emperor*. ('17) AIR 1917 All 404 (404) : 38 All 457 : 18 Cr.L.J. 47, *Emperor v. Bechan Pande*. ('21) AIR 1921 All 19 (21, 22) : 22 Cr. L. J. 641, *Sanuman v. Emperor*. ('21) AIR 1921 All 246 (247) : 22 Cr. L. J. 657, *Itam Prasad v. Emperor*. (Three offences within 12 months but not committed in the same transaction — Joint trial of several accused is illegal.) ('21) AIR 1921 All 408 (409) : 22 Cr. L. Jour 397, *Ram Sahai v. Emperor*. ('23) AIR 1923 All 88 (88) : 24 Cr. L. J. 155, *Ganesht Lal v. Emperor*. (Joint trial of keeper of gaming house and persons found using it is legal.) ('23) AIR 1923 All 126 (126):45 All 223:24 Cr.L.J. 149, *Durga Prasad v. Emperor*. ('26) AIR 1926 All 261 (261, 262):48 All 236 : 27 Cr.L.J. 143, *Fauzdar v. Emperor*. ('28) AIR 1928 All 417 (417) : 30 Cr. L. Jour 214, *Seival v. Emperor*. ('90) 15 Bom 491 (500), *Queen-Empress v. Fakirappa*. ('08) 8 Cr. L. J. 281 (302) : 10 Bom L R 848, *Emperor v. Dal Gangadhar Tilak*. (Doubted whether separate newspaper articles written week after week would come under "same transaction.") ('29) AIR 1929 Bom 296 (298):53 Bom 479 : 31 Cr.L.J. 65, *Emperor v. C. E. Ring*. ('32) AIR 1932 Bom 277 (277) : 33 Cr. L. J. 619, *Krishnaji Anant v. Emperor*. ('04) 1 Cr.L.J. 58 (60) : 8 C W N 180, *Pran Krishna Saha v. Emperor*. (Principle of joinder of charges and persons is applicable to inquiries under S. 107, Cr. P. C.) ('10) 11 Cr.L.J. 325 (326) : 37 Cal 604 : 6 I.C. 352, *Ram Sewak Lal v. Maneshwar*. ('12) 13 Cr. L. J. 593 (593) : 40 Cal 168 : 16 I. C. 161, *Sita Ahir v. Emperor*. ('13) 14 Cr.L.J. 428 (429) : 40 Cal 318 : 20 I. C. 412, *Nitya Gopal v. Jiban Krishna*. ('16) AIR 1916 Cal 693 (705) : 16 Cr. L. J. 641, *Ram Subhag Singh v. Emperor*. (Disregard to provisions of S. 233 cannot be cured by S. 537.) ('22) AIR 1922 Cal 76 (77) : 23 Cr. L. J. 685, *Banga Chandra v. Ananda Charan*. ('05) 2 Cr. L. J. 34 (36) : 1905 Pun Re No. 2 Cr, *Bhagwati Dyal v. Emperor*. ('28) AIR 1928 Lah 34 (35) : 29 Cr. L. J. 521, *Muhammad Khan v. Emperor*. ('73) 7 Mad H C R 375 (375, 376), *In re Noujan*. ('08) 8 Cr. L. Jour 11 (13) : 4 N. L. R. 71, *Emperor v. Balwant Singh*. ('16) AIR 1916 Mad 571 (572) : 16 Cr.L.J. 298, *In re Mala Mekalakati Subbadu*. ('16) AIR 1916 Nag 73 (75) : 13 N L R 35 : 18 Cr.L.J. 339, *Gunwant v. Emperor*. ('19) AIR 1919 Mad 487 (492) : 20 Cr. L. J. 354, *Kumaramuthu Pillai v. Emperor*. ('25) AIR 1925 Mad 690 (697, 699) : 49 Mad 74 : 26 Cr.L.J. 1513, *In re Mallu Dora*. ('21) AIR 1921 Oudh 49 (51) : 22 Cr. L. Jour 344, *Kallu v. Emperor*. ('31) AIR 1931 Oudh 86 (87) : 6 Luck 441 : 32 Cr. L. Jour 540, *Dubri Misir v. Emperor*. (The words "same transaction" are to be interpreted according to facts of each case.) ('20) AIR 1920 Pat 230 (231) : 21 Cr.L.J. 161 : 5 Pat L J 11, *Gobinda v. Emperor*. ('01-02) 1 Low Bur Rul 361 (361), *San Daik v. Crown*. ('03-04) 2 Low Bur Rul 10 (13) (FB), *Nga Lun Maung v. Emperor*. ('04) 1 Cr.L.J. 537 (538, 539) : (1904) U B R 1st Qr., Cr.P.C., 2, *Emperor v. Asgar Ali*. ('08) 8 Cr. L. Jour 497 (502) : 4 L. B. R. 294, *S. P. Chatterjee v. Emperor*. ('14) AIR 1914 L B 263 (264) : 7 L. B. R. 272 : 16 Cr.L.J. 44, *Po Mya v. Emperor*. ('33) AIR 1933 Sind 255 (256) : 35 Cr.L.J. 256, *Jethanand Muriymal v. Emperor*. (It is legal to join charges under Bombay Abkari Act.) [See also ('25) AIR 1925 Mad 1 (6) : 47 Mad 746 : 25 Cr. L. J. 1297 (FB), *In re Theethumalai Gounder*.]
3. ('08) 8 Cr. L. Jour 191 (195) : 1 Sind L R 73, *Emperor v. Ghulam*. ('25) AIR 1925 Mad 690 (697) : 49 Mad 74 : 26 Cr. L. J. 1513, *In re Mallu Dora*.

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Note 1

accused by the joining together of more than one offence in the same trial.^{3a} Of these exceptions, Ss. 234 to 238 apply to cases where *one* person may be dealt with at one trial for more than one offence, while S. 239 applies to the trial of *more* persons than one jointly.⁴

The principles as to joinder of charges and joint trial of accused persons embodied in Ss. 233 to 239 are applicable to the trial of even summons cases⁵ and to inquiries under S. 107.⁶

Sections 233 to 239 refer only to the *trial* of the accused and not to a preliminary inquiry before a committing Magistrate and, therefore, no objection can be taken to the commitment on account of any misjoinder of charges or joint inquiry.⁷ See also Note 6.

The test whether a trial is or is not bad due to misjoinder of charges is not the number of offences of which the accused has been convicted but number of offences with which he has been *charged*. It is the multiplicity of charges which vitiates the trial and prejudices the accused in his defence.⁸

For a discussion on the question whether the exceptions under Ss. 234 to 239 are mutually exclusive, see S. 239 Note 2.

Where at the time of framing charges in a warrant case the Magistrate finds that to frame charges against all the accused will lead to a misjoinder of charges, he can in the exercise of his inherent power order that there should be a new trial in regard to some of the accused and is not bound to frame charges against them also at that stage.⁹

3a. ('16) AIR 1916 Mad 550 (552) : 16 Cr. L. J. 323, *Virupana Goud v. Emperor*.

4. ('14) AIR 1914 L B 263 (264) : 7 Low Bur Rul 272 : 16 Cr. L. J. 44, *Po Mya v. Emperor*. (The last words of S. 239 do not mean that S. 239 and S. 234 are to be read together.)

('21) AIR 1921 All 246 (247) : 22 Cri L Jour 657, *Ram Prasad v. Emperor*.

('08) 8 Cri L Jour 11 (13) : 4 N. L. R. 71, *Emperor v. Balwant Singh*.

5. ('05) 2 Cri L Jour 739 (744) : 3 Low Bur Rul 52 (FB), *Emperor v. San Dan*.

('14) AIR 1914 Cal 603 (606) : 41 Cal 694 : 15 Cri L Jour 73, *Biswas v. Emperor*. (Case under the Bengal Excise Act.)

('12) 13 Cr. L. J. 124 (124) : 13 Ind Cas 780 (Mad), *Emperor v. Arumukham Pillai*. (Case under Act II of 1890.)

('32) AIR 1932 Mad 497 (500) : 33 Cri L Jour 589, *Lakshumana Mudaliar v. Emperor*. (Case under the Companies Act.)

6. ('04) 1 Cri L Jour 58 (60) : 8 C W N 180, *Pran Krishna Saha v. Emperor*.

7. ('02) 26 Mad 592 (594) : 2 Weir 262, *In the matter of Govindu*. (It is open to the Sessions Judge to try the accused separately.)

(1900) 1900 All W N 206 (206), *Queen-Empress v. Salamatullah Khan*. (Do.)

('05) 2 Cri L Jour 432 (433) : 7 Bom L R 457, *Emperor v. Sita*.

('17) AIR 1917 Mad 612 (612) : 17 Cri L Jour 369, *In re Krishnamurthy Iyer*.

('19) AIR 1919 Mad 190 (191) : 20 Cr. L. J. 514, *In re Sessions Judge of Tanjore*.

('29) AIR 1929 Nag 237 (237) : 30 Cr. L. J. 404, *Manbodh Singh v. Jhaboolal*.

See S. 207 Note 5 and S. 239 Note 1.

8. ('38) AIR 1938 Sind 171 (173) : 39 Cr. L. J. 890, *Emperor v. Balumal Hotchand*.

[See also ('38) AIR 1938 P C 130 (133, 134) : 39 Cr. L. J. 452 : ILR (1938) 2 Cal 295 : 65 IA 158 : 32 SLR 476 (PC), *Babulal Chaukhani v. Emperor*. (Decision on S. 239 Cl. (d).)]

9. ('38) AIR 1938 Cal 258 (261) : 1 L R (1938) 1 Cal 588 : 39 Cr. L. J. 596, *Akhil Bandhu Ray v. Emperor*.

[See also ('36) AIR 1936 Rang 474 (475) : 38 Cri L Jour 183, *Nga Po Htwe v. Emperor*. (If there is any risk of a misjoinder of charges by two accused being tried together, then their separate trials should be ordered: but it is wrong to acquit an accused against whom a prima facie case has been made out by the prosecution evidence merely because of this technical difficulty.)]

Section 233
Note 2

2. Scope and object of the section. — The provisions of this section are mandatory¹ and must be strictly applied.² Separate trial is the rule and joint trial the exception.³ The exceptions provided for are only empowering sections and must be strictly construed and applied so as not to defeat the right of independent trial conferred by this section.⁴

The object of the section (which has been enacted for the benefit of the accused)^{4a} in requiring that there shall be a separate charge for every distinct offence and a separate trial for every charge is twofold: *firstly*, to give the accused notice of the charges which he has to meet and *secondly*, to see that he is not embarrassed by having to meet charges in no way connected with one another.⁵ Another object is to prevent the mind of the Court from being prejudiced against the accused, if he were tried in one trial upon different charges resting on different evidence.⁶ In other words, the object is to prevent the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to the Judge and to the accused.⁷

Note 2

1. ('12) 13 Cri L Jour 593 (593): 40 Cal 168: 16 I. C. 161, *Sita Ahir v. Emperor*. ('25) AIR 1925 Cal 341(345): 52 Cal 253: 26 Cr. L. J. 487, *Alimuddi Naskar v. Emperor*.
- ('21) AIR 1921 Pat 291 (292): 21 Cr. L. J. 619, *Padmanabha Patnaik v. Emperor*. (Objection as to violation of this section can be taken before High Court in revision.)
2. ('21) AIR 1921 All 246 (247): 22 Cr. L. J. 657, *Ram Prasad v. Emperor*. (Three offences within 12 months but not committed in the same transaction — Joint trial of several accused is illegal.)
- ('16) AIR 1916 Mad 571 (572): 16 Cri L Jour 298, *In re Mekalakati Subbadu*.
- ('16) AIR 1916 Mad 110 (115): 39 Mad 527: 16 Cri L Jour 593 (FB), *Public Prosecutor v. Kadiri Koya Haji*.
- ('25) AIR 1925 Mad 690 (697): 49 Mad 74: 26 Cr. L. J. 1513, *In re Mallu Dora*.
- ('03) 1903 Pun LR No. 149 p. 613 (615): 1903 Pun Re No. 17 Cr, *Singhara v. Emperor*.
3. ('23) AIR 1923 All 88 (88): 24 Cri L Jour 155, *Ganesh Lal v. Emperor*.
- ('23) AIR 1923 All 126 (126): 45 All 223: 24 Cr. L. J. 149, *Durga Prasad v. Emperor*. [See also ('25) AIR 1925 Cal 341 (345): 52 Cal 253: 26 Cr. L. J. 487, *Alimuddi Naskar v. Emperor*.]
- See also S. 235 Note 1.
4. ('18) AIR 1918 Pat 168 (169, 170): 3 Pat L Jour 124: 19 Cr. L. J. 673, *Kailash Prasad v. Emperor*. (Accused should not be tried jointly if the trial is prejudicial to their interest.)
- ('20) AIR 1920 Pat 230 (231): 5 Pat L J 11: 21 Cr. L. J. 161, *Gobinda v. Emperor*.
- ('17) AIR 1917 All 404 (404): 38 All 457: 18 Cr. L. J. 47, *Emperor v. Bechan Pande*.
- ('13) 14 Cri L Jour 116 (117): 18 Ind Cas 676 (All), *Shankar v. Emperor*.
- ('05) 2 Cri L Jour 34 (36): 1905 Pun Re No. 2 Cr, *Bhagwati Dial v. Emperor*.
- 4a. ('05) 2 Cri L Jour 34 (36): 1905 Pun Re No. 2 Cr, *Bhagwati Dial v. Emperor*.
5. ('16) AIR 1916 Cal 693 (697): 16 Cr. L. J. 641, *Ramsubag Singh v. Emperor*.
6. ('84) 7 All 174 (177): 1884 A W N 321 (FB), *Queen-Empress v. Juala Prasad*.
- ('21) AIR 1921 All 19 (21): 22 Cri L Jour 641, *Sanuman v. Emperor*.
- ('90) 15 Bom 491 (497), *Queen-Empress v. Fakirappa*.
- ('16) AIR 1916 Mad 550 (552): 16 Cr. L. J. 323, *Virupana Goud v. Emperor*.
7. ('39) AIR 1939 Bom 129 (143): 40 Cri L Jour 579, *Ram Chandra Rango v. Emperor*. (Necessity of following procedure relating to joinder of charges is dictated by reasons of practical expediency and justice.)
- ('03) 2 Low Bur Rul 10 (12), *Nga Lun Maung v. King-Emperor*.
- ('98) 1898 All W N 205 (207): 21 All 127, *Queen-Empress v. Mathura Prasad*.
- ('25) AIR 1925 Mad 690 (697): 49 Mad 74: 26 Cr. L. J. 1513, *In re Mallu Dora*. [See ('39) AIR 1939 Mad 59 (59): 40 Cr. L. J. 211, *In re Uppara Dodda Narasa*. (Charges under Ss. 302 and 211 of preferring false complaint of murder ought not to be tried together, though joint trial is not illegal as they formed part of same transaction—But it is embarrassing to prosecution and to the accused and may lead to failure of justice.)]

Section 233 Notes 2-3

This section applies not only to original trials but also to an Appellate Court in altering a finding under S. 423⁸ or in the trial of two appeals arising out of two separate cases.⁹

3. Distinct offences — Illustration. — The words “distinct offence” in the section mean, as the illustration to the section shows, offences which have no connexion with each other.¹ The following are illustrations of distinct offences:—

1. Offences falling under *different sections* of a penal enactment, as for example, under two sections of the Penal Code,² or of a special

8. ('05) 2 Cr. L. J. 694 (695) : 1905 Pun Re No. 38 Cr, *Sahib Singh v. Emperor*. See also S. 423 Note 31.

9. ('28) AIR 1928 Cal 230 (230, 231) : 29 Cr. L. J. 512, *Doat Ali v. Emperor*. [See also ('77) 1 Bom 610 (614), *Reg. v. Hanmanta*.]

Note 3

1. ('39) AIR 1939 Bom 129 (138) : 40 Cr.L.J. 579, *Ramchandra Rango v. Emperor*. ('39) AIR 1939 Cal 32 (33) : 40 Cr. L. J. 290, *Emperor v. Afsaruddi Naseraddi*. (Two murders and one offence of causing grievous hurt committed in same night at different times and places cannot be jointly tried—Two separate charges under S. 302 and another under S. 325 are necessary.)
- ('16) AIR 1916 Cal 693 (705) : 16 Cr. L. J. 641, *Ram Subhag Singh v. Emperor*. [See ('36) AIR 1936 Cal 686 (687) : 38 Cr. L. J. 1, *Haridas Chatterjee v. Manmatha Nath Mullick*. (Held, offence under S. 283, Penal Code, of creating obstruction in river bed and making bank, and that under S. 76-B, Bengal Embankment Act, 1882 are not distinct offences.)]
2. ('40) AIR 1940 Pesh 10 (11) : 41 Cr.L.J. 543, *Jhar Khan Nur Khan v. Emperor*. (Offences under Ss. 353 and 225, Penal Code, are separate offences.)
- ('39) AIR 1939 Bom 129 (138) : 40 Cr. L. J. 579, *Ramchandra Rango v. Emperor*. (Offences under Penal Code, Ss. 477A, 193 read with S. 109.)
- ('39) AIR 1939 Cal 32 (33) : 40 Cr. L. J. 290, *Emperor v. Afsaruddi Naseraddi*. (Ss. 302 and 325.)
- ('02) 29 Cal 387 (388) : 6 C W N 550, *Mohendro v. Emperor*. (Ss. 411 and S. 489 (c).)
- ('11) 12 Cri L Jour 82 (82) : 9 Ind Cas 455 (Cal), *Kanta Neya v. Emperor*. (Ss. 147 and 323.)
- ('12) 13 Cr. L. J. 593 (593) : 40 Cal 168 : 16 I. C. 161, *Sita Ahir v. Emperor*. (Do.)
- ('22) AIR 1922 Cal 573 (574) : 50 Cal 94 : 24 Cr.L.J. 72, *Radha Nath v. Emperor*. (Ss. 147, 323 and 325.)
- ('28) AIR 1928 Lah 185 (186) : 29 Cr.L.J. 34, *Babu Mal v. Ghasi*. (Ss. 147 and 429.)
- ('87) 14 Cal 395 (396), *Queen-Empress v. Chandi Singh*. (Ss. 147 and 447.)
- ('82) 8 Cal 450 (454) : 10 Cal L R 421, *In the matter of Sreenath Kur*. (Ss. 167 and 466.)
- ('33) AIR 1933 Mad 434 (434) : 34 Cri L Jour 1183, *Muthusami Pillai v. Govt. Tahsildar of Ramnad*. (Ss. 170 and 175.)
- ('85) 10 Bom 124 (129), *Queen-Empress v. Ramji Sajabarao*. (Ss. 182 and 193.)
- ('10) 11 Cri L Jour 325 (326) : 37 Cal 604 : 3 Ind Cas 352, *Ram Sewak Lal v. Maneshwar Singh*. (Ss. 182 and 500.)
- ('09) 10 Cr.L.J. 452 (453) : 4 Ind Cas 1 (Cal), *Laskari v. Emperor*. (Ss. 183 and 323.)
- ('08) 8 Cri L Jour 497 (502, 504) : 4 Low Bur Rul 294 (FB), *S. P. Chatterji v. Emperor*. (Ss. 193 and 201.)
- ('97) 1897 Rat 925 (926), *Queen-Empress v. Daulata Dhondi*. (Ss. 193 and 211.)
- ('83) 1883 All W N 188 (188), *Empress v. Harnam*. (Ss. 193 and 471.)
- ('18) AIR 1918 Cal 237 (237) : 19 Cri L Jour 868, *Emperor v. Rajendra Roy*. (Ss. 210 and 403.)
- ('06) 4 Cr.L.J. 389 (390) : 3 Low Bur Rul 221, *Emperor v. Po Hla*. (Ss. 224 and 379.)
- ('09) 9 Cri L Jour 147 (148) : 1 I. C. 69 (Cal), *Tilakdhari Mahton v. Lali Singh*. (Sections 225 and 379.)
- ('88) 11 Mad 441 (442) : 1 Weir 210, *Queen-Empress v. Kutti*. (Ss. 225 and 380.)
- ('04) 1 Cri L Jour 714 (716) : 31 Cal 1007 : 8 C W N 717, *Prosunnd Kumar v. Emperor*. (Sections 240 and 243.)
- ('82) 5 Mad 20 (21) : 2 Weir 303, *Pulisanke Reddi v. Queen*. (Ss. 290 and 291.)
- ('13) 14 Cr.L. J. 116 (117) : 18 I. C. 676 (All), *Shankar v. Emperor*. (Ss. 302 and 323.)
- ('02) 1 Low Bur Rul 361 (362), *San Daik v. Crown*. (Sections 302 and 366.)
- ('92) 14 All 502 (503) : 1892 AVN 95, *Queen-Empress v. Mulua*. (Ss. 302 and 390.)

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- (27) AIR 1927 Mad 243 (244) : 27 Cr.L.J. 1368, *In re Muniyan*. (Ss. 302 and 392.)
 ('09) 10 Cr. L. J. 291 (291) : 3 I. C. 466 (All), *Nithuri v. Emperor*. (Ss. 307 and 406.)
 ('19) AIR 1919 Mad 954 (954, 955) : 19 Cri L Jour 445, *In re Narasimha Rao*. (Sections 323, 341 and 383.)
 ('22) AIR 1922 Lah 144 (145) : 22 Cri L Jour 505, *Ganda Singh v. Emperor*. (Sections 323 and 392.)
 ('04) 1 Cr. L. J. 872 (873) : 1904 Upp Bur Rul, 2nd Qr., Cr. P. C., 9, *Emperor v. Nga Tok Gyi*. (Do.)
 ('03) 30 Cal 288 (289), *Fakub Ali v. Lethu*. (Sections 323 and 448.)
 ('13) 14 Cr. L. J. 212 (213) : 19 I. C. 308 (Cal), *Sital Chandra Maitra v. Emperor*. (Sections 324 and 352.)
 ('24) AIR 1924 All 211 (211) : 25 Cr. L. J. 964, *Shafi v. Emperor*. (Ss. 325 and 379.)
 ('12) 13 Cri L Jour 485 (486) : 15 Ind Cas 485 (LB), *Nga Tha Gyi v. Emperor*. (Sections 325 and 454.)
 ('19) AIR 1919 Mad 487 (490) : 20 Cr. L. J. 354, *Kumaramuthu Pillai v. Emperor*. (Sections 330 and 348.)
 ('06) 4 Cr. L. J. 496 (497) (Lah), *Abdul Sattar v. Emperor*. (Sections 341 and 379.)
 ('02) 26 Mad 454 (455, 456) : 2 Weir 296, *Chekutty v. Emperor*. (Ss. 352 and 363.)
 ('10) 11 Cri L Jour 340 (340) : 5 I. C. 974 (Mad), *In re Bommaraddi Somireddi*. (Sections 352 and 380.)
 ('06) 3 Cri L Jour 141 (142) : 10 C W N 53, *Gul Muhammad Sircar v. Chcharu Mandal*. (Sections 352 and 384.)
 ('25) AIR 1925 Mad 1065 (1066) : 26 Cr. L. J. 1618, *Krishnamurthy v. Narayanaswamy*. (Sections 352 and 504.)
 (1865) 2 Suth W R Cr L 6 (7). (Sections 361 and 362.)
 (1865) 2 Suth W R Cr L 13 (13), *In re Mt. Bhuggut Coocr*. (Do.)
 ('28) 29 Cr.L.J. 248 (249):107 I.C. 388(Lah), *Tek Singh v. Emperor*. (Ss. 366 and 376.)
 ('28) 29 Cri L Jour 485 (485, 486) : 109 I. C. 213 (Lah), *Eaga v. Emperor*. (Do.)
 ('26) AIR 1926 All 261 (262) : 48 All 236 : 27 Cri L Jour 143, *Faujdar Mahito v. Emperor*. (Sections 366 and 420.)
 ('89) 12 Mad 273 (276) : 1 Weir 375, *Queen-Empress v. Ramanna*. (Ss. 372 and 373—Held only an irregularity which did not result in failure of justice.)
 ('94) 9 C P L R Cr 23 (23), *Empress v. Amilal Perdhau*. (Sections 376 and 377—Accused not prejudiced—Joinder of charges held only an irregularity.)
 ('03) 1903 Pun Re No. 17, Cr. p. 44 (46) : 1903 Pun L R No. 149, *Singhara v. Emperor*. (Sections 368 and 419.)
 ('77) 1 Bom 610 (613), *Reg. v. Hanmanta*.
 (1865) 3 Suth W R Cri L 17 (17).
 ('18) AIR 1918 Cal 233 (234) : 18 Cri L Jour 310, *Asrafulla Sarkar v. Emperor*. (Sections 380 and 403.)
 (1900) 5 Cal W N 294 (296), *Nikunja Behari v. Queen-Empress*. (Ss. 380 and 409.)
 ('04) 1 Cri L Jour 834 (834) : 6 Bom L R 725 (725), *Emperor v. Wassanji*. (Ss. 380 and 414.)
 ('22) AIR 1922 All 244 (245):23 Cr.L.J. 671, *Bechai v. Emperor*. (Ss. 380 and 420.)
 ('02) 15 C P L R Cr 53 (54), *Emperor v. Bisahu Panka*. (Ss. 380 and 454.)
 ('04) 1 Cri L Jour 537 (539) : 1904 Upp Bur Rul 1st Qr. Cr. P. C. 2, *Emperor v. Asgar Ali*. (Ss. 380 and 457.)
 ('32) AIR 1932 Bom 277 (278):33 Cr.L.J. 619, *Krishnaji Anant v. Emperor*. (Do.)
 ('33) AIR 1933 Lah 512 (512) : 34 Cri L Jour 402, *Ajaib Singh v. Emperor*. (Ss. 393, 394 and 397.)
 ('82) 1882 All W N 178 (178), *Empress v. Letha*. (Ss. 395 and 400.)
 ('07) 6 Cri L Jour 215 (216) : 1907 All W N 203, *Emperor v. Ram Singha*. (Ss. 397 and 454.)
 ('83) 1883 All W N 179 (179), *Empress v. Bhikari*. (Ss. 401 and 411.)
 ('82) 1882 All W N 215 (215), *Empress v. Daya Ram*. (Ss. 411 and 457.)
 ('31) AIR 1931 Oudh 86 (87) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Misir v. Emperor*. (Ss. 405 and 477-A.)
 ('17) AIR 1917 Mad 612 (612) : 17 Cr.L.J. 369, *In re, Krishnamurthy Iyer*. (Do.)
 ('33) 1933 Mad W N 326 (328), *Venkata Subbaya v. Emperor*. (Ss. 406 and 474.)
 ('09) 10 Cri L Jour 476 (479) : 4 Ind Cas 28 (Cal), *Parmeshwar Lal v. Emperor*. (Ss. 408 and 420.)
 ('10) 11 Cri L Jour 285 (285, 286) : 32 All 219 : 5 Ind Cas 896, *Shco Saran Lal v. Emperor*. (Ss. 408 and 467.)
 ('02) 26 Mad 125(126):2Weir 295, *Krishnasami Pillai v. Emperor*. (Ss. 408 and 477.)
 ('13) 14 Cri L Jour 428 (429) : 40 Cal 318 : 20 Ind Cas 412, *Nitya Gopal v. Jiban Krishna*. (Ss. 408 and 477A.)

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Note 3

or local law,³ or under a section of the Penal Code and a section of a special or local law.⁴

- (‘22) AIR 1922 All 214 (214) : 44 All 540 : 23 Cr.L.J. 258, *Shuja v. Emperor*. (Do.)
 (‘15) AIR 1915 Cal 296 (296, 297) : 41 Cal 722 : 15 Cri L Jour 153, *Raman Behari Das v. Emperor*. (Ss. 409 and 477A.)
 (‘08) 8 Cri L Jour 4 (5) : 30 All 351 : 1908 All W N 152 : 5 All L Jour 400, *Emperor v. Mata Prasad*. (Ss. 409 and 467.)
 (‘32) AIR 1932 Cal 486 (486) : 33 Cri L Jour 265, *Nagendra Nath v. Emperor*. (Ss. 409 and 477A.)
 (‘07) 5 Cri L Jour 341 (342) : 30 Mad 328 : 2 M L T 177 : 17 Mad L Jour 141, *Kasi Viswanathan v. Emperor*. (Do.)
 (‘13) 13 Cr.L.J. 21 (22) : 13 I.C. 213 (Mad), *Subramaniya Pattar v. Emperor*. (Do.)
 (‘15) AIR 1915 All 462 (462) : 38 All 42 : 16 Cr.L.J. 813, *Kalka v. Emperor*. (Do.)
 (‘82) 8 Cal 634 (636) : 10 C L R 466, *In the matter of the petition of Uttam Koondoo*. (Ss. 411 and 413.)
 (‘22) AIR 1922 Cal 401 (401) : 49 Cal 555 : 24 Cri L Jour 86, *Chetto v. Emperor*. (Ss. 411 and 414.)
 (‘05) 2 Cri L Jour 694 (695) : 1905 Pun Re No. 38 Cr, *Sahib Singh v. Emperor*. (Ss. 411 and 454.)
 (‘83) 1883 All W N 158 (158), *Empress v. Jurawan*. (Ss. 411 and 457.)
 (‘05) 2 Cri L Jour 30 (31) (Lah), *Gurditta v. Emperor*. (Do.)
 (‘17) AIR 1917 Lah 191 (192) : 18 Cr. L. J. 112, *Muhammad v. Emperor*. (Do.)
 (‘06) 3 Cr.L.J. 76 (77) : 1905 Pun Re No. 51 Cr, *Jagga v. Emperor*. (Ss. 411 and 458.)
 (‘02) 29 Cal 387 (388) : 6 Cal W N 550, *Mohendro Nath Das Gupta v. Emperor*. (Ss. 411 and 489.)
 (‘05) 2 Cr. L. J. 34 (35, 36) : 1905 Pun Re No. 2 Cr, *Bhagwati Dayal v. Emperor*. (Ss. 420 and 467.)
 (‘03) 30 Cal 822 (830) : 7 C W N 639, *Birendra Lal v. Emperor*. (Ss. 471 and 467.)
 (‘06) 3 Cr.L.J. 350 (350) : 3 L.B.R. 113, *Emperor v. Maung Gale*. (Ss. 426 and 504.)
 (1864) 1 Suth W R Cri L 12 (12), *In re Puroshoola*. (Ss. 443 and 446.)
 (‘02) 4 Bom L R 440 (441), *Emperor v. Lallubhai*. (Ss. 471 and 477A.)
 (1865) 1865 Rat 4 (4), *Reg. v. Vithace*. (Ss. 494 and 497.)
 See also S. 234 Note 8.

3. Excise Act, XII of 1896.

- (‘14) AIR 1914 Lah 455 (456) : 1914 Pun Re No. 20 Cr : 15 Cr.L.J. 172, *Banwari Lal v. Emperor*. (Ss. 48 and 53.)

Bengal Excise Act, V of 1909.

- (‘14) AIR 1914 Cal 603 (606) : 41 Cal 694 : 15 Cri L Jour 73, *U. N. Biswas v. Emperor*. (Ss. 13, 18 and 20.)

Gambling Act, III of 1867.

- (‘10) 11 Cr.L.J. 211 (212) : 5 Ind Cas 720 (Lah), *Makhan v. Emperor*. (Ss. 3 and 4.)

Prevention of Adulteration Act (1912).

- (‘31) AIR 1931 All 705 (705, 706) : 32 Cr.L.J. 1031, *Raghubar Dayal v. Emperor*. (Ss. 4 and 5.)

Opium Act and Dangerous Drugs Act.

- (‘37) AIR 1937 Nag 188 (189) : 38 Cr.L.J. 542 : I L R (1939) Nag 297, *Ghashiram Tularam v. Emperor*. (Selling opium without license and importing foreign opium into British India are different offences and cannot be offences committed in course of same transaction — Their joint trial is illegal.)

4. (‘33) AIR 1933 Lah 231 (231, 232) : 34 Cr.L.J. 637, *Sukhdeo Raj v. Emperor*. (S. 120-B, Penal Code and Ss. 19 and 20, Arms Act.)

- (‘10) 11 Cr.L.J. 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa v. Emperor*. (S. 147, Penal Code and S. 21A, Forest Act.)

- (‘34) AIR 1934 Oudh 457 (459) : 35 Cri L Jour 1417 : 10 Luck 235, *Onkar Singh v. Emperor*. (S. 411, Penal Code and S. 19 (d), Arms Act.)

- (‘02) 29 Cal 385 (386) : 6 C W N 468, *Gobind Koeri v. Emperor*. (S. 225, Penal Code and S. 128, Railways Act.)

- (‘28) AIR 1928 Lah 34 (35) : 29 Cri L Jour 521, *Muhammad Khan v. Emperor*. (S. 307, Penal Code and S. 20, Arms Act.)

- (‘18) AIR 1918 Lah 148 (148) : 1917 Pun Re No. 44 Cr : 19 Cr.L.J. 100, *Jai Singh v. Emperor*. (S. 395, Penal Code and S. 20, Arms Act.)

- (‘03) 30 Cal 822 (830) : 7 C W N 639, *Birendra Lal v. Emperor*. (S. 467, Penal Code and S. 82, Registration Act.)

[See however (‘36) AIR 1936 Cal 686 (687) : 38 Cr.L.J. 1, *Haridas v. Manmatha*. (Held, offence under S. 283, Penal Code, of creating obstruction in river bed by

2. Offences committed on different occasions even though they may fall under the same section.⁵

Section 238:
Note 3

- extending a tank and making banks and offence under S. 76B, Bengal Embankment Act, are not distinct offences within the meaning of S. 403.)
5. ('40) AIR 1940 Mad 509 (510): (1940) 1 M L J 428 (429): 41 Cr.L.J. 581, *In re Boya Lingadu*. (Two distinct offences of theft in two separate houses cannot be joined together and tried at one and the same trial. Nor can two alternative charges under S. 411, Penal Code, in respect of the properties stolen from the two houses be tried together.)
- ('39) AIR 1939 Bom 129 (138): 40 Cr.L.J. 579, *Ramchandra v. Emperor*. (Criminal breach of trust in respect of different sums of money on different occasions.)
- ('37) AIR 1937 Sind 304 (304): 32 S L R 30: 39 Cr.L.J. 59, *Emperor v. Shivalomal*. (Accused persons consisting of two groups having no connection with one another showing that they were engaged in the same transaction and playing at different places, cannot be summarily tried together under s. 12, Bombay Prevention of Gambling Act.)
- ('82) 1882 All W N 178 (178), *Empress v. Lekha*. (Dacoity.)
- ('82) 1882 All W N 180 (180), *Empress v. Dalla*. (Do.)
- ('83) 1883 All W N 12 (12), *Empress v. Serha*. (Do.)
- ('83) 1883 All W N 107 (107), *Empress v. Dukhi*. (Robbery.)
- ('18) AIR 1918 All 399 (400): 40 All 565: 19 Cr.L.J. 967, *Karimuddin v. Emperor*. (Offence under S. 408, Penal Code.)
- ('19) AIR 1919 All 239 (239): 20 Cri L Jour 353, *Fauja v. Emperor*. (Several murders in one day but not so connected as to represent acts forming same transaction.)
- ('24) AIR 1924 All 316 (317): 46 All 51: 25 Cr. L. J. 466, *Futoo Lal v. Emperor*. (Offences under Ss. 323 and 342, Penal Code.)
- ('05) 2 Cri L Jour 480 (483): 29 Bom 449: 7 Bom L R 527, *Emperor v. Jethalal Harlochand*. (Different receipts of stolen property.)
- ('19) AIR 1919 Bom 111 (112, 114): 20 Cr. L. J. 657, *Ramnarayan Amarchand v. Emperor*. (Charges in respect of items in two balance sheets.)
- ('32) AIR 1932 Bom 277 (278): 33 Cri L Jour 619, *Krishnaji Anant v. Emperor*. (1865) 2 Suth W R Cr L 17 (17), *In re Moha*.
- ('68) 9 Suth W R Cr 14 (15), *Queen v. Frojdar Roy*. (Offence under S. 193, I. P. C.)
- ('71) 15 Suth W R Cr 5 (5), *In re, C. I. Chetter*. (Misappropriation of each separate item of money.)
- ('73) 20 Suth W R Cr 70 (70), *Queen v. Sobrai Gowallah*.
- ('04) 1 Cr. L. J. 713 (714): 31 Cal 1053: 8 C W N 715, *Hira Lal v. Emperor*.
- ('05) 2 Cri L Jour 393 (394): 1 C L J 475, *Emperor v. Esua Sheikh*.
- ('05) 2 Cri L Jour 847 (851): 9 C W N 1027, *Ram Sarup v. Emperor*.
- ('06) 3 Cr. L. J. 111 (112): 2 C L J 618: 10 C W N 520, *Johan Subrana v. Emperor*.
- ('06) 3 Cri L Jour 126 (127, 128): 33 Cal 292: 10 C W N 32, *Budhai Sheikh v. Tarap Sheikh*.
- ('07) 6 Cr. L. J. 321 (323): 11 C W N 1128, *Nanda Kumar Sircar v. Emperor*.
- ('09) 9 Cri L Jour 277 (278): 1 Ind Cas 335 (Cal), *Ali Muhammad v. Emperor*.
- ('09) 10 Cri L Jour 469 (469): 4 Ind Cas 16 (Cal), *Srish Chandra v. Emperor*. (Cheating.)
- ('13) 14 Cri L Jour 449 (449): 40 Cal 846: 20 I. C. 609, *Asgar Ali v. Emperor*.
- ('26) AIR 1926 Cal 320 (321): 27 Cr. L. J. 263, *Keramat Mandal v. Emperor*.
- ('04) 1 Cri L Jour 971 (971) (Lah), *Bhagat Singh v. Emperor*.
- ('06) 4 Cri L Jour 496 (497) (Lah), *Abdul Sattar v. Emperor*.
- ('66) 1866 Pun Re No. 66 Cr, p. 71 (71), *Mohur Banji v. Chunda*. (Theft.)
- ('10) 11 Cr. L. J. 597 (598): 8 Ind Cas 229 (Lah), *Wasawa Singh v. King-Emperor*.
- ('22) AIR 1922 Lah 144 (145): 22 Cr. L. J. 505, *Ganda Singh v. Emperor*. (Theft and assault.)
- ('28) AIR 1928 Lah 637 (637): 10 Lah 158: 29 Cr. L. J. 737, *Hayat v. Emperor*.
- ('32) AIR 1932 Lah 615 (615): 34 Cri L Jour 458, *Jalal v. Emperor*.
- ('89) 12 Mad 273 (275, 276): 1 Weir 375, *Queen-Empress v. Ramanna*.
- ('96) 2 Weir 299 (300), *Public Prosecutor v. Kali Vannan*.
- ('10) 11 Cr. L. J. 477 (477): 7 Ind Cas 390 (Mad), *Shanmooga Tevan v. Emperor*.
- ('11) 12 Cr. L. J. 567 (567): 12 Ind Cas 655 (Mad), *K. Raghavendra Rao v. Emperor*. (Misappropriation on different occasions.)
- ('16) AIR 1916 Mad 762 (763): 16 Cri L Jour 717, *In re Krishnamma*. (Every act in breach of the conditions of a license or permit is a distinct offence.)
- ('97) 11 C P L R Cr 6 (7), *Empress v. Mt. Ganga*. (Abduction of each girl is a distinct offence.)

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Note 3

3. Offences committed against different persons.⁶

Offences of the same kind committed on one occasion though consisting of parts are not different offences but are to be treated as constituting only one offence.

Illustrations

(a) The theft of several articles from one person or more at the same time.⁷

(b) The receiving of stolen property belonging to different owners or the gains of different thefts but received at the same time.⁸

- (197) 1 Oudh Cas 4 (7), *Ram Adhin v. Queen-Empress*. (Kidnapping.)
 ('22) AIR 1922 Oudh 250 (251) : 25 Oudh Cas 151 : 23 Cr. L. J. 687, *Girja Dayal v. Emperor*. (Cheating different persons at different intervals.)
 ('21) AIR 1921 Pat 291 (291) : 21 Cr. L. J. 619, *Padmanabh Patnaik v. Emperor*. (Receiving stolen articles by several persons at different times.)
 ('33) AIR 1933 Pat 488 (489) : 34 Cr. L. J. 892, *Sachidanand Prasad v. Emperor*. (Withdrawing money on two different dates by forged withdrawal cheques.)
 ('11) 12 Cr. L. J. 72 (72) : 9 Ind Cas 421 (Sind), *Imperator v. Alu Jaro*. (Offences under Ss. 379 and 215.)
 ('26) 27 Cr. L. J. 872 (873) : 96 Ind Cas 120 (Sind), *Ghulamo v. Emperor*. (Receiving stolen property at different dates.)
 [See ('25) AIR 1925 Pat 20 (27, 28) : 3 Pat 503 : 25 Cri L Jour 738, *Emperor v. Bishun Singh*.]
 [See also ('06) 3 Cr. L. J. 391 (393, 399) : 33 Cal 1256, *Abdul Majid v. Emperor*.]
 6. ('39) AIR 1939 Cal 32 (33) : 40 Cr. L. J. 290, *Emperor v. Afsaruddi Naseraddi*. (Two murders on same night — Two separate charges to be framed but may be legally tried together under the provisions of S. 234, Criminal P. C.)
 ('04) 1 All L Jour 225n (225n), *In re Nand Lal*. (Receiving different sums of money as illegal gratification from different persons.)
 ('04) 1 Cri L Jour 364 (364) : 26 All 195 : 1903 A W N 231, *Emperor v. Fatu*. (Dacoity in several houses in the same night.)
 ('66) 6 Suth W R Cr 83 (83), *Queen v. Itwaree Dome*. (Do.)
 ('68) 9 Suth W R Cr 30 (30), *In the matter of Goolzar Khan*. (Criminally intimidating three different persons.)
 ('07) 6 Cri L Jour 442 (444) : 6 C. L. J. 757, *Tilakdhari Das v. Emperor*. (Criminal breach of trust with monies of different persons.)
 ('09) 9 Cri L Jour 277 (278) : 1 Ind Cas 335 (Cal), *Ali Muhammad v. Emperor*. (Receiving property stolen from different persons.)
 ('26) 27 Cri L Jour 872 (873) : 96 I. C. 120 (Sind), *Ghulamo v. Emperor*. (Do.)
 ('09) 10 Cri L Jour 469 (469) : 4 Ind Cas 16 (Cal), *Shrish Chandra v. Emperor*. (Cheating different persons.)
 ('22) AIR 1922 Oudh 250 (251) : 25 Oudh Cas 151 : 23 Cri L Jour 687, *Girja Dayal v. Emperor*. (Do.)
 ('16) AIR 1916 Cal 693 (699, 706) : 16 Cri L Jour 641, *Ram Subhag v. Emperor*. (Causing hurt to different persons on one occasion.)
 ('66) 5 Suth W R Cr L 4 (4). (Do.)
 ('07) 11 Cal W N cclxxiv (cclxxiv), *King v. Henry Augustus Berney*. (Do.)
 [See also ('06) 4 Cri L Jour 394 (395) : 4 C. L. J. 411, *Manik Lal Mullick v. Corporation of Calcutta*.]
 7. ('36) AIR 1936 Rang 94 (95) : 37 Cri L Jour 530, *Nga Po E v. Emperor*.
 ('81) 1881 All W N 154 (154), *Queen-Empress v. Raghu Rai*.
 ('97) 1897 Rat 927 (927), *Queen-Empress v. Krishna Shahaji*.
 ('26) AIR 1926 Nag 89 (90) : 26 Cri L Jour 1495, *Bhura v. Emperor*.
 ('72-92) 1872-1892 Low Bur Rul 168 (168), *Queen-Empress v. Nga Po*.
 ('72-92) 1872-1892 Low Bur Rul 475 (475), *San Hla v. Queen-Empress*.
 ('05) 2 Cri L Jour 708 (709) : 1905 Pun Re No. 58 Cr, *Har Dial v. Emperor*.
 ('69) 11 Suth W R Cr 38 (38), *Queen v. Sheikh Moneeah*.
 ('20) AIR 1920 Cal 571 (573) : 21 Cr. L. J. 682, *Bijoy Krishna v. Satish Chandra*.
 8. ('93) 15 All 317 (318) : 1893 A W N 101, *Queen-Empress v. Makhan*.
 ('06) 3 Cri L J 207 (208) : 28 All 313 : 1906 A W N 22, *Emperor v. Mian Jan*.
 ('23) AIR 1923 All 547 (547, 548) : 45 All 485 : 24 Cri L Jour 632, *Sheo Charan v. Emperor*.
 ('01-02) 1 Low Bur Rul 89 (40, 41), *Nga Kywet v. Queen-Empress*.
 ('88) 15 Cal 511 (513), *Ishan Muchi v. Empress*.
 ('23) AIR 1923 Cal 557 (558) : 50 Cal 594 : 24 Cr. L. J. 707, *Ganeshi Sahu v. Emperor*.
 ('89) 1889 Pun Re No. 26 Cr p. 85 (86) (FB), *Sant Singh v. Empress*.

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- (c) The making of any number of false allegations in one statement.⁹
- (d) The misappropriation of several sums of money not proved to be committed on different occasions and in regard to one person,¹⁰ or of several books of account in respect of the same estate,¹¹ or of several articles.¹²
- (e) A single use of several forged documents as genuine, in a Court of law.¹³
- (f) Receiving a bribe partly on one day and partly on another.¹⁴
- (g) The projection of one board attached to two different rooms, into the street, an offence under S. 11 of the Bombay District Municipalities Act.¹⁵
- (h) An alternative charge of perjury.¹⁶

4. Separate charges.— For every distinct offence of which any person is accused, a *separate* charge should be framed¹ and this rule applies even though the case is one in which the accused may be tried at one trial for all the offences under the provisions of Ss. 234, 235, 236 and 239.²

5. Non-compliance with the section.— In *Subramaniya Iyer v. King-Emperor*,¹ in which a person was tried on an indictment charging him with fortyone acts extending over a period of two years, it was held by their Lordships of the Privy Council that this was plainly in contravention of S. 234 of the Code and that the defect

- (10) 11 Cri L Jour 597 (598) : 8 Ind Cas 229 (Lab), *Wasawa Singh v. Emperor*.
- (28) AIR 1928 Lah 637 (637) : 10 Lah 158 : 29 Cr. L. J. 737, *Hayat v. Emperor*.
- (32) AIR 1932 Lah 615 (615) : 34 Cri L Jour 458, *Jalal v. Emperor*.
- (34) AIR 1934 Pat 483 (485) : 13 Pat 161 : 36 Cr. L. J. 342, *Ramnatha v. Emperor*. See also S. 403 Note 5.
- 9. (109) 10 Cr. L. J. 150 (154) : 36 Cal 808 : 21 C. 697, *Rakhal Chandra v. Emperor*.
- (86) 13 Cal 270 (271, 272), *Poonit Singh v. Madho Bhot*.
- (71) 6 Mad H C R App xxvii (xxvii).
- [See however (137) AIR 1937 Pat 176 (177, 178) : 38 Cri L Jour 97, *Ramdin Lal v. Emperor*. (S. 193, Penal Code—Single charge in respect of two or three false statements made in one deposition held to be defective.)]
- 10. (86) 14 Cal 128 (132), *In the matter of Luchmi Narain*.
- 11. (13) 14 Cr. L. J. 219 (222) : 19 I. C. 315 (Cal), *Promotha Nath v. Emperor*.
- 12. (21) AIR 1921 Cal 114 (115) : 22 Cri L Jour 666, *Kali Charan v. Emperor*.
- 13. (93) 20 Cal 413 (417), *Queen-Empress v. Raghunath Das*.
- 14. (1900-01) 5 Cal W N 332 (335), *Jagat Chandra v. Lal Chand*.
- (11) 12 Cr. L. J. 217 (224) : 1911 Pun Re No. 11 Cr : 10 I. C. 156, *Giridhari v. Emperor*.
- 15. (02) 4 Bom L R 942 (943), *Emperor v. Atmaram*.
- 16. (84) 10 Cal 937 (945), *Habibullah v. Queen-Empress*.

Note 4

- 1. (71) 3 N W P H C R 314 (315), *Queen v. Sheo Churun*.
- (1865) 3 Suth W R Cr L 15 (15).
- (1865) 4 Suth W R Cr L 9 (9).
- (66) 5 Suth W R Cr L 5 (5).
- (67) 7 Suth W R Cr, 8 (8), *In re Kalaram Singh*.
- [See also (75) 7 N W P H C R 137 (144), *Queen v. Jamurha*.]
- 2. (39) AIR 1939 Cal 32 (33) : 40 Cr. L. J. 290, *Emperor v. Afsaruddi Nasiraddi*.
- (38) AIR 1938 P C 130 (135) : 39 Cri L Jour 452 : ILR (1938) 2 Cal 295 : 65 I A 158 : 32 Sind L R 476 (PC), *Babulal Choukhani v. Emperor*. (Offences alleged to be committed in course of same transaction — Separate charges necessary.)
- (37) AIR 1937 Pat 176 (177) : 38 Cri L Jour 97, *Ramdin Lal v. Emperor*. (False statements made in course of same deposition — Separate charges necessary.)
- (04) 1 Cri L Jour 364 (364) : 26 All 195 : 1903 All W N 231, *Emperor v. Fattu*.
- (27) AIR 1927 Cal 17 (20) : 54 Cal 237 : 28 Cri L Jour 99, *Azimoddy v. Emperor*. (In the course of one transaction three murders were committed and only one charge was framed — Overruled on another point in A I R 1939 P C 47.)
- (08) 7 Cri L Jour 178 (178) (Mysore), *In re Venkatigadu*.
- (13) 14 Cr. L. J. 449 (449) : 40 Cal 846 : 20 I. C. 609, *Asgar Ali Biswas v. Emperor*.

Note 5

- 1. (01) 25 Mad 61 (96, 97) : 28 Ind App 257 : 8 Sar 160 : 11 M. L. J. 233 (PC).

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Note 5

was one which could not be cured by S. 537. Their Lordships observed as follows :

"Their Lordships are unable to regard the disobedience to an express provision *as to a mode of trial* as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than, by law, could have been joined together in one indictment. The illustration to the section itself sufficiently shows what was meant.

"The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that, when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, this contravention of the Code comes within the description of error, omission or irregularity."

The question has arisen as to how far this decision is applicable to a disobedience of the directions of this section. The section directs two things, namely :

1. that for every distinct offence of which any person is accused there shall be a *separate charge*, and
2. that every such charge shall be *tried separately* unless the case falls within the classes of cases mentioned in Ss. 234, 235, 236 and 239.

Where a *single charge* is framed for several distinct offences and a *single trial* is held in respect of such charge and the case does not fall within Ss. 234, 235, 236 or 239, there is a non-compliance both as regards the *framing* of the charge and as regards the *mode of trial*. Where *separate charges* are framed for the distinct offences but a *single trial* is held in respect of all such charges and the case is not governed by Ss. 234, 235, 236 or 239, there is a non-compliance with the section as to the *mode of trial*. Where a *single charge* is framed for several distinct offences and a *single trial* is held in respect of such charge *and the case falls within Ss. 234, 235, 236 or 239*, there is a non-compliance as regards the *framing* of the charge, but *not* with regard to the *mode of trial*. It has been held that a non-compliance of the first kind is governed by the rule enunciated in *Subramaniya Iyer's case* and is an illegality not cured by S. 537;² so also is a non-compliance of the second kind.^{2a} But a non-compliance of the third

2. ('39) AIR 1939 Bom 129 (138) : 40 Cr. L. J. 579, *Ramchandra Rangov. Emperor*. ('38) ILR (1938) 1 Cal 98 (110, 113) : 41 CWN 1112, *Kamalakanta Ray v. Emperor*.

(Contravention of S. 233 read with S. 235 vitiates trial. S. 537 is no answer.)

('38) AIR 1938 Sind 164 (168) : 39 Cr. L. J. 881 : ILR (1939) Kar 64, *Chuharmal Nirmaldas v. Emperor*.

('15) AIR 1915 All 462 (462) : 38 All 42 : 16 Cri L Jour 813, *Kalka Prasad v. Emperor*. (Joint charge of breach of trust and falsification of accounts.)

('19) AIR 1919 All 239 (239) : 20 Cri L Jour 353, *Fauja v. Emperor*. (Several murders not so connected as to represent series of acts forming same transaction — Single charge is illegal.)

('27) AIR 1927 All 223 (224) : 49 All 312 : 28 Cr. L. J. 171, *Raman Lal v. Emperor*. (Single charge with respect to criminal breach of trust committed in various distinct transactions extending over one year.)

('04) 1 Cri L Jour 875 (876) : 1904 All WN 223, *Emperor v. Nand Lal*.

('07) 5 Cr. L. J. 341 (342) : 30 Mad 328 : 17 MLJ 141, *Kasi Viswanathan v. Emperor*.

('13) 14 Cri L Jour 116 (117) : 18 Ind Cas 676 (All), *Shankar v. Emperor*.

('32) AIR 1932 Bom 277 (278, 279) : 33 Cr. L. J. 619, *Krishnaji Anant v. Emperor*. (Single charge for offences under Ss. 380 and 457, Penal Code.)

2a. ('22) AIR 1922 Lah 144 (145) : 22 Cri L Jour 505, *Ganda Singh v. Emperor*. (Charges for theft and assault.)

kind, which has reference merely to the *frame of the charge* but not to the *mode of trial*, is not governed by the Privy Council decision,

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Note 5

- (31) AIR 1931 All 705 (706) : 32 Cr.L.J. 1031, *Raghubar Dayal v. Emperor*.
 ('04) 4 Bom L R 440 (441), *Emperor v. Lallubhai Gokaldas*. (Charges for offences under Ss. 471, 468 and 477A, Penal Code.)
 ('04) 1 Cr. L. J. 834 (834) : 6 Bom L R 725, *Emperor v. Wassanji Dayal*. (Joinder of charges under Ss. 380 and 414, Penal Code.)
 ('14) AIR 1914 Cal 589 (589) : 15 Cri L Jour 472, *Shyambar Koyal v. Emperor*. (Charges of theft and grievous hurt.)
 ('15) AIR 1915 Cal 296 (297) : 41 Cal 722 : 15 Cr. L. J. 153, *Raman Behari Das v. Emperor*. (Joinder of charges under Ss. 477A and 409, Penal Code.)
 ('03) 1903 Pun Re No. 17 Crp. 44 (46) : 1903 Pun L R No. 149, *Singhara v. Emperor*.
 ('02) 26 Mad 125 (127) : 2 Weir 295, *Krishnaswami Pillai v. Emperor*.
 ('31) AIR 1931 Oudh 86 (88) : 6 Luck 441 : 32 Cri L Jour 540, *Dubri Missir v. Emperor*. (Charges under Ss. 409 and 477A, Penal Code.)
 ('01-02) 1 Low Bur Rul 361 (362), *San Dai v. Crown*.
 ('03-04) 2 Low Bur Rul 10 (11, 12), *Nga Lun Maung v. King-Emperor*.
 ('04) 1 Cri L Jour 537 (539) : 1904 Upp Bur Rul 1st Qr., Cr. P. C., 2, *Emperor v. Asgar Ali*. (Charges under Ss. 457 and 380, Penal Code.)
 ('05) 2 Cr. L. J. 480 (484, 485, 499, 500) : 29 Bom L R 527, *Emperor v. Jethalal Hurlochand*.
 ('09) 9 Cri L Jour 147 (148) : 1 I. C. 69 (Cal), *Tilakdhari Mahlon v. Lali Singh*. (Joinder of charges under Ss. 225 and 379.)
 ('12) 13 Cri L Jour 485 (486) : 15 Ind Cas 485 (Rang), *Nga Tha Gyi v. Emperor*. (Charges under Ss. 454 and 325 I. P. C.)
 ('16) AIR 1916 Mad 550 (553) : 16 Cr. L. J. 323, *Virupana Gowd v. Emperor*.
 ('16) AIR 1916 Cal 188 (195) : 42 Cal 957 : 16 Cr.L.J. 497, *Anritalal v. Emperor*.
 ('21) AIR 1921 L B 51 (55) : 11 L B R 73 : 23 Cr.L.J. 49, *H. M. Yusoof v. Emperor*.
 ('14) AIR 1914 L B 263 (264) : 7 L B R 272 : 16 Cr. L. J. 44, *Po Mya v. Emperor*.
 ('04) 1 Cr.L.J. 872 (873) : 1904 U B R 2nd Qr., Cr. P. C., 9, *Emperor v. Nga Tok Gyi*.
 ('34) AIR 1934 Oudh 457 (459) : 10 Luck 235 : 35 Cr.L.J. 1417, *Onkar v. Emperor*.
 ('33) AIR 1933 Nag 327 (328) : 34 Cr.L.J. 673, *Rameshwar Brijmohan v. Emperor*. (Charges for offences under Ss. 409 and 477A, Penal Code)
 ('33) 1933 Mad W N 326 (328), *Venkatasubbaya v. Emperor*. (Joinder of charges for offences under Ss. 406 and 474, Penal Code.)
 ('12) 13 Cr.L.J. 21 (22) : 13 I.C. 213 (Mad), *Lakshminarainapuram v. Emperor*. (Charges for offences under Ss. 409 and 477A.)
 ('21) AIR 1921 Lah 381 (382, 383) : 1 Lah 562 : 21 Cr.L.J. 626, *Pahlad v. Emperor*.
 ('14) AIR 1914 Lah 455 (456) : 1914 Pun Re No. 20 Cr : 15 Cr.L.J. 172, *Banwari Lal v. Emperor*. (Joint trial of persons separately accused of offences under Ss. 48 and 53, Excise Act.)
 ('08) 8 Cri L Jour 243 (248) : 1908 Pun Re No. 12 Cr, *Mangal Singh v. Emperor*. (Joint trial of several persons for separate offences.)
 ('04) 1 Cri L Jour 971 (971) (Lah), *Bhagat Singh v. Emperor*. (Do.)
 (1900) 1900 Pun Re No. 5 Cr, p. 13 (14) : 1900 Pun L R p. 61, *Jang v. Empress*. (Do.)
 ('09) 9 Cr. L. J. 277 (277) : 1 I. C. 335 (Cal), *Ali Muhammad v. Emperor*. (Do.)
 ('07) 6 Cr. L. J. 321 (323) : 11 C W N 1128, *Nanda Kumar Sirkar v. Emperor*.
 ('04) 1 Cri L Jour 58 (62) : 8 C W N 180, *Pran Krishna Saha v. Emperor*. (Principles of section apply to proceedings under S. 107 also.)
 ('02) 29 Cal 385 (386, 387) : 6 C W N 468, *Gobind Koeri v. Emperor*.
 ('28) AIR 1928 All 417 (417) : 30 Cri L Jour 214, *Sewak v. Emperor*.
 ('24) AIR 1924 All 211 (211) : 25 Cri L Jour 964, *Shafi v. Emperor*.
 [See ('11) 12 Cr. L. J. 266 (267) : 10 Ind Cas 331 (Lah), *Mahbub Ali v. Emperor*.]
 [See also ('08) 8 Cr.L. J. 152 (153) : 18 M L J 330, *In re Rangaswamy Chetty*.]
 See also S. 234 Note 7, S. 235 Note 13, S. 239 Note 21 and S. 537 Note 10.

The following cases most of which were decided before the date of the Privy Council decision in 25 Mad 61 are no longer good law :

- (89) 12 Mad 273 (276) : 1 Weir 375, *Queen-Empress v. Ramanna*.
 ('96) 9 C P L R (Gr) 23 (23), *Empress v. Amilal Perdhan*.
 ('01) 1901 Pun Re No. 7 Cr, p. 21 (25) : 1901 Pun L R No. 83, *Mammun v. Empress*.
 ('92) 14 All 502 (504) : 1892 A W N 95, *Queen-Empress v. Mulua*.
 ('07) 6 Cr. L. J. 215 (216) : 1907 A W N 208, *Emperor v. Ram Singha*. (Simply following 14 All 502 which was decided before the Privy Council decision in 25 Mad 61.)

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Note 5

and is only a curable irregularity.³ A conviction for an offence different from that charged in a case not covered by S. 237 or S. 238 has been held to be a violation of the provisions of this section as regards the *mode* of trial and to be an illegality not curable under S. 537.⁴ The decision does not seem to be right as it does not take note of ss. 232 and 535 under which the absence of a charge is merely treated as an irregularity.

An objection as to non-compliance with the requirements of the

3. ('40) AIR 1940 Pat 603 (605) : 41 Cr. L. J. 523 (525), *Chandra Narain Jha v. Emperor*. (Three cases of cheating lumped together in one charge—No prejudice caused by defect—Trial not vitiated.)
 - ('40) 41 Cr. L. J. 725 (726) : 189 Ind Cas 258 (Oudh), *Madho Singh v. Emperor*.
 - ('38) AIR 1938 P C 130 (135) : 39 Cr. L. J. 452 : 65 I A 158 : 32 S L R 476 : I L R (1938) 2 Cal 295 (PC), *Babulal Chowkhani v. Emperor*. (Separate thefts alleged to be committed in course of same transaction—Separate charges necessary—But absence of separate charges not fatal where no injustice has in fact been occasioned.)
 - ('38) AIR 1938 Sind 171 (174) : I L R (1939) Kar 204 : 39 Cr. L. J. 890, *Emperor v. Balumal Hotchand*. (Misjoinder of charges must be distinguished from error in statement of charge otherwise lawful.)
 - ('37) AIR 1937 Pat 176 (178) : 38 Cr. L. J. 97, *Ramdin Lal v. Emperor*. (False statements by witness while deposing—One charge framed in respect of all the statements—Defect will be condoned where the accused is not prejudiced, A I R 1933 Pat 488, followed.)
 - ('33) AIR 1933 Cal 676 (678, 679) : 60 Cal 1394 : 34 Cr. L. J. 1219, *Rajabuddin Mondal v. Emperor*.
 - ('16) AIR 1916 Cal 693 (705) : 16 Cr. L. J. 641, *Ram Subhag Singh v. Emperor*. (Dissenting from 3 Cr. L. J. 141; 14 Cr. L. J. 449; 3 Cr. L. J. 111 and distinguishing 6 Cr. L. J. 442.)
 - ('34) AIR 1934 Sind 57 (60, 62) : 28 Sind L R 119 : 35 Cri L Jour 1337, *Dur Mahomed v. Emperor*.
 - ('14) AIR 1914 Cal 288 (288) : 41 Cal 66 : 15 Cr. L. J. 224, *Musai Singh v. Emperor*.
 - ('27) AIR 1927 Cal 330 (331, 332) : 28 Cr. L. J. 347, *Tamez Khan v. Rajjabali Mir*.
 - ('28) AIR 1928 Cal 700 (701, 702) : 30 Cr. L. J. 799, *Ajgar Shaikh v. Emperor*.
 - ('32) AIR 1932 Cal 390 (392) : 59 Cal 1233 : 33 Cr. L. J. 685, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Daulatram Mudi*.
 - ('18) AIR 1918 Lah 242 (243, 244) : 1918 Pun Re No. 12 Cr : 19 Cr. L. J. 510, *Emperor v. Mahomed Hussain*. (Single charge in respect of documents forming part of one transaction.)
 - ('19) AIR 1919 Mad 487 (490, 491) : 20 Cr. L. J. 354, *Kumaramuthu Pillai v. Emperor*. (Mere omission to frame separate charges does not vitiate trial (p. 490), but a misjoinder in one trial is illegal (p. 496).)
 - ('21) AIR 1921 Oudh 49 (51) : 22 Cr. L. J. 344, *Kallu v. Emperor*. (Single charge for three murders in one transaction.)
 - ('27) AIR 1927 Oudh 235 (236) : 2 Luck 430 : 28 Cr. L. J. 409, *Bachchu v. Piyara*.
 - ('33) AIR 1933 Pat 488 (490) : 34 Cr. L. J. 892, *Sachidanand Prasad v. Emperor*.
 - ('21) AIR 1921 Sind 47 (47, 48) : 16 Sind L R 15 : 23 Cr. L. J. 320, *Emperor v. Meharali Bachal*.
 - ('06) 4 Cr. L. J. 415 (417) : 11 C W N 54, *Moharuddi Malita v. Jadu Nath Mandul*.
 - ('34) AIR 1934 Sind 164 (166, 167) : 36 Cr. L. J. 231, *Allahrakhio v. Emperor*.
 - ('30) AIR 1930 Mad 857 (858) : 53 Mad 937 : 32 Cr. L. J. 30, *Ramaraju Thevan v. Emperor*. (In this case there was as a matter of fact no contravention of S. 233.)
 - ('34) AIR 1934 Oudh 244 (245) : 35 Cr. L. J. 935, *Mendi Lal v. Emperor*. (Single charge for different offences committed against different persons in same transaction.)
 - ('26) AIR 1926 Rang 53 (58) : 27 Cr. L. J. 669, *V. M. Abdul Rahman v. King-Emperor*. (Confirmed in AIR 1927 P C 44 (P C).)
 - [See also ('34) AIR 1934 Cal 85 (86) : 35 Cr. L. J. 487, *Ramizullah v. Emperor*.]
 - [But see ('30) AIR 1930 Sind 62 (64) : 30 Cr. L. J. 1073, *Ali Mahomed v. Emperor*. (There was also prejudice in this case.)]
 - ('04) 1 Cr. L. J. 364 (365) : 26 All 195 : 1903 A W N 231, *Emperor v. Fattu*.]
- See also S. 537 Note 10.
4. ('39) AIR 1939 All 665 (667) : 40 Cr. L. J. 948, *Thakur Singh v. Emperor*. (Charge under S. 304, Penal Code—Conviction under S. 385—S. 238, Cr. P. C., not applying—S. 537 does not cure defect of misjoinder.)

section regarding the mode of trial can be taken for the first time even in appeal.⁵

Section 233
Notes 5-6

6. Counter-cases. — The joint trial of two parties arrayed against each other in a riot at one and the same trial is altogether illegal and void under this section.¹ It has been held that even committals in such cases should be made separately and not all together, though it is in the power of the Sessions Judge to try them separately in spite of the joint committal.² Nor can the evidence for the prosecution in one case be used as evidence for the defence in the other case and *vice versa*.^{2a}

A *simultaneous trial* of a case and a counter-case is not a joint trial and is not prohibited by the Code.

A simultaneous trial in certain cases and in certain circumstances might be irregular and improper but that would not entitle the accused to have the whole trial set aside, unless the procedure adopted had prejudiced him in his defence.³ The proper course to pursue is to give each party or faction a separate trial so as to enable its several members to be examined as witnesses in the case in which they are the complainants.⁴

The question as to which case ought to be taken first, depends upon the circumstances of each case. For instance, the case against a person should be taken up first before the case in which he is the complainant, as it is not fair to force a person to throw himself open

5. ('33) 1933 Mad W N 326 (328), *Venkatasubbayya v. Emperor*.

Note 6

1. ('06) 4 Cr. L. J. 75 (76) : 1906 Pun Re No. 5 Cr, *Ala Dya v. Emperor*.
('24) AIR 1924 Lah 104 (106, 107) : 4 Lah 376 : 25 Cr.L.J. 68, *Allu v. Emperor*.
('25) AIR 1925 Lah 149 (150) : 25 Cri L Jour 551, *Muhammad v. Emperor*.
('20) AIR 1920 Low Bur 90 (90) : 22 Cri L Jour 707, *Mamsa v. Emperor*.
('03-04) 2 Low Bur Rul 106 (107), *Nga Tha Dun Aung v. Emperor*. (A causing hurt to B and B causing grievous hurt to A.)
('69) 12 Suth W R Cr 75 (76), *Queen v. Surroop Ghunder Paul*.
('83) 13 Cal L R 275 (278, 279), *Chakowri Lall v. Moti Kurmi*.
('01-02) 1 Low Bur Rul 56 (56, 57), *Queen-Empress v. Nga Aung Nyun*.
('81) 1881 Pun Re No. 26 Cr, p. 56 (57), *Nawab v. Empress*.
[See also ('09) 5 Nag L R 65 (66) : 9 Cr. L. J. 560 : 2 I. C. 240, *Ganapat v. Emperor*. (The principle applies also to joint inquiries under S. 107.)
('04) 1 Cr. L. J. 58 (60) : 8 C W N 180, *Pran Krishna Saha v. Emperor*. (Do.)]
See also S. 239 Note 8.
2. ('81) 1881 Pun Re No. 22 Cr, p. 47 (49), *Empress v. Haibat*.
('67) 8 Suth W R Cr 47 (52) (FB), *Queen v. Sheikh Bazu*.
('68) 9 Suth W R Cr 33 (35), *Queen v. Durzoolla*.
('82) 1882 All W N 160 (161), *Empress v. Pulandar Singh*.
See also Note 1 and S. 207 Note 5.
- 2a. ('38) AIR 1938 Oudh 249 (249) : 39 Cri L Jour 929, *Sarju v. Emperor*.
3. ('20) AIR 1920 Pat 177 (179) : 21 Cr. L. J. 739, *Dhako Singh v. Emperor*.
('04) 1 Cr. L. J. 199 (203, 204) : 8 C W N 344, *Sahadev Ahir v. Emperor*.
('28) AIR 1928 All 593 (593, 595) : 50 All 457 : 30 Cr.L.J. 337, *Sukhai Ahir v. Emperor*.
('25) AIR 1925 Pat 152 (153) : 25 Cr. L. J. 1018, *Shafayat Khan v. Emperor*.
('25) AIR 1925 Pat 619 (621) : 26 Cr.L.J. 1179, *Ram Saran v. Nikhad Narain*.
[See also ('27) AIR 1927 P C 26 (27) : 8 Lah 193 : 28 Cr. L. J. 254 (PC), *Madat Khan v. Emperor*.]
See also S. 239 Note 19.
4. ('81) 1881 All W N 28 (29), *Empress v. Bahadur Khan*. (The necessity for this is greater where a right of private defence is asserted.)

Section 233
Note 6

to cross-examination by the other side,⁵ or again if one case looks on its face stronger than the other, it can be heard first.⁶ No hard and fast rule can be laid down as to the procedure to be followed. There is nothing irregular in the judge trying each case to its conclusion and then pronouncing judgment in both. But it is necessary that —

- (1) the trial should be separate and the judgments should be separately delivered;
- (2) the conclusion in each case must be founded on and only on the evidence in that case; and,
- (3) the judge must keep his hands free and not commit himself to a decision one way or another and must detach himself from extraneous considerations.⁷

See also the undermentioned cases.⁸

Again, simultaneous trials of the two cases before two different Courts over one and the same occurrence are undesirable and both cases should be tried by one Magistrate or Judge one after the other.⁹

Section 234

234.* (1) When a person is accused of more

* Code of 1898, original S. 234.

234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law.

Code of 1882 — Section same as original section of 1898 Code.

5. ('25) AIR 1925 Cal 1260 (1262): 26 Cr.L.J. 1615, *Makhan Mapa v. Monindra*. [See ('32) 1932 Mad W N 692 (710), *Jaggu Naidu v. Emperor*.]
6. ('31) 1931 Mad W N 1316 (1317), *Satha Kuttia Pillai v. Pichai Cruz*.
7. ('33) AIR 1933 Mad 367 (369): 56 Mad 159: 34 Cr.L.J. 175 (FB), *M. Mouna-guruswami Naicker v. Emperor*. ('28) 29 Cr.L.J. 1059 (1060): 112 I. C. 563 (Lab), *Emperor v. Krishan Murari Lal*. ('30) AIR 1930 Mad 190 (191): 31 Cr. L. J. 461, *Krishna Pannadi v. Emperor*. [See ('32) 1932 Mad W N 692 (700-702), *Jaggu Naidu v. Emperor*.]
8. ('38) AIR 1938 Pesh 10 (11): 39 Cr. L. J. 401: 1938 Pesh L J 13, *Ibrahim v. Emperor*. (Cross cases—Circular No. 52 of Judicial Commissioner's Court, N.-W. F. Province—Cross cases relating to same transaction—File in each case should be complete with regard to whole story.) ('36) AIR 1936 Lah 294 (295, 296): 37 Cr.L.J. 1033, *Panna Lal v. Emperor*. (Two separate trials—Judgment only one document—Decisions separate and distinct—Findings in each based on evidence in each case—Judgment in one case based on its own evidence—Procedure held not illegal and accused not prejudiced thereby.) ('35) AIR 1935 Cal 548 (550): 36 Cr. L. J. 1339, *Kshitish Chandra v. Nanuram Maklania*. (Cross-cases—Magistrate hearing evidence in each case separately — Same argument for both cases and one judgment delivered—Held, trial, though irregular, did not cause prejudice to accused.) ('92) 20 Cal 537 (548), *Queen-Empress v. Chandra Bhuiya*. (Cross-cases committed separately — Sessions Judge hearing evidence in first case and then evidence in the second case — Examination of some accused in one case as prosecution witnesses in the other—Arguments in both heard together—Opinion of assessors taken at same time—Both cases dealt with in one judgment—Held that the procedure though irregular did not prejudice accused in defence.)
9. ('23) AIR 1923 Cal 644 (645): 24 Cr.L.J. 940, *Sheikh Samir v. Beni Madhab Gope*.

offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

Section 234
Note 1

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law:

Provided that, for the purpose of this section, an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

Synopsis

- | | |
|---|---|
| 1. Legislative changes. | 5. "More offences than one." |
| 2. Section applies to trials and not to committals. | 6. "Committed within the space of twelve months." |
| 3. 'Person,' if includes 'persons'—
See Note 5a to S. 239. | 7. "Not exceeding three." |
| 4. "Whether in respect of the same person or not." | 8. Offences of the same kind. |
| | 9. Proviso. |

Other Topics (miscellaneous)

- | | |
|---|--|
| Distinct offences. See S. 233 Note 3. | Offences under Ss. 124A and 153A, I.P.C. See Note 5. |
| Effect of violation of this section. See Notes 6 and 7. | Only one offence—Section inapplicable. See Note 5. |
| Forgery. See Note 5. | Same series under different sections. See Note 5. |
| Object of the section. See S. 233 Note 1. | Single trial and not separate trials prohibited. See Note 5. |
| Offences and not charges. See Note 5. | Theft. See Notes 8 and 9. |
| Offences and not transactions. See Note 5. | |
| Offences not of the same kind. See Note 8. | |
| Offences under same section. See Note 8. | |

1. Legislative changes.

Changes made in the Code of 1882 —

The words "committed within the space of twelve months from the first to the last of such offences" were substituted for the words

Code of 1872 : S. 453.

More offences than one of same kind may be charged within a year of each other. 453. When a person is accused of more offences than one of the same kind; committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three.

Explanation : — Offences are said to be of the same kind under this section if they fall within the provisions of section four hundred and fifty five.

Code of 1861 — Nil.

Section 234
Notes 1-4

"committed within one year of each other" occurring in the Code of 1872.

Changes made by Act XVIII of 1923 —

1. In sub-s.(1) after the words "such offences" the words "whether in respect of the same person or not" have been added.
2. The proviso to sub-s. (2) is new.

2. Section applies to trials and not to committals. — The section refers to a *trial* and not to a *commitment*. So, where an accused is committed to trial on more than three charges, the commitment is not illegal, as the Sessions Judge can limit the *trial* to three charges only.¹

3. 'Person,' if includes 'persons.' — See Note 5a to S. 239.

4. "Whether in respect of the same person or not." — Before the amendment of 1923, there was a conflict of opinions as to whether the section was applicable to cases of offences committed against *several* persons, one set of cases holding that it applied only when the offences were committed against the *same* person¹ and another set holding that there was no such restriction and that it applied in all cases, whether the offences were committed against the same person or against different persons.² The addition of the words "whether in respect of the same person or not" has removed this conflict and a person can now be charged for offences of the same kind not exceeding three within a year, even if they were committed against several persons.³

Section 234 — Note 2

1. ('17) AIR 1917 Mad 612 (612) : 17 Cri L Jour 369, *In re Krishnamurthy Iyer*.

Note 4

1. ('81) 4 All 147 (148) : 1881 A W N 156, *Empress of India v. Murari*.
('83) 1883 All W N 39 (39) *Empress v. Sheodin*.
('83) 1883 All W N 107 (107), *Empress v. Dukhi*.
('04) 1 Cri L Jour 489 (490) (Kathiawar), *In re Khavas Vasu Monji*.
2. ('83) 6 All 121 (124, 125) : 1883 A W N 241, *Empress v. Ram Partab*.
('84) 7 All 174 (178) : 1884 A W N 321 (FB), *Queen-Empress v. Juala Prasad*.
('17) AIR 1917 All 369 (369) : 38 All 458 : 18 Cri L Jour 41, *Emperor v. Jagar Deo*. (4 All 147, not followed.)
('19) AIR 1919 All 26 (27, 28) : 42 All 12 : 20 Cr. L. J. 642, *Babu Ram v. Emperor*.
('87) 1887 Rat 331 (331), *Queen-Empress v. Dhondi*.
('83) 9 Cal 371 (373) : 11 C. L. R. 522, *Manu Miya v. Empress*.
('09) 10 Cri L Jour 272 (273) : 3 I. C. 319 (Cal), *Sri Bhagwan Singh v. Emperor*.
('15) AIR 1915 Cal 366 (367) : 43 Cal 13 : 16 Cri L Jour 332, *Subedar Ahir v. Emperor*. (Per Fletcher, J.)
('14) AIR 1914 Cal 288 (288) : 41 Cal 66 : 15 Cr. L. J. 224, *Musai v. Emperor*.
('17) AIR 1917 Mad 879 (880) : 17 Cri L Jour 479, *In re Raja Rao*.
('23) AIR 1923 Mad 181 (181) : 23 Cr. L. J. 719, *Kovaganti v. Emperor*. (Passing counterfeit coins on different occasions to different persons on the same day—Joint trial is not illegal.)
('18) AIR 1918 Nag 147 (147) : 20 Cri L Jour 71, *Krishnayya v. Emperor*.
('23) AIR 1923 Nag 156 (156) : 26 Cri L Jour 327, *Tukaram v. Ganpat*.
('17) AIR 1917 Pat 656 (656) : 2 Pat L J 209 : 18 Cr. L. J. 614, *Babu Lal v. Emperor*.
('21) AIR 1921 L B 36 (37) : 23 Cr. L. J. 740 : 11 L B R 45, *Nga Po Kyin v. Emperor*.
3. ('39) AIR 1939 Cal 32 (33) : 40 Cri L Jour 290, *Emperor v. Afsaruddi*. (In course of same night two murders committed at different times and places—Charges may be legally tried together—But separate charges are necessary.)
('26) AIR 1926 Pat 347 (348) : 27 Cri L Jour 909, *Farzand Ali v. Emperor*.

5. "More offences than one." — The section applies only where a person is accused of *more offences than one* of the same kind, and not where he is charged with only *one* offence. A trial for such offence is not barred even though such offence is based upon various acts which by themselves are offences, and which extend beyond a period of one year. In other words, the word "offence" in the section is not intended to include every act so connected with that offence as to form part of the same transaction.¹

Section 234
Note 5

Illustrations

1. A is charged with an offence under S. 401 of the Penal Code. It is based on several offences of theft and various acts of association extending over more than one year. The trial is not bad under this section. The reason is that the gist of the offence under S. 401 is association for the purpose of habitually committing theft or robbery and habit is to be proved by the aggregate of acts extending, it may be, over many years.²

2. A is charged with the offence of waging war under S. 121 of the Penal Code, based upon seventeen separate incidents ranging over a period of fifteen months. The trial is not bad inasmuch as the offence under S. 121 is a *single continuing* offence.³

3. A is charged with the offence of falsification of accounts under S. 477A, Penal Code. Prosecution is not restricted to only three instances of falsification but any number of false entries or omission of entries may be proved.^{3a}

The section refers to "offences" and limits the trial to three offences. "An offence" is defined in S. 4(o) as an *act* or *omission* made punishable by any law for the time being in force. A single act or omission will be only one offence though chargeable under several sections of the Penal Code. Thus, the printing of a seditious article on a particular date is only *one* offence though the accused may be charged therefor under Ss. 124A and 153A. The printing of another article of a similar nature on *another date* is another offence chargeable under the same two sections and of the same nature as the first. The two offences can therefore be tried together at one trial under this section.⁴ This section does not allow a single trial in respect of two *transactions* of the same kind, each of such transactions being made up of offences of different kinds. Thus, when A was charged: (1) with abetting of forgery in respect of the service of summons alleged to have been served on 21-10-1914; (2) with swearing a false affidavit with regard to the service of such summons; (3) with abetment of forgery in respect of the service of summons alleged to have been served on 22-1-1915; and (4) with swearing a false affidavit as to the service of the latter summons, it was held that S. 234 did not apply and that the trial was bad,⁵ inasmuch as there were *four* offences not of the same

Note 5

1. ('34) AIR 1934 Sind 57(64):28 S.L.R.119:35 Cr. L. J. 1337, *Dur Md. v. Emperor*. ('05) 2 Cr. L. J. 34 (37): 1905 Pun Re No. 2 Cr, *Bhagwati Dial v. King-Emperor*.
2. ('20) AIR 1920 Cal 87 (88): 47 Cal 154: 21 Cr. L. J. 386, *Kasem Ali v. Emperor*.
3. ('25) AIR 1925 Mad 690 (695): 49 Mad 74: 26 Cr. L. J. 1513, *In re Mallu Dora*.
- 3a. ('31) AIR 1931 Cal 8 (9): 32 Cr. L. J. 318, *Prafulla Chandra v. Emperor*.
- ('15) AIR 1915 Cal 296 (297): 15 Cr. L. J. 153: 41 Cal 722, *Raman v. Emperor*.
4. ('08) 8 Cr. L. J. 272 (277, 280): 1 I. C. 641: 33 Bom 77, *Emperor v. Tribhuvandas*.
5. ('17) AIR 1917 Sind 40 (41): 10 S.L.R. 192: 18 Cr. L. J. 664, *Gerimal v. Emperor*.
[See also ('07) 5 Cr. L. J. 341 (342): 30 Mad 328, *Kasi Viswanathan v. Emperor*.
(Offences committed within one year in the course of three separate transactions if they amount to more than three cannot be tried at one trial.)]

Section 234
Notes 5-7

kind, though there were *two transactions of the same kind*, namely in respect of the two summonses.

The section bars only a *single* trial of more than three offences of the same kind committed within the space of a year. It does not mean that if the accused had committed fifty offences in the course of twelve months, only *three* shall be tried and the rest abandoned. He may be tried in batches of three at *each trial* under separate charges.⁶ Further, the section merely *authorises* a combination of three offences in one trial. It does not bar a separate trial of the accused for each separate offence.⁷ Moreover, the effect of the section is not to make the three offences which are tried together under its provisions, one offence. The *offences* continue to be separate though there is only one trial for all of them.⁸

6. "Committed within the space of twelve months." — The Section provides for a single trial of offences committed within *the space of twelve months*. If the offences extend over a period longer than a year, a single trial therefor is illegal as contravening the provisions of this section, and the defect is not curable under section 537.¹

7. "Not exceeding three." — An accused can under the section, be charged and tried at one trial for offences of the same kind not exceeding three. A trial for more than three offences committed during the year, is contrary to the provisions of this section and is an illegality and not merely an irregularity covered by S. 537.¹ Where a person is

6. ('18) AIR 1918 Pat 343 (344) : 19 Cri L Jour 255, *Sital Prasad v. Emperor*.

7. ('10) 11 Cr. L. J. 337 (337, 338) : 5 I. C. 970 (Bom), *Emperor v. Kashinath Bagaji*. ('78) 3 Cal 540 (541) : 1 Cal L R 478, *Empress v. Dononjoy Baraj*.

8. ('34) AIR 1934 Sind 185 (186) : 28 Sind L R 336 : 36 Cr. L. J. 608, *Chetumal Rekumal v. Emperor*.

Note 6

1. ('01) 25 Mad 61 (97) : 28 Ind App 257 : 8 Sar 160 (PC), *Subramaniya v. Emperor*. (On appeal from and overruling 10 M L J 147 (FB), and also overruling 27 Cal 839.)
- ('10) 11 Cr L Jour 53 (54) : 4 I. C. 808 : 32 All 57, *Sali Mulla Khan v. Emperor*.
- ('27) AIR 1927 All 223 (224) : 49 All 312 : 28 Cr. L. J. 171, *Raman Lal v. Emperor*.
- ('99) 26 Cal 560 (563) : 3 C W N 412, *Queen-Empress v. Mati Lal*.
- ('31) AIR 1931 Cal 357 (357, 358) : 32 Cri L Jour 195, *Kalu Mian v. Emperor*.
- ('05) 2 Cr. L. J. 130 (131) : 1905 Pun Re No. 14 Cr, *Dhanjibhoy v. Kaim Khan*.
- ('19) AIR 1919 Lah 440 (441) : 19 Cri L Jour 187, *Emperor v. Jagat Ram*.

Note 7

1. ('36) AIR 1936 Sind 164 (168) : ILR (1939) Kar 64 : 39 Cr. L. J. 881, *Chuharmal Nirmaldas v. Emperor*.
- ('37) 1937 Mad W N 209 (209), *Appalaswami v. Emperor*. (Six counts of bribery and six counts of false personation relating to different dates and different persons — Single trial illegal — Conviction held void and of no legal effect.)
- ('36) AIR 1936 Cal 693 (694) : 38 Cri L Jour 201, *Amitava Ghose v. Emperor*.
- ('01) 25 Mad 61 (96, 97) : 28 Ind App 257 : 8 Sar 160 (PC), *Subramaniya v. Emperor*.
- ('04) 1 Cri L Jour 875 (876) : 1904 A W N 223, *Emperor v. Nand Lal*.
- ('08) 8 Cr. L. J. 4 (5) : 30 All 351 : 5 A L J 400 : 1908 A W N 152, *Emperor v. Mata Prasad*.
- ('10) 11 Cri L Jour 51 (52) : 5 Ind Cas 178 (All), *Umed Singh v. Emperor*.
- ('10) 11 Cr. L. J. 285 (286) : 5 I. C. 896 : 32 All 219, *Sheo Saran Lal v. Emperor*.
- ('18) AIR 1918 All 351 (352) : 19 Cr. L. J. 161, *Emperor v. Raghunath*. (In this case, the High Court accepted the above principle — However, in order to meet the ends of justice the conviction was not set aside.)
- ('19) AIR 1919 All 239 (239) : 20 Cri L Jour 353, *Emperor v. Fauza*.
- ('19) AIR 1919 All 413 (414) : 20 Cri L Jour 784, *Avadh Behari v. Emperor*.
- ('23) AIR 1923 All 483 (484) : 25 Cri L Jour 220, *Ganga Prasad v. Emperor*.

charged with more than three offences at one trial, the Judge can, *before the trial begins*, strike off a charge or charges so as to reduce the number of charges to be tried to three.² *After* the trial begins, however, the illegality cannot be cured by the striking out of the extra charges.³ See also S. 227, Note 4.

Section 234
Notes 7-8

This section must be read subject to the special provisions of sub-section (2) of S.222 with regard to the offences of criminal breach of trust and dishonest misappropriation of money, as to which, see S.222 and the Notes thereunder.

8. Offences of the same kind. — This section applies only where a person is accused of more offences than one of the *same kind*. It does not apply where a person is accused of offences which are not of the same kind, such as criminal breach of trust and falsification of

- (1902) 4 Bom L R 433 (434), *Emperor v. Nathalal*.
 (1926) AIR 1926 Bom 110 (112) : 49 Bom 892 : 27 Cr.L.J. 305, *Emperor v. Manant*.
 (1934) AIR 1934 Bom 303 (305) : 35 Cr.L.J. 1477, *Khimchand A. Mehta v. Emperor*.
 (187) 14 Cal 128 (131), *In the matter of Luchmi Narain*.
 (1908) 2 Cal W N 341 (346), *Ekram Ali v. Queen-Empress*.
 (1905) 2 Cr. L. J. 847 (850, 851) : 9 C W N 1027, *Ram Sarup Denia v. Emperor*.
 (1927) AIR 1927 Cal 946 (946) : 28 Cri L Jour 291, *Krishna Lal v. Emperor*.
 (1932) AIR 1932 Cal 377 (379) : 33 Cr.L.J. 357, *Surendra Nath Goswami v. Emperor*.
 (1926) AIR 1926 Lah 193 (194) : 27 Cri L Jour 793, *Fitzmaurice v. Emperor*.
 (1902) 2 Weir 299 (299), *In re Venkata Laul*.
 (1907) 5 Cr. L. J. 94 (95, 96) : 29 Mad 569 : 17 M L J 219 : 1 M L T 409, *Manavala Chetty v. Emperor*.
 (1912) 13 Cri L Jour 21 (22) : 13 I. C. 213 (Mad), *Lakshminarain v. Emperor*.
 (1912) 13 Cr. L. J. 124 (125) : 13 I. C. 780 (Mad), *Emperor v. Arumukhan Pillai*.
 (1912) 13 Cri L Jour 125 (126) : 13 I. C. 781 (Mad), *Mandi Ghasi v. Emperor*.
 (1917) AIR 1917 Mad 612 (612) : 17 Cr. L. J. 369, *In re Krishnamurthy Iyyer*.
 (1922) AIR 1922 Mad 435 (435) : 24 Cri L Jour 462, *Shama Sastri v. Emperor*.
 (1930) AIR 1930 Mad 508 (509) : 31 Cr. L. J. 1195, *Varaswamy Naidu v. Emperor*.
 (1918) AIR 1918 Nag 22 (27) : 19 Cri L Jour 657, *Jangilal v. Emperor*.
 (1927) AIR 1927 Nag 22 (23) : 27 Cri L Jour 1099, *Emperor v. Dhaneshram*.
 (1931) AIR 1931 Oudh 86 (87) : 6 Luck 441 : 32 Cr.L.J. 540, *Dabri Misir v. Emperor*.
 (1934) AIR 1934 Oudh 325 (326) : 35 Cri L Jour 1048, *Gunno v. Emperor*.
 (1918) AIR 1918 Pat 343 (344) : 19 Cri L Jour 255, *Sital Prasad v. Emperor*.
 (1925) AIR 1925 Pat 623 (624) : 4 Pat 503 : 27 Cr.L.J. 359, *Jeobaran v. Ramkishun*.
 (1908) 8 Cr.L.J. 497 (502, 504) : 4 L B R 294 : 14 Bur L R 242, *S.P. Chatterji v. Emperor*.
 (1909) 9 Cri L Jour 15 (20, 21) : 4 Low Bur Rul 315, *Emperor v. Tha Byaw*.
 (1933) AIR 1933 Rang 325 (326) : 34 Cr. L. J. 1179, *Nga San Mya v. Emperor*.
 (1917) AIR 1917 Sind 40 (41) : 10 S L R 192 : 18 Cr.L.J. 664, *Gerimal v. Emperor*.
 (1926) AIR 1926 Sind 129 (129, 130) : 20 S L R 3 : 27 Cr.L.J. 32, *Hyder v. Emperor*.
 (1935) AIR 1935 Oudh 273 (274, 275) : 36 Cr. L. J. 518, *Piarcy Lal v. Emperor*.
 [See (1935) AIR 1935 Bom 24 (25) : 36 Cr. L. J. 516, *Emperor v. Sulman Abbu*.
 (Where it was held that the irregularity "cannot be regarded as one not material and not having prejudiced the accused at the trial.")]
 (1936) AIR 1936 Cal 678 (679) : 38 Cri L Jour 4, *Girdharilal v. Emperor*. (Held, on facts that there was no infringement of the provisions of S. 234.)]
 [See also (1928) 29 Cr.L.J. 287 (288) : 107 I.C. 826 (Pat), *Jamuna Prasad v. Emperor*.]
 [But see (1908) 7 Cr. L. J. 95 (97) : 7 C. L. J. 63 : 35 Cal 161, *Bepin v. Emperor*.]
 See also S. 233 Note 5, S. 235 Note 13 and S. 537 Note 10.
2. (1908) 8 Cr.L.J. 281 (302, 303, 341) : 10 Bom L R 848, *Emperor v. Bal Gangadhar Tilak*.
3. (1907) 5 Cr.L.J. 94 (95, 96) : 29 Mad 569 : 17 M L J 219 : 1 M L T 409, *Manavala Chetty v. Emperor*.
 (1922) AIR 1922 Cal 401 (401) : 49 Cal 555 : 24 Cr.L.J. 86, *Chetoo Kalwar v. Emperor*.
 (1926) AIR 1926 Lah 193 (194) : 27 Cri L Jour 793, *Fitzmaurice v. Emperor*.
 See also S. 227 Note 4.

Section 234
Note 8

accounts.¹ The provisions of the section cannot be evaded by the omission to name the offences and sections of the statute in the charge, where in fact the accused has been charged with two offences which are not of the same kind.²

Sub-section (2) provides that in order that offences may be of the same kind, they should be punishable —

1. under the same section, and
2. with the same amount of punishment.

See the undermentioned cases³ for examples of offences which are not of the same kind.

See also Note 3 to S. 233.

Note 8

1. ('37) AIR 1937 Sind 1 (1) : 30 S L R 391 : 38 Cr. L. J. 324, *Emperor v. Mohammad Ismail*. (Offences of falsification of accounts and criminal breach of trust even though they relate to the same transaction, are not one offence and three charges of criminal breach of trust and three charges of falsification of accounts cannot be combined together at one trial.)
- ('26) AIR 1926 Bom 110 (111) : 49 Bom 892 : 27 Cr. L. J. 305, *Emperor v. Manant K. Mehta*.
- ('07) 5 Cr. L. J. 341 (342) : 30 Mad 328 : 17 M L J 141, *Kasi Viswanathan v. Emperor*. [See ('13) 40 Cal 318 (319) : 20 Ind Cas 412 (413) : 14 Cr. L. J. 428, *Nityagopal v. Jiban Krishna*. (But two unconnected charges of falsification of accounts can be tried at one trial under S. 234.)]
2. ('37) AIR 1937 Sind 293 (295) : 39 Cr. L. J. 123 : 32 S L R 87, *Mohanlal v. Emperor*.
3. ('39) AIR 1939 Bom 129 (138) : 40 Cr. L. J. 579, *Ramchandra Rango v. Emperor*. (Offence of fabrication of false evidence relating to items partly or wholly unconnected with the charge of criminal breach of trust is a distinct offence.)
- ('39) AIR 1939 Cal 32 (33) : 40 Cr. L. J. 290, *Emperor v. Afsaruddi Naseraddi*. (Murder and grievous hurt are not offences of the same kind and so cannot be tried together.)
- ('96) 21 All 127 (131, 132) : 1898 A W N 205, *Queen-Empress v. Mathura Prasad*. (Ss. 161 and 409, I. P. C.)
- ('82) 8 Cal 450 (454) : 10 C L R 421, *Empress v. Srinath Kur*. (Ss. 167 and 466, I. P. C.)
- ('17) AIR 1917 Sind 40 (41) : 10 Sind L R 192 : 18 Cr. L. J. 664, *Gerimal Hemamal v. Emperor*. (Ss. 193 and 465 with 109, I. P. C.)
- ('29) 1929 Mad W N 395 (397), *Collett v. Emperor*. (Ss. 279 and 304, I. P. C.)
- ('13) 14 Cr. L. J. 116 (116) : 18 Ind Cas 676 (All), *Shanker v. Emperor*. (Ss. 302 and 323, I. P. C.)
- ('92) 14 All 502 (503, 504) : 1892 A W N 95, *Queen-Empress v. Mulua*. (Ss. 302 and 392, I. P. C.)
- ('24) AIR 1924 All 316 (317) : 46 All 54 : 25 Cr. L. J. 466, *Puttoo Lal v. Emperor*. (Ss. 323 and 342, I. P. C.)
- ('24) AIR 1924 All 454 (455) : 46 All 138 : 25 Cr. L. J. 552, *Badlu Shah v. Emperor*. (Ss. 366 and 368, I. P. C.)
- ('02) 15 C P L R Cr 53 (54), *Emperor v. Bishau Panka*. (Ss. 380, 454 and 457, I. P. C.)
- ('32) AIR 1932 Bom 277 (278) : 33 Cr. L. J. 619, *Krishnaji Anant v. Emperor*. (Ss. 380 and 457 Penal Code.)
- ('04) 1 Cr. L. J. 537 (539) : 1904 U B R 1st Qr. Cr. P. C. 2, *Emperor v. Asgar Ali*. (Do.)
- ('32) AIR 1932 Sind 64 (65) : 26 Sind L R 191 : 33 Cr. L. J. 650, *Emperor v. Attursing*. (Ss. 408 and 477A, I. P. C.)
- ('26) AIR 1926 Bom 110 (112) : 49 Bom 892 : 27 Cr. L. J. 305, *Emperor v. Manant K. Mehta*. (Do.)
- ('33) AIR 1933 Nag 327 (327, 328) : 34 Cri L Jour 673, *Rameshwar Brijmohan v. Emperor*. (Ss. 409 and 477A, I. P. C.)
- ('02) 4 Bom L R 433 (434), *Emperor v. Nathalal*. (Do.)
- ('32) AIR 1932 Cal 486 (486) : 33 Cr. L. J. 265, *Nagendra Nath v. Emperor*. (Do.)
- ('07) 5 Cri L Jour 341 (342) : 30 Mad 328 : 17 M L J 141 : 2 M L T 177, *Kasi Viswanathan v. Emperor*. (Do.)
- ('82) 8 Cal 634 (636) : 10 C L R 466, *Empress v. Uttom*. (Ss. 411 and 413, I. P. C.)
- ('34) AIR 1934 Pat 170 (172) : 35 Cr. L. J. 814, *Jangli Mian v. Emperor*. (Accused charged in alternative of kidnapping or abduction of minor girl—Separate charges must be framed in respect of each offence.)

9. Proviso. — The proviso lays down specifically that an attempt to commit an offence is of the same kind as the actual offence, when such attempt is itself an offence. It also provides that offences under ss. 379 and 380 of the Penal Code are of the same kind even though punishable under different sections and with different punishments, thus overruling the view held in the undermentioned cases¹ that they were not offences of the same kind.

Section 234
Note 9

235.* (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

Section 235

* Code of 1882 : Section same as that of 1893 Code.

Code of 1872 : S. 454.

454. I.—If in one set of facts, so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time.

II.—If a single act falls within two separate definitions of any law in force for the time being, by which offences are defined or punished the person who does it may be charged with each of the offences so committed, but he must not receive a more severe punishment than could be awarded, by the Court which tries him, for either.

III.—If several acts, of which one or more than one would by itself constitute an offence, form, when combined, an offence under the provisions of any law in force for the time being, by which offences are defined or punished a person who does them may be charged with every offence which he may have committed, but he must not receive for such offences, collectively, a punishment more severe than that which might have been awarded, by the Court trying him, for any one of such offences, or for the offence formed by their combination.

Illustrations

To Paragraph I. —

(a) *A* rescues *B*, a person in lawful custody, and causes grievous hurt to *C*, a constable in whose custody *B* was. *A* may be separately charged with, convicted of, and punished for, offences under Ss. 225 and 333, Indian Penal Code.

(b) *A* has in his possession several counterfeit seals with the intention of committing several forgeries. *A* may be separately charged with, convicted of, and punished for, the possession of each seal for a distinct forgery under S. 473, Indian Penal Code.

(c) *A*, with intent to cause injury to *B*, institutes proceedings against him, knowing there is no just or lawful ground for such proceedings. *A* also falsely charges *B* with having committed an offence. *A* may be separately charged with, convicted of, and punished for, two offences under S. 211, Indian Penal Code.

(d) *A*, with intent to injure *B*, brings a false charge against him of having committed an offence. On the trial, *A* gives false evidence against *B*. *A* may be separately charged with, convicted of, and punished for, offences under Ss. 211 and 194 or Section 195, Indian Penal Code.

(¹34) AIR 1934 Bom 303 (305) : 35 Cr. L. J. 1477, *Khimchand A. Mehta v. Emperor*. (Cl. (a) (iii) and Cl. (b) (ii) of S. 103 of the Presidency Towns Insolvency Act.)

Note 9

1. (¹16) AIR 1916 Cal 124 (124) : 17 Cr. L. J. 224, *Rakiman Bibi v. Mubarak Mondal*. (¹18) AIR 1918 Nag 107 (108) : 20 Cri L Jour 751, *Hari Singh v. Emperor*.

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(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the

Offence falling within two definitions.

(e) *A*, knowing that *B*, a female minor, has been kidnapped, wrongfully confines her and detains her as a slave. *A* may be separately charged with, convicted of, and punished for, offences under Ss. 368 (read with S. 367) and 370, Indian Penal Code.

(f) *A*, with six others, commits the offences of rioting, grievous hurt and of assaulting a public servant engaged in suppressing the riot. *A* may be separately charged with, convicted of, and punished for, offences under Ss. 147, 325 and 152, Indian Penal Code.

(g) *A* criminally intimidates *B*, *C* and *D* at the same time. *A* may be separately charged with, convicted of, and punished for, each of the three offences under S. 506, Indian Penal Code.

(h) *A* intentionally causes the death of three persons by upsetting a boat. *A* may be separately charged with, convicted of, and punished for, three offences under S. 302, Indian Penal Code.

To Paragraph II. —

(i) *A* commits mischief by cutting down a tree in a Government forest. The tree overhangs the bank of a river and falls into the stream. *A* commits theft by having severed the tree and by floating it down the river to his village where he sells it. *A* may be separately charged with, and convicted of, offences under Ss. 426 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted under S. 379 only.

(j) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under Ss. 352 and 323, Indian Penal Code, but the Court which tries him may not inflict a more severe sentence than if it had convicted him under Section 323 only.

(k) *A* wrongfully kills a buffalo worth sixty rupees belonging to *B*, and then takes away the carcass in a manner amounting to theft. *A* may be separately charged with, and convicted of, offences under Ss. 429 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under S. 429 only.

(l) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property. *A* and *B* thereupon assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with and convicted of, offences under Ss. 411 and 414, Indian Penal Code; but the Court which tries them may not inflict a severer sentence than if it had convicted them under one of those Sections only.

(m) *A* uses a forged document in evidence, in order to convict *B*, a public servant, of an offence under S. 167. *A* may be separately charged with, and convicted of, offences under Ss. 471 (read with S. 466) and 196, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under one of those Sections only.

To Paragraph III. —

(n) *A* commits house-breaking by day with intent to commit adultery and commits, in the house so entered, adultery with *B*'s wife. *A* may be separately charged with, and convicted of, offences under Ss. 454 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under S. 497 only.

(o) *A* robs *B*, and in doing so, voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under Ss. 323, 392 and 394, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under S. 392 or S. 394 only.

(p) *A* entices *B*, the wife of *C* away, and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under Ss. 498 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under S. 497 only.

Code of 1861 : S. 240.

Charges in cases falling within two or more Sections of the Penal Code.

240. When it appears to the Magistrate that the facts which can be established in evidence show a case falling within two or more sections of the Penal Code, the charge shall contain two or more heads, each of which shall be applicable to one of such sections.

time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

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(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71.

Illustrations

TO SUB-SECTION (1) —

(a) *A* rescues *B*, a person in lawful custody, and in so doing causes grievous hurt to *C*, a constable in whose custody *B* was. *A* may be charged with, and convicted of, offences under Ss. 225 and 333 of the Indian Penal Code.

(b) *A* commits house-breaking by day with intent to commit adultery, and commits in the house so entered adultery with *B*'s wife. *A* may be separately charged with, and convicted of, offences under Ss. 454 and 497 of the Indian Penal Code.

(c) *A* entices *B*, the wife of *C*, away from *C*, with intent to commit adultery with *B*, and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under Ss. 498 and 497 of the Indian Penal Code.

(d) *A* has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under S. 466 of the Indian Penal Code. *A* may be separately charged with, and convicted of, the possession of each seal under S. 473 of the Indian Penal Code.

(e) With intent to cause injury to *B*, *A* institutes a criminal proceeding against him knowing that there is no just or lawful ground for such proceeding; and also falsely accuses *B* of having committed an offence, knowing that there is no just or lawful ground for such charges. *A* may be separately charged with, and convicted of, two offences under S. 211 of the Indian Penal Code.

(f) *A*, with intent to cause injury to *B*, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, *A* gives false evidence against *B*, intending thereby to cause *B* to be convicted of a capital offence. *A* may be separately charged with, and convicted of, offences under Ss. 211 and 194 of the Indian Penal Code.

(g) *A*, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. *A* may be separately charged with, and convicted of, offences under Ss. 147, 325 and 152 of the Indian Penal Code.

(h) *A* threatens *B*, *C* and *D* at the same time with injury to their persons with intent to cause alarm to them. *A* may be separately charged with, and convicted of, each of the three offences under S. 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time.

TO SUB-SECTION (2) —

(i) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under Ss. 352 and 323 of the Indian Penal Code.

(j) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property, for the purpose of concealing them. *A* and *B* thereupon

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voluntarily assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with, and convicted of, offences under S. 411 and 414 of the Indian Penal Code.

(*k*) *A* exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. *A* may be separately charged with, and convicted of, offences under Ss. 317 and 304 of the Indian Penal Code.

(*l*) *A* dishonestly uses a forged document as genuine evidence, in order to convict *B*, a public servant, of an offence under S. 167 of the Indian Penal Code. *A* may be separately charged with, and convicted of, offences under Ss. 471 (read with 466) and 196 of the same Code.

TO SUB-SECTION (3) —

(*m*) *A* commits robbery on *B*, and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under Ss. 323, 392 and 394 of the Indian Penal Code.

Synopsis

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| <ol style="list-style-type: none"> 1. Scope of the section. 2. "Same transaction"—Sub-s.(1). 3. "More offences than one." 4. "Are committed by the same person." 5. "May be tried at one trial." 6. "Trial" includes conviction. 7. Sub-section (2). 8. "Constitute, when combined, a different offence"—Sub-s.(3). 9. Sub-section (4). | <ol style="list-style-type: none"> 10. Illustration (j). 11. Sections 234, 235 and 236, if mutually exclusive — See Note 2 under S. 239. 12. Failure to charge under sub-section (1) — Subsequent trial therefor — S. 403 — See S. 403 and Notes thereto. 13. Joint trial for several charges not forming part of same transaction — Effect. 14. Offences forming part of same transaction—Jurisdiction to try. |
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Other Topics (miscellaneous)

Acts include illegal omissions. See S. 3, sub-s. (2) of General Clauses Act.
 Burden of proof on prosecution as to applicability of Ss. 234 to 239. See Note 1.
 Connected as cause and effect. See Note 2.
 Connected as principal and subsidiary acts. See Note 2.
 Conspiracy and offence for which conspiracy formed. See Note 2.
 Desirability of avoiding embarrassment. See Note 5.
 Identity of purpose and continuity of action. See Note 2.
 Instances. See Note 2.

Joint charges. See S. 233 Note 1.
 Joint trial, some with jury and some with assessors. See S. 269, sub-s.(3).
 Offences for which complaint by or on behalf of Government is needed. See Note 5.
 Offences under different sections or definitions. See S. 233 Note 3.
 Prejudice to accused. See Note 5.
 Proximity of time. See Note 2.
 Question of same transaction is one of fact. See Note 2.
 Section permissive and not mandatory. See Note 5.

1. Scope of the section. — This section is another exception to the rule in S. 233 that there should be a separate trial for every offence charged. Where the case falls within this section, a *single trial* for more offences than one is legal. The exception only extends, however, to the *trial* and not to the framing of *charges*. The general rule that every offence should be *charged separately* applies, though there may be *one* trial for all such offences under the provisions of the section.¹ See also Note 4 under S. 233.

Section 235 — Note 1

1. ('39) AIR 1939 Cal 321 (322) : 40 Cri L Jour 649, *Nanda Ghose v. Emperor*.
 ('38) AIR 1938 Bom 481 (484) : ILR (1939) Bom 42 : 40 Cri L Jour 118, *Emperor v. Karamalli Gulamali*.
 ('03) 1 Cri L Jour 364 (364) : 26 All 195 : 1903 A W N 231, *Emperor v. Fattu*.
 ('27) AIR 1927 Cal 17 (20) : 54 Cal 237 : 28 Cri L Jour 99, *Azimaddi v. Emperor* (Overruled on another point in A I R 1939 P C 47.)

Separate trial for different offences being the rule and joint trial the exception,² the burden of proof is on the prosecution to show that the case falls within the exceptions to the general rule.³

See also the undermentioned case.⁴

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Notes 1-2

2. "Same transaction" — Sub-section (1). — Sub-section (1) provides that an accused person may be charged with and tried at one trial for any number of offences which he is alleged to have committed in one series of acts so connected together as to form part of the "same transaction."¹ The expression "same transaction" has, however, not been defined in the Code. From its very nature the word "transaction" is incapable of exact definition and appears to have been purposely used because it has this quality.² It should be interpreted, not in any special or technical way, but in its ordinary etymological meaning³ of "an affair" or "a carrying through."⁴ The Court may also

2. ('38) ILR (1938) 1 Cal 98 (106), *Kamala Kanta Ray v. Emperor*.

('23) AIR 1923 All 88 (88) : 24 Cri L Jour 155, *Ganesh Lal v. Emperor*.

See also S. 233 Note 2.

3. ('15) AIR 1915 All 380 (381) : 16 Cri L Jour 795, *Sohan Lal v. Emperor*.

('23) AIR 1923 All 88 (88) : 24 Cri L Jour 155, *Ganesh Lal v. Emperor*.

4. ('37) AIR 1937 Cal 99 (114) : 38 Cr. L. J. 818 (SB), *Jitendra Nath v. Emperor*.
(Anything contained in the Criminal Law Amendment Act, does not bar the operation of the provisions of the Code of Criminal Procedure as contained in Sections 196, 235, 236 and 237.)

Note 2

1. ('38) AIR 1938 Bom 481 (481) : ILR (1938) Bom 42 : 40 Cr.L.J. 118, *Emperor v. Karamalli Gulamali*. (If offences are committed in the course of the same transaction they may be tried together, although they are more than three in number and extending over a period of more than a year.)

(1900) 1 Low Bur Rul 33 (35, 36) (FB), *Queen-Empress v. Aw Wa*. (Illicit working of still and possession of spirit manufactured in that still.)

('15) AIR 1915 All 380 (380) : 16 Cri L Jour 795 (796), *Sohanlal v. Emperor*. (Offences under Sections 403 and 417, Penal Code, can be tried together.)

2. ('36) AIR 1936 Bom 154 (156):60 Bom 148:37 Cr.L.J. 688, *Shapurji v. Emperor*.

('08) 8 Cri L Jour 191 (195) : 1 Sind L R 73, *Emperor v. Ghulam*.

('25) AIR 1925 Sind 233 (235) : 18 Sind L R 199 : 27 Cr. L. J. 257, *Frank Crossly Woodward v. Emperor*.

('21) AIR 1921 All 19 (22) : 22 Cri L Jour 641, *Sanuman v. Emperor*.

('23) AIR 1923 All 88 (88):24 Cri L Jour 155, *Ganeski Lal v. Emperor*.

('91) 15 Bom 491 (495), *Queen-Empress v. Fakirappa*.

('27) AIR 1927 Bom 177 (183) : 51 Bom 310 : 28 Cr. L. J. 373, *Sejmal v. Emperor*.

('05) 2 Cr.L.J. 578 (581):30 Bom 49:7 Bom L R 633, *Emperor v. Datto Hanmant*.

('33) AIR 1933 Bom 266 (267) : 57 Bom 400:34 Cr.L.J. 870, *Mazarali v. Emperor*.

('20) AIR 1920 Lah 265 (267) : 1 Lah 562 : 21 Cr. L. J. 626, *Pahlad v. Emperor*.

('27) AIR 1927 Lah 274 (275) : 28 Cri L Jour 357, *Muhammadi v. Emperor*.

('25) AIR 1925 Mad 690 (700) : 26 Cr. L. J. 1513 : 49 Mad 74, *In re Mallu Dora*.

('10) 11 Cri L Jour 258 (259) : 5 I. C. 847 : 33 Mad 502, *Choragudi Venkataadri v. Emperor*. (It is not necessary or advisable to attempt to define it.)

3. ('36) AIR 1936 Bom 154 (156):60 Bom 148:37 Cri L Jour 688, *Shapurji Sorabji v. Emperor*. (Common sense and ordinary use of language must decide whether on the facts of a particular case, there is one transaction or several transactions.)

('25) AIR 1925 Mad 690 (698) : 26 Cr. L. J. 1513 : 49 Mad 74, *In re Mallu Dora*.

('97-01) 1 Upp Bur Rul 31 (40), *Nga Po Ke v. Queen-Empress*.

('10) 11 Cri L Jour 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa v. Emperor*.

[See also ('30) AIR 1930 Mad 857 (858) : 53 Mad 937 : 32 Cr.L.J. 30, *Ramaraju Thevan v. Emperor*.]

[See however ('18) AIR 1918 Bom 117 (121) : 43 Bom 147 : 20 Cr.L.J. 71, *Emperor v. Madhav Lazman*. (Wide meaning to be given.)]

4. ('97-01) 1 Upp Bur Rul 31 (40), *Nga Po Ke v. Queen-Empress*.

('05) 2 Cr.L.J. 578 (581):30 Bom 49:7 Bom L R 633, *Emperor v. Datto Hanmant*.

('34) AIR 1934 Pat 483 (484, 485) : 13 Pat 161 : 36 Cr.L.J. 342, *Ramnath Rai v. Emperor*.

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ote 2

look for guidance to the illustrations to the section, remembering, however, that those illustrations are not exhaustive.⁵ In *Emperor v. Sharufalli*⁶ it was observed that the real and substantial test for determining whether several offences are connected together so as to form one transaction "depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action." And this has been adopted generally by the Courts.⁷ *Proximity of time* is not so

5. ('91) 15 Bom 491 (495), *Queen-Empress v. Fakirappa*.
- ('05) 2 Cri L Jour 578 (581) : 30 Bom 49 : 7 Bom L R 633, *Emperor v. Datto*.
- ('23) AIR 1923 All 88 (88) : 24 Cri L Jour 155, *Ganeshi Lal v. Emperor*.
- ('10) 11 Cri L Jour 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa v. Emperor*.
- ('08) 8 Cri L Jour 191 (195) : 1 Sind L R 73, *Emperor v. Ghulam*.
6. ('02) 27 Bom 135 (138, 139) : 4 Bom L R 930.
7. ('39) AIR 1939 Bom 129 (141) : 40 Cri L Jour 579, *Ramchandra Rango v. Emperor*.
- ('38) I L R (1938) 1 Cal 98 (108) : 41 C W N 1112, *Kamala Kanta Ray v. Emperor*.
(Offence of cheating by personation and murder and robbery, held, disconnected acts and not forming parts of same transaction.)
- ('36) AIR 1936 Bom 154 (158) : 60 Bom 148 : 37 Cr. L. J. 688, *Shapurji v. Emperor*.
- ('21) AIR 1921 All 19 (22) : 22 Cri L Jour 641, *Sanuman v. Emperor*.
- ('06) 4 Cri L Jour 420 (421, 422) : 2 Nag L R 147, *Empress v. Hari Raot*. (Distinct interval of time—Not same transaction.)
- ('28) AIR 1928 Oudh 401 (401) : 3 Luck 664 : 29 Cr. L. J. 801, *Rasul v. Emperor*.
(Trial of offences under Ss. 324 and 325, I. P. C., though outside common objects of rioting is not illegal if the acts constitute one transaction.)
- ('24) AIR 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cr. L. J. 1082, *Kushai Mallik v. Emperor*. (Abduction and concealment on different dates.)
- ('22) AIR 1922 Lah 144 (145) : 22 Cr. L. J. 505, *Ganda Singh v. Emperor*. (Theft and assault committed on different occasions—Joinder of charges for, is bad and vitiates trial.)
- ('34) AIR 1934 Mad 88 (94) : 57 Mad 545 : 35 Cr. L. J. 631, *Venkata v. Emperor*.
(Series of acts of misappropriation, though subject of separate charges can be jointly tried with the main offence of conspiracy to commit breach of trust.)
- ('17) AIR 1917 Low Bur 5 (5) : 19 Cr. L. J. 34, *Emperor v. Nga Lu Gale*. (Illegal possession of opium and cocaine for carrying on business of vendor of contraband — Possession of both articles held to be part of same transaction.)
- ('25) AIR 1925 Sind 233 (235) : 18 Sind L R 199 : 27 Cr. L. J. 257, *Woodward v. Emperor*. (Accused charged under Ss. 304A, 337 and 338 and under Ss. 465 and 471 or S. 193, I. P. C., in the alternative for forging entries in order to conceal his offence of criminal neglect — Held, there was misjoinder of charges.)
- ('26) AIR 1926 Sind 151 (153) : 20 Sind L R 74 : 27 Cr. L. J. 456, *Hussainbibi v. Emperor*. (Accused decoying girl to make money by giving her in marriage on pretext of being her lawful guardian and after about fortnight cheating a man by inducement to marry the girl — The offences under Ss. 366 and 420, Penal Code, held committed in the same transaction.)
- ('12) 13 Cr. L. J. 833 (840) : 17 Ind Cas 705 (Bom), *Emperor v. Ganesh Narayan*.
- ('15) AIR 1915 Cal 688 (689) : 16 Cri L Jour 3 (4), *Superintendent and Remembrancer of Legal Affairs, Bengal v. Manmohan Roy*.
- ('10) 11 Cr. L. J. 258 (261) : 5 I. C. 847 : 33 Mad 502, *Choragudi v. Emperor*.
- ('19) AIR 1919 Mad 353 (356) : 20 Cr. L. J. 145, *Krishna v. Emperor*. (Unlawful assemblies at different places — Each with different common object but all in pursuance of a common purpose — Acts of all accused can be subject of one trial.)
- ('25) AIR 1925 Mad 690 (692, 700) : 49 Mad 74 : 26 Cri L Jour 1513, *In re Mallu Dora*. (Reilly, J., contra.)
- ('14) AIR 1914 Oudh 275 (278) : 17 Oudh Cas 276 : 15 Cr. L. J. 643, *Abbas-Quli Khan v. Emperor*.
- ('08) 8 Cri L Jour 191 (195) : 1 Sind L R 73, *Emperor v. Ghulam*.
- ('29) AIR 1929 Bom 296 (303) : 53 Bom 479 : 31 Cr. L. J. 65, *Emperor v. C. E. Ring*.
- ('20) AIR 1920 Mad 201 (202) : 43 Mad 411 : 21 Cr. L. J. 297, *W. H. Lockley v. Emperor*.
- ('33) AIR 1933 Cal 308 (309, 310) : 34 Cri L Jour 530, *Ali Hussain v. Emperor*.
- ('20) AIR 1920 Pat 230 (232) : 5 Pat L J 11 : 21 Cr. L. J. 161, *Govinda v. Emperor*.
- ('16) AIR 1916 Mad 550 (551) : 16 Cri L Jour 323, *Virupanna Goud v. Emperor*.

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Note 2

essential as continuity of action and purpose.⁸ On the one hand, the mere proximity of time between several acts will not necessarily constitute the acts parts of the same transaction;⁹ on the other hand, the mere fact that there are intervals of time between the various acts will not necessarily import want of continuity,¹⁰ though the length of

(20) AIR 1920 Lah 265 (267) : 1 Lah 562 : 21 Cr. L. J. 626, *Pahlad v. Emperor*.
(35) AIR 1935 Cal 312 (313) : 62 Cal 809, *Kashiram Jhunjhunwalla v. Hurdut Rai-Gopal Rai*. (Offence of misappropriation in respect of several items may be joined with charge of falsification which is one of series of acts.)

(35) AIR 1935 Nag 149 (154) : 36 Cr. L. J. 1153 : 31 N L R 318, *R. S. Ruikar v. Emperor*.
(10) 11 Cr. L. J. 135 (136) : 5 Ind Cas 436 (Mad), *Krishna v. Emperor*. (Defamatory resolutions and transmission of resolutions to a newspaper, are not parts of the same transaction in the absence of concert.)

(26) AIR 1926 Oudh 161 (165) : 26 Cr. L. J. 1602, *Bishambar Nath v. Emperor*.

(08) 8 Cr. L. Jour 11 (13) : 4 N L R 71, *Emperor v. Dalwant Singh*.

(32) AIR 1932 Bom 545 (546) : 56 Bom 488 : 34 Cr. L. J. 357, *Sanjiv v. Emperor*.

(29) AIR 1929 Bom 128 (130) : 53 Bom 344 : 30 Cr. L. J. 588, *Emperor v. Gopal*.

(25) AIR 1925 All 301 (303) : 26 Cr. L. Jour 734, *Tufail Ahmad v. Emperor*.

(31) 1931 Mad W N 556 (557, 558), *Balliah v. Emperor*. (Where it was held that identity of purpose is not the only test.)

(32) AIR 1932 Bom 277 (278) : 33 Cr. L. J. 619, *Krishnaji Anant v. Emperor*. (Do.)

(17) AIR 1917 Pat 287 (288) : 18 Cr. L. Jour 739, *Ghasi Ram v. Sukra Uraon*. (Where it was held that the mere sameness of motive does not make distinct acts parts of same transaction.)

(18) AIR 1918 Pat 343 (344) : 19 Cr. L. Jour 255, *Sital Prasad v. Emperor*. (Do.)

(27) AIR 1927 Bom 177 (183) : 51 Bom 310 : 23 Cr. L. J. 373, *Sejmal v. Emperor*. (Where it was held that even community of purpose is not necessary.)

(26) AIR 1926 All 334 (336, 337) : 48 All 325 : 27 Cr. L. Jour 445, *Rafuzzaman Khan v. Chhotey Lal*. (Where the expression "identity of purpose" was preferred to the expression "community of purpose" it was held that "identity of purpose" is enough.)

[See (38) AIR 1938 Nag 283 (285) : 1 L R (1939) Nag 686 : 40 Cr. L. J. 197, *Nana Sadeba v. Emperor*. (Unity of time, place and purpose ought to be looked to.)]

See also S. 239 Note 6.

8. (38) ILR (1938) 1 Cal 98 (107, 108), *Kamalakant Ray v. Emperor*. (There must be one continuous thread of a common purpose running through the acts to support a joinder of charges in respect thereof.)

(36) AIR 1936 Bom 154 (157) : 60 Bom 148 : 37 Cr. L. J. 688, *Shapurji v. Emperor*.

(05) 2 Cr. L. J. 578 (581) : 30 Bom 49, *Emperor v. Datto Hanmant*.

(06) 4 Cr. L. Jour 420 (421) : 2 Nag L R 147, *Emperor v. Hari Raot*.

(31) AIR 1931 Pat 52 (53) : 32 Cr. L. Jour 478, *Ganesh Pershad v. Emperor*.

(29) AIR 1929 Bom 128 (131) : 53 Bom 344 : 30 Cr. L. J. 588, *Emperor v. Gopal*.

(24) AIR 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cr. L. J. 1082, *Kushai Malik v. Emperor*.

(25) AIR 1925 Cal 580 (581) : 26 Cr. L. J. 369, *Patit Paban Ray v. Emperor*.

(20) AIR 1920 Lah 265 (267) : 1 Lah 562 : 21 Cr. L. J. 626, *Pahlad v. Emperor*.

(16) AIR 1916 Nag 73 (76) : 13 N L R 35 : 18 Cr. L. J. 339, *Gunwant v. Emperor*.

(17) AIR 1917 Low Bur 5 (5) : 19 Cr. L. Jour 34, *Emperor v. Nga Lu Gale*.

(35) AIR 1935 Nag 149 (154) : 36 Cr. L. J. 1153 : 31 N L R 318, *R. S. Ruikar v. Emperor*.

(27) AIR 1927 Lah 274 (275) : 28 Cr. L. Jour 357, *Muhammadi v. Emperor*.

(1900) 1 Low Bur Rul 361 (362), *Nga San Daik v. Crown*.

(12) 13 Cr. L. J. 485 (486) : 15 I. C. 485 (Low Bur), *Nga Tha Gyi v. Emperor*.

(17) AIR 1917 Pat 287 (288) : 18 Cr. L. Jour 739, *Ghasi Ram v. Emperor*. (Complaints on same day or similarity of motive is no ground for joint trial of several persons for distinct offences at different places.)

(31) AIR 1931 Pat 102 (103, 104) : 32 Cr. L. Jour 611, *Abdur Rahim v. Emperor*.

9. (38) ILR (1938) 1 Cal 98 (107), *Kamala Kanta Ray v. Emperor*.

(12) 13 Cr. L. J. 485 (486) : 15 I. C. 485 (486) (L B), *Nga Tha Gyi v. Emperor*.

(02) 26 Mad 125 (127) : 2 Weir 295, *Krishnaswamy Pillai v. Emperor*.

See also S. 239 Note 6.

10. (38) ILR (1938) 1 Cal 98 (108), *Kamala Kant Ray v. Emperor*.

(Mere difference in time or place between the commission of one offence and of another will not necessarily import want of such continuity.)

(02) 27 Bom 135 (138) : 4 Bom L R 930, *Emperor v. Sherufalli*.

(02) 2 Low Bur Rul 19 (21), *Nga Ta Pu v. King-Emperor*.

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the interval may be an important element in determining the question of connexion between the several acts.¹¹ The transaction itself need not be a criminal transaction; an offence can be committed in the course of a transaction the aim of which is perfectly legitimate.^{11a} It has, however, been held in the undermentioned cases^{11b} that *proximity of time* is also *necessary* in order to constitute the acts parts of the same transaction.

Although according to the test mentioned above, *community of action and purpose* is necessary in order to constitute the several acts, parts of the same transaction, the mere existence of some *general* purpose or design, such as defrauding the public, is not sufficient. The purpose must be something particular and definite.¹² The words "continuity of action" do not mean merely doing the same thing or similar things continuously or repeatedly, for, a recurring series of similar transactions is not, according to the ordinary use of language, the same transaction. The words mean "the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts comes to an end, either by attainment of the object or by being put an end to or abandoned. If any of those things happens and the whole process is begun over again, it is not the same transaction but a new one in spite of the fact that the same general purpose may continue."^{12a}

('06) 6 Cr.L.J. 28 (29, 30): 14 Bur L.R. 38: 1907 U.B.R. Cr. 5, *Nga Nyo Gyi v. Emperor*.
(17) AIR 1917 Pat 287 (288): 18 Cr. L. J. 739, *Ghasi Ram v. Sukra Uraon*.

11. ('36) AIR 1936 Bom 154 (157): 60 Bom 148: 37 Cr.L.J. 688, *Shapurji v. Emperor*.
(02) 27 Bom 135 (138): 4 Bom L.R. 930, *Emperor v. Sherufalli*.

(17) AIR 1917 Sind 40 (41): 10 S.L.R. 192: 18 Cr. L. J. 664, *Gerimal v. Emperor*.
(The words "same transaction" in S. 235 are not applicable to cases in which the offences are separated by distinct intervals of time or place and require to be proved by distinct evidence.)

('35) AIR 1935 Nag 149 (154): 36 Cr.L.J. 1153: 31 N.L.R. 318, *R.S. Ruikar v. Emperor*.

11a. ('35) AIR 1935 Nag 149 (154): 36 Cr. L. J. 1153: 31 N. L. R. 318, *R. S. Ruikar v. Emperor*.

11b. ('19) AIR 1919 Mad 487 (493): 20 Cr. L. J. 354, *Kumaramuthu v. Emperor*.

('16) AIR 1916 Cal 188 (196): 16 Cr.L.J. 497 (504): 42 Cal 957, *Amritlal v. Emperor*.

('22) AIR 1922 Cal 76 (77): 23 Cr. L. J. 685, *Banga Chandra De v. Ananda Charan*.

('18) AIR 1918 Bom 117 (119): 43 Bom 147: 20 Cr. L. J. 71, *Madhao v. Emperor*.

('27) AIR 1927 Cal 330 (332): 28 Cri L Jour 347, *Tamezkhan v. Rajaballi Mir*.

('05) 2 Cri L Jour 480 (497): 29 Bom 449: 7 Bom L.R. 527, *Emperor v. Jethalal*.

('90) 15 Bom 491 (495), *Queen-Empress v. Fakirappa*.

('91) 16 Bom 414 (424), *Queen-Empress v. Fajiram*.

('27) AIR 1927 Sind 39 (45): 21 S.L.R. 107: 27 Cr. L. J. 1233, *Emperor v. Iulman*.

12. ('39) AIR 1939 Bom 129 (141): 40 Cr. L. J. 579, *Ramchandra Rango v. Emperor*.

(A mere common purpose does not constitute a transaction—Nor would community of purpose coupled with concert and design implied in abetment by conspiracy make the different acts alleged parts of the same transaction.)

('36) AIR 1936 Bom 154 (158): 60 Bom 148: 37 Cr. L. J. 688, *Shapurji v. Emperor*.

('31) AIR 1931 Pat 102 (103, 104): 32 Cr. L. J. 611, *Abdur Rahim v. Emperor*.

('10) 11 Cr. L. J. 258 (261): 5 I. C. 847: 33 Mad 502, *Choragudi Venkatadri v. Emperor*.

('24) AIR 1924 Lah 734 (737, 738): 25 Cr. L. J. 1020, *Nanak Chand v. Emperor*.

[But see (26) AIR 1926 Sind 171 (173): 27 Cr. L. J. 243: 20 S. L. R. 18, *Kishan-chand v. Emperor*. (Offence of conspiracy to cheat the public.)]

12a. ('36) AIR 1936 Bom 154 (158): 60 Bom 148: 37 Cr. L. J. 688, *Shapurji Sorabji v. Emperor*. (Charges of forgery in respect of different consignments of tickets supplied at intervals — Different acts of forgery do not form parts of the same transaction.)

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When a person is charged with two offences and the evidence to prove the one offence is identical with that by which the other is to be established, then the two must be held to have been committed in the course of the same transaction.^{12b}

It will be clear from the above discussion that the question as to what does or does not form part of the same transaction is a question of fact¹³ depending largely upon the circumstances of each case.¹⁴ As pointed out by Sadasiva Iyer, J., in *Kumaramuthu v. Emperor*¹⁵:

"Different judicial minds might, where the facts are complicated, arrive at different conclusions as to whether a particular complicated series of acts were committed in the same transaction or not and one can very well conceive many sets of facts which are on the border-line."

Thus, the offence of hiring a person to take part in a riot is a separate and distinct offence from the riot itself and, ordinarily, the hiring and the riot would be separate transactions. There may, however, be

('39) AIR 1939 Bom 129 (141) : 40 Cr. L. J. 579, *Ramchandra Rango v. Emperor*. (Idea of completion cannot be divorced in interpretation of expression — Mere common purpose does not constitute same transaction nor existence of some general purpose or design.)

[See also ('35) AIR 1935 Nag 178 (181) : 31 Nag L R 337 : 36 Cri L Jour 1216, *Ramsheshan v. Emperor*. (Each act of embezzlement and the steps taken to conceal it form one transaction and the fact that the offence was repeated on several occasions in pursuance of a studied policy of fraud cannot make all the acts parts of the same transaction.)]

12b. ('39) AIR 1939 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Potthal*.

13. ('37) AIR 1937 All 714 (717, 718) : ILR (1937) All 779 : 39 Cri L Jour 38, *Emperor v. Bishan Sahai*

('27) AIR 1927 Cal 330 (332) : 28 Cri L Jour 347, *Tamez Khan v. Rajjabali Mir*.

('23) AIR 1923 All 277 (280) : 26 Cri L Jour 29, *Gayan Singh v. Emperor*.

('18) AIR 1918 Bom 117 (119) : 43 Bom 147 : 20 Cr. L. J. 71, *Madhav v. Emperor*.

('19) AIR 1919 Bom 111 (112) : 20 Cr. L. J. 657, *Ramnarayan Amarchand v. Emperor*.

('27) AIR 1927 Bom 177 (183) : 51 Bom 310 : 28 Cri L Jour 373, *Sejmal Punamchand v. Emperor*.

('09) 10 Cri L Jour 463 (465) : 4 Ind Cas 13 (Cal), *Girwardharilal v. Emperor*.

('25) AIR 1925 Cal 580 (581) : 26 Cri L Jour 369, *Patit Paban Ray v. Emperor*.

('25) AIR 1925 Cal 903 (905) : 26 Cri L Jour 594, *Nayan Ullah v. Emperor*.

('20) AIR 1920 Lah 265 (267) : 1 Lah 562 : 21 Cr. L. J. 626, *Pahlad v. Emperor*.

('27) AIR 1927 Lah 274 (275) : 28 Cri L Jour 357, *Muhammadi v. Emperor*.

('10) 11 Cr. L. J. 258 (259) : 33 Mad 502 : 5 Ind Cas 847, *Choragudi Venkatachari v. Emperor*.

('16) AIR 1916 Mad 550 (553) : 16 Cri L Jour 323, *Virupana Gowd v. Emperor*.

('19) AIR 1919 Mad 353 (355) : 20 Cri L Jour 145, *Krishna Iyer v. Emperor*.

('19) AIR 1919 Mad 487 (494, 496) : 20 Cr. L. J. 354, *Kumaramuthu v. Emperor*.

('25) AIR 1925 Mad 690 (699, 700) : 49 Mad 74 : 26 Cr. L. J. 1513, *In re Mallu Dora*.

('30) AIR 1930 Mad 857 (858) : 53 Mad 937 : 32 Cr. L. J. 30, *In re Ramaraju Tevan*.

('16) AIR 1916 Nag 73 (76) : 13 N. L. R. 35 : 18 Cr. L. J. 339, *Gunwant v. Emperor*.

('31) AIR 1931 Oudh 86 (88) : 6 Luck 441 : 32 Cr. L. J. 540, *Dubri Missir v. Emperor*.

('31) AIR 1931 Pat 102 (103) : 32 Cri L Jour 611, *Abdur Rahim v. Emperor*.

14. ('37) AIR 1937 All 714 (717, 718) : ILR (1937) All 779 : 39 Cr. L. J. 38, *Emperor v. Bishan Sahai*.

('37) AIR 1937 Nag 188 (189) : ILR (1939) Nag 297 : 38 Cr. L. J. 542, *Ghasi Ram v. Emperor*.

('36) AIR 1936 Bom 154 (158) : 60 Bom 148 : 37 Cr. L. J. 688, *Shapurji v. Emperor*.

('35) AIR 1935 Nag 149 (154) : 31 N. L. R. 318 : 36 Cr. L. J. 1153, *R. S. Ruikar v. Emperor*.

('08) 8 Cri L Jour 191 (195, 200) : 1 Sind L R 73, *Emperor v. Ghulam*.

('25) AIR 1925 Sind 233 (235) : 18 S. L. R. 199 : 27 Cr. L. J. 257, *F. C. Woodward v. Emperor*.

('19) AIR 1919 Mad 487 (493) : 20 Cr. L. J. 354, *Kumaramuthu Pillai v. Emperor*.

('33) AIR 1933 Bom 266 (267) : 34 Cr. L. J. 870 : 57 Bom 400, *Mazarali v. Emperor*.

15. ('19) AIR 1919 Mad 487 (493) : 20 Cri L Jour 354.

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circumstances which might justify the Court in holding that the alleged hiring or employing and the riot were parts of the same transaction.¹⁶

Where an offence is committed, the object of which is the concealment of another offence already committed or about to be committed, the two would ordinarily be considered to form parts of the same transaction.¹⁷ Thus, a criminal misappropriation or a criminal breach of trust and a falsification of accounts for the purpose of concealing the former offence, or a charge of murder and of causing evidence thereof to disappear, or causing grievous hurt with the object of extorting a confession from a person and after his death forging entries to conceal the cause of death or misappropriation of ornament by a police-officer and subsequent alteration of entries in the police diaries to conceal the fact of misappropriation, will be considered to form parts of the same transaction.¹⁸ Similarly, where a gang of dacoits lie concealed waiting for nightfall in order to commit dacoity, but

16. ('25) AIR 1925 Cal 903 (905) : 26 Cr. L. J. 594, *Nayan Ullah v. Emperor*.

17. ('40) AIR 1940 Pat 289 (290) : 19 Pat 369, *Nebti Mandal v. Emperor*. (Accused may be tried under S. 302 and S. 201 at one trial—It is not necessary that the person to be convicted under S. 201 should be completely innocent of the murder.)

('38) AIR 1938 All 91 (95) : 39 Cri L Jour 364, *Mirza Zahid Beg v. Emperor*. (Primary offence and offence of destroying evidence of primary offence may form part of same transaction.)

('19) AIR 1919 Lah 440 (441) : 19 Cr. L. J. 187, *Emperor v. Jagatram*. (Criminal breach of trust and falsification of accounts can be tried together if latter is made to conceal act of misappropriation.)

('24) AIR 1924 All 211 (211) : 25 Cri L Jour 964, *Shafi v. Emperor*. (Theft and then beating complainant to prevent him from making complaint.)

('29) AIR 1929 Lah 843 (844) : 30 Cr. L. J. 958, *Mangal Sen v. Emperor*. (Criminal breach of trust and falsification of accounts to conceal it.)

('20) AIR 1920 Pat 775 (776) : 22 Cr. L. J. 230, *Gajadhar Lal v. Emperor*. (Criminal breach of trust and falsification of accounts.)

('34) AIR 1934 Mad 673 (674) : 35 Cr. L. J. 1503 : 58 Mad 178, *Srirenghachariar v. Emperor*. (Theft of railway ticket and making forged entries thereon.)

('33) AIR 1933 Nag 136 (140) : 34 Cr. L. J. 505 : 29 Nag L R 251, *Mrs. M. F. Rego v. Emperor*. (Charge under Ss. 302 and 201, Penal Code.)

('02) 26 Mad 125 (127) : 2 Weir 295, *Krishnasami Pillai v. Emperor*. (Charges of falsification of accounts and destruction of account books — Falsification of accounts not for the purpose of destroying account books—Destruction of account books not for concealing the falsification — Not same transaction.)

('12) 15 Ind Cas 485 (486) : 13 Cr. L. J. 485 (L B), *Nga Tha Gyi v. Emperor*. (House-trespass and assault on complainant while on his way to police-station.)

('13) 40 Cal 318 (321) : 20 I. C. 412 : 14 Cr. L. J. 428, *Emperor v. Jibankristo*. (Charge of criminal breach of trust and falsification of accounts to conceal it.)

('23) AIR 1923 Bom 262 (263) : 25 Cri L Jour 1349, *Hanmappa Rudrappa v. Emperor*. (Murder and being accessory after the fact.)

('12) 13 Cri L Jour 137 (137) : 13 I. C. 825 (Bom), *Emperor v. Balwant Kondo*. (Causing grievous hurt for the purpose of extorting information and making false entries to attribute another cause for the death of the injured person.)

('10) 11 Cr. L. J. 731 (733) : 8 I. C. 936 : 4 S L R 174, *Emperor v. Bawa Manghnidas*. (Murder and causing disappearance of evidence of the murder.)

[But see ('22) AIR 1922 All 244 (245) : 23 Cr. L. J. 671, *Bechai v. Emperor*. (Cheating and then stealing articles to destroy evidence of cheating do not form part of the same transaction.)]

18. ('35) AIR 1935 Nag 178 (181) : 31 N L R 337 : 36 Cr. L. J. 1216, *Ramsheshan v. Emperor*. (Embezzlement and falsification of accounts for the purpose of concealing the embezzlement form one transaction.)

('25) AIR 1925 Sind 233 (235) : 18 Sind L R 199 : 27 Cr. L. J. 257, *F. C. Woodward v. Emperor*.

See also the cases cited in foot-note 17.

being seen by a woman, kill her fearing detection, and thereafter commit dacoity, the murder and dacoity will form parts of the same transaction.¹⁹ But an offence A and an offence B the object of which is to conceal offence C, cannot be considered to be parts of the same transaction.²⁰

Where there is a *conspiracy* having a definite object in view, and several offences are committed in pursuance of such conspiracy, the several offences will generally form parts of the same transaction.²¹ But isolated acts committed by individual conspirators during the continuance of the conspiracy and not committed in pursuance of the conspiracy are not parts of the same transaction with the conspiracy itself.²²

All offences committed in prosecution of a common object will generally be parts of the same transaction.²³ As to illustrative cases

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19. ('02) 4 Bom L R 789 (791), *Emperor v. Punya*.
20. ('19) AIR 1919 Lah 440 (441) : 19 Cr. L. J. 187, *Emperor v. Jagat Ram*.
21. ('38) AIR 1938 PC 130 (133) : 65 IA 158 : 32 S L R 476 : I L R (1938) 2 Cal 295 : 39 Cri L Jour 452 (PC), *Babulal Chowkhani v. Emperor*. (If several persons conspire to commit offences and commit overt acts in pursuance of the conspiracy, these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it.)
- ('39) AIR 1939 Bom 129 (140) : 40 Cr. L.J. 579, *Ramchandra Rango v. Emperor*.
- ('38) AIR 1938 Cal 195 (201) : 39 Cr.L.J. 417, *Ramkrishna v. Emperor*. (Charge of offences committed as part of same transaction with offence of conspiracy — No misjoinder.)
- ('38) AIR 1938 Cal 253 (260) : I L R (1938) 1 Cal 588 : 39 Cri L Jour 596, *Akhil Bandhu v. Emperor*.
- ('38) AIR 1938 Sind 171 (173) : I L R (1938) Kar 204 : 39 Cr. L. J. 890, *Emperor v. Balumal Hotchand*.
- ('37) AIR 1937 Cal 269 (271) : 38 Cri L Jour 1018, *Sanyasi Gain v. Emperor*. (But to make a joint trial legal, the accusation must be a real one and not a mere excuse for a joinder of charges which otherwise cannot be joined.)
- ('37) 41 Cal W N 251 (255), *C. S. Joseph v. Emperor*.
- ('36) AIR 1936 Cal 753 (759) : 38 Cri L Jour 545, *Rash Behari v. Emperor*. (The principle will also apply where the several offences are committed by different persons.)
- ('16) AIR 1916 Cal 188 (196) : 19 C W N 676 (686) : 42 Cal 957 : 16 Cr. L.J. 497, *Anritalal Hazra v. Emperor*. (If A, B and C conspire to make or have in possession or under control an explosive substance, and if in pursuance of such conspiracy, A has in his possession an explosive substance, they may be charged and tried together under S. 120B, Penal Code, and S. 4 (6), Explosive Substances Act, 1908.)
- ('32) AIR 1932 Bom 406 (407) : 56 Bom 304 : 33 Cr.L.J. 666, *Emperor v. Ramrao*.
- ('22) AIR 1922 Cal 107 (112) : 49 Cal 573 : 23 Cr.L.J. 657, *Abdul Salim v. Emperor*.
- ('34) AIR 1934 Mad 88 (94) : 57 Mad 545 : 35 Cr.L.J. 631, *Venkata Hanumantha Rao v. Emperor*.
- ('33) AIR 1933 Oudh 86 (89) : 8 Luck 286 : 34 Cr.L.J. 124, *Kunwar Sen v. Emperor*. (Conspiracy to start bogus bank and cheating and forgery in pursuance thereof.)
- ('24) AIR 1924 Rang 98 (99) : 1 Rang 604 : 25 Cr.L.J. 270, *Emperor v. Nga Aung Gyaw*. (Conspiracy to boycott.)
- ('26) AIR 1926 Rang 53 (57) : 27 Cri L Jour 669, *Abdul Rahman v. Emperor*. (AIR 1915 Cal 688 and A I R 1924 Rang 98, followed.)
- ('19) AIR 1919 Cal 367 (368) : 46 Cal 712 : 20 Cr.L.J. 122, *Kailash Chandra Pal v. Emperor*. (Accused misrepresenting to joint debtors and recovering excess amount from them — Offences being committed in same place and time and in pursuance of same conspiracy are triable together.)
22. ('37) AIR 1937 All 714 (718) : I L R (1937) All 779 : 39 Cr.L.J. 38, *Emperor v. Bishan Sahai*.
23. ('26) AIR 1926 Lah 367 (367, 368) : 7 Lah 264 : 27 Cri L Jour 803, *Bahadur Singh v. Emperor*.

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of acts forming parts of the same transaction, see the undermentioned decisions.²⁴

- (1929) AIR 1929 Lah 843 (844) : 30 Cr. L. J. 958, *Mangal Sen v. Emperor*. (Series of falsifications of accounts made to cover a single act of defalcation.)
- (1920) AIR 1920 Mad 201 (202) : 43 Mad 411; 21 Cr. L. J. 297, *W. H. Lockley v. Emperor*.
- (1928) AIR 1928 Pat 634 (637) : 29 Cr. L. J. 728, *Habib Khan v. Emperor*. (Accused having common object of taking away complainants and confining them until they agreed to work for H—H not present at place from where complainants were taken away, but present at place of confinement—Complainants confined with his knowledge—Offences form part of the same transaction.)
- (1909) 9 Cri L Jour 367 (368) : 1 Ind Cas 682 (Mad), *Venkata Reddy v. Emperor*. (Several acts done at different times to demonstrate the power of the accused.)
- (1912) 13 Cr. L. J. 251 (251) : 14 Ind Cas 603 (Mad), *Venkataramiah v. Emperor*. See also S. 239 Note 8.
24. (1940) 44 Cal W N 340 (343), *Ahmadar Rahaman v. Emperor*. (Accused alleged to have made up his mind to obtain insurance money from insurance company by fraud, and to that end setting fire to his shop and after the fire putting in a claim for the money—Attempt to cheat and arson are parts of same transaction—No misjoinder.)
- (1940) 1940 Mad W N 865 (867), *Subba Rao v. Emperor*. (User of four forged documents at registration of a sale deed and obtaining money.)
- (1939) AIR 1939 Mad 59 (59) : 40 Cri L Jour 211, *In re Uppara Dodda Narasa*. (Offences of murder and preferring false complaint of murder though form part of the same transaction should not be jointly tried as such joint trial will be very embarrassing to the accused.)
- (1939) AIR 1939 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*. (Offences under Ss. 302, 392 and 411, Penal Code.)
- (1938) AIR 1938 All 91 (95) : 39 Cri L Jour 364, *Mirza Zahid Beg v. Emperor*. (Primary offence of causing death and offence of destroying evidence of the primary offence.)
- (1938) AIR 1938 Oudh 95 (96) : 39 Cri L Jour 341, *Manni Lal v. Emperor*. (An offence under S. 147, I. P. C., has been made a substantive offence by the Penal Code and there is no illegality in the accused being charged under that section in addition to charges under Ss. 323 and 325, I. P. C.)
- (1937) 1937 Mad W N 463 (464), *Ganganna v. Emperor*. (Accused determined to murder G and P, murdering G and then going to P's house and murdering him—Fact that G and P lived about 250 yards apart does not mean that the two murders were not parts of the same transaction.)
- (1936) 30 Sind L R 238 (240), *Manghan Khan v. Emperor*. (There is nothing incongruous between a charge of attempted murder under S. 307, I. P. C., which also includes hurt, and a charge under S. 326, I. P. C., for grievous hurt.)
- (1931) AIR 1931 Cal 8 (9) : 32 Cri L Jour 318, *Prafulla Chandra v. Emperor*. (Intention to defalcate a certain amount—Any act done to achieve the object as making false entries forms part of the same transaction.)
- (1923) AIR 1923 All 88 (88) : 24 Cri L Jour 155, *Ganeshi Lal v. Emperor*. (Offence of keeping gaming house and offence of using it.)
- (1923) AIR 1923 All 137 (137) : 24 Cri L Jour 153, *Ram Prasad v. Emperor*. (Gang of dacoits robbing several carts on road at short intervals.)
- (1932) AIR 1932 Bom 545 (546) : 56 Bom 488 : 34 Cr. L. J. 357, *Sanjiv Ratnappa v. Emperor*. (Charges of causing hurt, wrongful confinement and forgery to cover up the other offences.)
- (1923) AIR 1923 Cal 647 (648) : 25 Cri L Jour 343, *Bilas Chandra Banerjee v. King-Emperor*. (Criminal misappropriation and criminal breach of trust by a public servant—Public servant framing incorrect record—Falsification of record.)
- (1904) 1 Cri L Jour 974 (977) : 1904 Pun Re No. 18 Cr, p. 53 (55), *Emperor v. Harcharan Singh*. (Intimidation to make and subsequent making of defamatory statements.)
- (1927) AIR 1927 Oudh 369 (376) : 2 Luck 631 : 29 Cri L Jour 129, *Ram Prasad v. Emperor*. (Joinder of charges under Ss. 121A and 120B, I. P. C., is not illegal.)
- (1903) 2 Low Bur Rul 23 (24), *King-Emperor v. Nga To*. (Stealing cattle for the purpose of obtaining money for their restoration.)
- (1911) 12 Cr. L. J. 346 (347) : 10 I.C. 946 (Cal), *Jagadish v. Atma Ram*. (Personating a police-officer and committing extortion and cheating on the strength thereof.)
- (1904) 1 Cri L Jour 552 (553) : 1904 Upp Bur Rul 1st Qr 1, *Emperor v. Nga San Dun*. (It was however stated that it is not desirable that there should be a conviction for the smaller offences—This, it is submitted, is not correct.)

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- (84) 7 All 29 (34, 35) : 1884 A W N 220, *Empress v. Dungar*. (Rioting and hurt.)
- (25) AIR 1925 All 299 (301) : 47 All 284 : 26 Cr.L.J. 688, *Ram Sukh v. Emperor*. (Affray and hurt.)
- (86) 1886 Rat 228 (228, 229), *Queen-Empress v. Kashinath Mahader*. (Offences under Ss. 457 and 380 of the Penal Code.)
- (88) 1888 Pun Re No. 8 Cr, p. 11 (12), *Empress v. Mohurram*. (Ss. 457 and 480.)
- (85) 1885 Pun Re No. 32 Cr, p. 70 (75, 76), *Jafir Khan v. Empress*. (Rioting and hurt during such rioting.)
- (34) AIR 1934 Mad 673 (674) : 35 Cr. L. J. 1503 : 58 Mad 178, *Srirangachariar v. Emperor*. (Theft of railway ticket and committing forgery thereon.)
- (92) 6 C P L R Cr 36 (37), *Empress v. Padam Singh*. (Theft from child and hurting it to prevent it from giving information to any one.)
- (23) AIR 1923 Nag 156 (156) : 26 Cri L Jour 327, *Tukaram v. Ganpat*. (Several acts forming one transaction — Joint trial can be held.)
- (32) AIR 1932 Oudh 28 (29) : 33 Cr. L. J. 275, *Emperor v. Zamin*. (A joint trial for offences under Ss. 366 and 368, Penal Code, is not illegal where the whole chain of events beginning with the kidnapping or abduction and ending with the discovery of the woman can fairly be regarded as forming one and the same transaction.)
- (08) 7 Cri L Jour 76 (78) : 4 Low Bur Rul 104, *Emperor v. Mi Thin*. (Owning of common gaming house and also taking part in gambling.)
- (08) 7 Cr. L. J. 464 (466) : 4 Low Bur Rul 199 (FB), *Twet Pe v. Emperor*. (Theft and taking gratification to restore stolen property.)
- (10) 11 Cri L Jour 415 (416) : 6 I. C. 880 : 3 Sind L R 224, *Imperator v. Baradi*. (There is nothing improper in the accused being charged with and tried at one trial for the two offences under Ss. 147 and 332 read with S. 149, Penal Code.)
- (12) 13 Cr. L. J. 861 (862) : 35 All 63 : 17 I. C. 797, *Badri Prasad v. Emperor*. (Conviction at one trial of offences under Ss. 467 and 471 is legal.)
- (17) AIR 1917 All 11 (12) : 39 All 623 : 18 Cr. L. J. 788, *Katwaru Rai v. Emperor*. (Members of an unlawful assembly causing hurt to one person and by a separate act causing hurt to another—The offences under Ss. 323 and 147 can be tried jointly.)
- (12) 13 Cr. L. J. 609 (610) : 16 I. C. 257 (Cal), *Pulin Behari Das v. King-Emperor*. (Offences under Ss. 123 and 121A, Penal Code, can be tried jointly.)
- (12) 13 Cri L Jour 501 (502) : 15 Ind Cas 645 (Bom), *Emperor v. Lalji Bhanji*. (Criminal breach of trust and falsification of accounts — Offences under Ss. 408 and 465, Penal Code.)
- (12) 13 Cri L Jour 137 (137) : 13 I. C. 825 (Bom), *Emperor v. Balwant Kondo*. (Causing grievous hurt to a person to extort information and making false entries to attribute another cause for the death of the injured person.)
- (33) AIR 1933 Pesh 99 (100), *Gopichand v. Emperor*. (Offences made punishable under Ss. 239 and 240, Penal Code, can be jointly tried.)
- (28) AIR 1928 Bom 177 (179) : 29 Cri L Jour 522, *Dagdi Dagdya v. Emperor*. (Offences under Sections 193 and 182, Penal Code.)
- (16) AIR 1916 Cal 41 (41) : 42 Cal 760 : 16 Cr. L. J. 120, *Deputy Superintendent and Remembrancer of Legal Affairs, Bengal v. Kailash Chandra Ghosh*. (Offences under Ss. 347 and 352 read with S. 114.)
- (33) AIR 1933 Sind 255 (256, 257) : 35 Cr. L. J. 256, *Jethanand v. Emperor*. (Offences under Ss. 45 and 43 (1) (i) read with S. 47, Bombay Abkari Act, 1878.)
- (18) AIR 1918 Mad 371 (372) : 41 Mad 727 : 19 Cr. L. J. 613, *Raghuvalu Nancker v. Singaram*. (Ss. 352 and 504, Penal Code.)
- (19) AIR 1919 All 26 (27) : 42 All 12 : 20 Cr. L. J. 642, *Babu Ram v. Emperor*.
- (35) AIR 1935 Oudh 190 (194), *Bishunath v. Emperor*. (Rioting—Offences committed under Ss. 147, 333, 302 and 396 — Joint trial legal.)
- (15) AIR 1915 Bom 203 (204) : 16 Cr. L. J. 761 : 40 Bom 97, *Jivram Dankarji v. Emperor*. (Forging and using the document is one transaction.)
- (34) AIR 1934 Pat 483 (485) : 13 Pat 161 : 36 Cr. L. J. 342, *Ramnath Rai v. Emperor*. (Property stolen on different occasions — Dishonest retention forms a single transaction.)
- (35) AIR 1935 Rang 357 (358, 359) : 37 Cr. L. J. 3, *Maung Kaung Kywe v. Emperor*. (On two consecutive nights offences under Ss. 447 and 448, Penal Code, were committed by accused in respect of property over which they asserted a right of possession—Held that as those two offences formed part of the same transaction, joint trial was valid under S. 235.)
- (18) AIR 1918 Pat 250 (251) : 3 Pat L J 433 : 19 Cr. L. J. 446, *Bali Sahu v. Emperor*. (Offences under S. 47 (a), Bihar and Orissa Excise Act, and S. 9 (c) and (f) can be tried together.)

Section 235
Note 2

See also the undermentioned cases²⁵ for instances of acts not forming parts of the same transaction.

- (‘07) 5 Cr. L. J. 484 (487) : 11 C W N 715, *Emperor v. Sri Narain*. (Offences under Ss. 420, 466, 468, 471 and 419, Penal Code.)
- (‘07) 6 Cr. L. J. 446 (449) (Lah), *Gowardhan Das v. Emperor*. (Assaulting the police officers discharging their duty and hurting some of them—Offences under Ss. 147 and 332, Penal Code, can be tried jointly.)
- (‘17) AIR 1917 Low Bur 5 (5) : 19 Cr. L. J. 34, *Emperor v. Nga Lu Gale*. (Possession of cocaine, and possession of opium punishable under the Excise Act and the Opium Act respectively.)
- (‘02) 2 Low Bur Rul 19 (21), *Nga Ta Pu v. King-Emperor*. (Theft and dishonestly receiving or disposing of stolen property.)
- (‘12) 13 Cr. L. J. 59 (60) : 13 I. C. 395 (Low Bur), *Nga Po Shat v. Emperor*. (Do.)
- (‘18) AIR 1918 Lah 242 (243) : 1918 Pun Re No. 12 Cr : 19 Cr. L. J. 510, *Emperor v. Muhammad Hussain*. (Preparing several false records for screening the offenders from punishment.)
- (‘86) 10 Bom 493 (496), *Queen-Empress v. Sakharan Bhau*. (Offences under Ss. 380 and 457, Penal Code.)
- (‘85) 7 All 29 (35) : 1884 A W N 220, *Queen-Empress v. Dungar Singh*. (Rioting and voluntarily causing grievous hurt.)
- [See also (‘66) 2 Bom H C R Cr 392 (393), *Reg. v. Narayan Krishna*. (Mischief and theft.)]
25. (‘40) AIR 1940 Mad 509 (510) : (1940) 1 M L J 428 (429) : 41 Cr. L. J. 581, *In re Boya Lingadu*. (Two distinct offences of theft in two separate houses or in the alternative two charges under S. 411 in respect of properties stolen from two houses tried together—Trial bad for misjoinder.)
- (‘39) AIR 1939 Bom 129 (143) : 40 Cr. L. J. 579, *Ramchandra Rango v. Emperor*. (Conspiracy to commit criminal breach of trust—Misappropriation of funds committed—New circumstances arising and parties agreeing to make a fraudulent adjustment of their accounts with a view to prolong refund of money misappropriated—This second conspiracy cannot be tacked on to a charge on the former conspiracy.)
- (‘39) AIR 1939 Cal 32 (33) : 40 Cr. L. J. 290, *Emperor v. Afsaruddi Naseraddi*. (Two murders and offence of causing grievous hurt committed at different times and places during same night—No evidence to suggest any connexion between the incidents—Incidents do not form part of the same transaction.)
- (‘38) AIR 1938 Cal 769 (770) : 40 Cr. L. J. 280, *Ali Hyder v. Emperor*. (It is doubtful whether an offence under S. 376 committed by five persons before the end of September 1936 can rightly be held to be a part of the same transaction as an offence under S. 377, Penal Code committed by three of them between the end of December 1936 and the end of June 1937.)
- (‘38) I L R (1938) 1 Cal 98 (108, 109), *Kamala Kanta Ray v. Emperor*. (Offence of cheating by personation tried along with offences under Ss. 302 and 394—Fact that accused entered complainant’s service by cheating him by personating as a Brahmin and after an year killed complainant’s wife will not make cheating part of the same transaction as murder.)
- (‘37) 1937 Mad W N 209 (209), *Appalaswami v. Emperor*. (Six counts of bribery and six counts of false personation, the counts of bribery relating to different dates and different persons and the counts of false personation relating to different persons—Offences committed on same day but at different times of the day—Joint trial is bad.)
- (‘37) AIR 1937 Nag 188 (189) : I L R (1939) Nag 297 : 38 Cr. L. J. 542, *Ghasi Ram v. Emperor*. (Offence of sale of opium without a licence is quite dissociable from the offence of importing foreign opium into British India, and cannot form part of the same transaction.)
- (‘36) AIR 1936 Bom 154 (157) : 60 Bom 148 : 37 Cr. L. J. 688, *Shapurji Sorabji v. Emperor*. (Charges under Ss. 408, 409, 467, 471, 420 and 403, Penal Code, against two accused—Charges of forgery in respect of different consignments of tickets supplied at intervals in batches—*Held*, offences committed in connexion with any one consignment of books would be part of same transaction but offences committed in connexion with any other consignment of books would not be part of the same but similar transaction.)
- (‘36) AIR 1936 Lah 507 (507) : 37 Cr. L. J. 722, *Bahali v. Emperor*. (Two offences under S. 457 and S. 324 read with S. 34, Penal Code, committed on different dates cannot possibly be considered to be part of one and the same transaction.)

Section 235
Note 2

- ('19) AIR 1919 All 239 (239) : 20 Cr. L. J. 353, *Fauja v. Emperor*. (One trial for two offences of triple and double murders is unjustifiable if the offences do not represent a series of acts forming the same transaction.)
- ('21) AIR 1921 All 408 (409) : 22 Cr. L. J. 397, *Ram Sahai v. Emperor*. (Several offences committed by several groups of accused, some but not all being common — Joint trial improper.)
- ('19) AIR 1919 Bom 111 (112, 114) : 20 Cr. L. J. 657, *Ramnarayan Amarchand v. Emperor*. (Preparation of balance sheets for the years 1912 and 1913 could not be regarded as forming the same transaction.)
- ('03) 30 Cal 822 (829, 830) : 7 C W N 639, *Bircndra Lal v. Emperor*.
- ('18) AIR 1918 Cal 237 (237) : 19 Cr. L. J. 868, *Emperor v. Rajendra Roy*. (Three charges of criminal misappropriation committed by accused within a year added to by another charge of offence under S. 210, Penal Code, not committed within the same year—*Held*, offence under S. 210 did not form one transaction with other offences.)
- ('26) AIR 1926 Lah 193 (195) : 27 Cr. L. J. 793, *Fitz Maurice v. Emperor*. (Four distinct acts on different dates relating to four different documents charged under S. 477A, I. P. C.)
- ('33) AIR 1933 Lah 512 (512, 513) : 34 Cr. L. J. 402, *Ajaib Singh v. Emperor*. (First charge related to an attempt to rob G near village B on a particular night — Robbery of P near village X with deadly weapons on the next night.)
- ('34) AIR 1934 Lah 630 (631) : 36 Cr. L. J. 676, *Dhan Singh v. Emperor*.
- ('02) 26 Mad 454 (455, 456) : 2 Weir 296, *Chekutty v. Emperor*. (Kidnapping of X and assault next day on Y.)
- ('29) 1929 Mad W N 266 (267), *Laxumana v. Kamala*. (Defamation published by word of mouth of five different persons.)
- ('29) 1929 Mad W N 395 (397), *Collet v. Emperor*. (Two separate and independent occurrences.)
- ('33) 1933 Mad W N 326 (328), *Venkata Subbanna v. Emperor*. (A joint trial of charges under Ss. 406 and 474, Penal Code is not legal, where the acts constituting the two offences could not be said to be so connected together as to form the same transaction.)
- (1900) 1 Low Bur Rul 361 (362), *Nga San Daik v. Crown*. (Mere proximity in time between two acts does not necessarily constitute them parts of the same transaction.)
- ('05) 2 Cri L Jour 847 (848, 850) : 9 C W N 1027, *Ram Sarup v. Emperor*. (Dishonest receipt of stolen property which forms the proceeds of several thefts.)
- ('08) 8 Cr. L. J. 281 (302) : 10 Bom L R 848, *Emperor v. Bal Gangadhar Tilak*. (Separate newspaper articles written week after week are not parts of the same transaction.)
- ('08) 8 Cr. L. J. 497 (502, 503, 504) : 4 Low Bur Rul 294 : 14 Bur L R 242 (FB), *S. P. Chatterjee v. King-Emperor*. (Screening murderer of A and screening murderer of B.)
- ('09) 10 Cr. L. J. 291 (291) : 3 Ind Cas 466 (All), *Nithuri v. Emperor*. (Taking of ornaments from X and pushing her into well — It is submitted that the latter act being to conceal the former, the acts form parts of the same transaction.)
- ('09) 10 Cri L Jour 452 (453) : 4 Ind Cas 1 (Cal), *Laskari v. Emperor*.
- ('09) 10 Cr. L. J. 476 (478, 479) : 4 Ind Cas 28 (Cal), *Parmeshwar Lal v. Emperor*. (Cheating A and criminal misappropriation against B on different occasions.)
- ('10) 11 Cri L Jour 293 (294) : 6 Ind Cas 242 (Mad), *Musalappa v. Emperor*. (Permitting cattle to trespass in reserve forest, rioting and rescuing cattle after they were impounded.)
- ('11) 12 Cr. L. J. 567 (567) : 12 Ind Cas 655 (Mad), *Raghavendra Rao v. Emperor*. (Different acts — Unconnected — Not one transaction.)
- ('13) 14 Cri L Jour 116 (117) : 18 Ind Cas 676 (All), *Shanker v. Emperor*.
- ('32) AIR 1932 Bom 277 (278) : 33 Cri L Jour 619, *Krishnaji Anant v. Emperor*. (Offences under Ss. 380 and 457, I. P. C. — A mere common purpose does not constitute a transaction.)
- ('02) 29 Cal 387 (388) : 6 C W N 550, *Mohendro Nath v. Emperor*. (Offences under Ss. 411 and 489.)
- ('35) AIR 1935 Nag 90 (98) : 36 Cr. L. J. 744, *Diwan Singh v. Emperor*. (Composing of article, editing and printing at one place and publishing it at different places at different times cannot be regarded as one set of acts forming the same transaction.)

Section 235
Notes 3-5

3. "More offences than one." — The section is not controlled by s. 234. There is nothing in the section to warrant the rule that not more than three offences can be combined even if those offences have been committed in the course of the same transaction.¹ Nor is a trial illegal by reason of containing more than three offences spread over a period longer than a year.² But a multitude of accusations which will result in bewildering the accused and prejudicing him in his defence ought not to be permitted.³

4. "Are committed by the same person." — The expression "*by the same person*" indicates that where there are more than one accused, this section is inapplicable. To such cases s. 239 will apply. See Notes to s. 238.

5. "May be tried at one trial." — The provisions of this section are only enabling and not imperative and therefore, though they provide for a joint trial, yet a separate trial for each of the offences is not illegal.¹ As a matter of fact, if there is a risk of embarrassing the defence, a joinder of charges should not be resorted to.² Nor is it necessary that the accused should be tried for all the offences committed by the same acts. Thus, where the accused, by a speech abets an offence under s. 122 of the Penal Code and by the same speech also abets the offence of dacoity, he can be tried for each of the offences

Note 3

1. ('38) AIR 1938 Bom 481 (484): ILR (1939) Bom 42 : 40 Cr. L. J. 118, *Emperor v. Karamali Gulamali*.
- ('21) AIR 1921 All 19 (22) : 22 Cri L Jour 641, *Sanuman v. Emperor*.
- ('26) AIR 1926 Oudh 161 (165) : 26 Cr. L. J. 1602, *Bishambar Nath v. Emperor*.
[But see ('84) 6 All 121 (124, 125) : 1883 All W N 241, *Empress v. Ram Partab* (Obiter).]
2. ('25) AIR 1925 Mad 690 (695) : 26 Cr.L.J. 1513:49 Mad 74, *In re Mallu Dora*. ('10) 11 Cr.L.J. 258(260):33 Mad 502:5 I.C. 847, *Choragudi Venkatadri v. Emperor*.
3. ('34) AIR 1934 Sind 57 (60):28 S L R 119:35 Cr.L.J. 1337, *Dur Md. v. Emperor*.

Note 5

1. ('86) 1886 Rat 307 (308), *Queen-Empress v. Ugra*. ('25) AIR 1925 Cal 341 (345) : 52 Cal 253 : 26 Cr.L.J. 487, *Alimuddi v. Emperor*. ('27) AIR 1927 Pat 13 (14):6 Pat 208:27 Cr.L.J. 1100, *Abdul Hamid v. Emperor*. ('72-92) 1872-1892 Low Bur Rul 444 (446), *Nga San Dun v. Queen-Empress*. ('28) AIR 1928 Bom 231 (232) : 29 Cri L Jour 981, *Emperor v. Rama Deoji*. ('82) 8 Cal 481 (483) : 4 Shome L R 282, *Ameruddin v. Farid Sarkar*. ('15) AIR 1915 Mad 1036 (1037) : 16 Cri L Jour 717, *In re Sennimalai Goundan*.
2. ('39) AIR 1939 Mad 59 (59) : 40 Cr.L.J. 211, *In re Uppara Dodda Narasa*. (It is very embarrassing to the accused to have to answer a charge of murder at the same time as a charge of wilfully preferring a false complaint of murder—It is also embarrassing to the prosecution and may lead to failure of justice.) ('37) 41 Cal W N 414 (414, 415), *Abdul Gafur v. Emperor*. (Charges under Ss. 302, 364 and 201 — Joint trial before one jury held improper.) ('36) AIR 1936 Cal 753 (759) : 38 Cr. L. J. 545, *Rash Behari Shaw v. Emperor*. ('25) AIR 1925 Cal 341 (345) : 52 Cal 253 : 26 Cr.L.J. 487, *Alimuddi v. Emperor*. ('21) AIR 1921 All 19 (21) : 22 Cri L Jour 641, *Sanuman v. Emperor*. ('90) 15 Bom 491 (497), *Queen-Empress v. Fakirapa*. ('25) AIR 1925 Cal 413 (414) : 26 Cr. L. J. 467, *Surendra Lal v. Emperor*. ('25) AIR 1925 Mad 690 (697) : 26 Cr. L. J. 1513 : 49 Mad 74, *In re Mallu Dora*. ('28) AIR 1928 Oudh 401 (401) : 3 Luck 664 : 29 Cr. L. J. 801, *Rasul v. Emperor*. ('08) 8 Cri L Jour 491 (195) : 1 Sind L R 73, *Emperor v. Ghulam*. ('34) AIR 1934 Sind 57 (60):28 S L R 119:35 Cr.L.J. 1337, *Dur Md. v. Emperor*. [See also ('22) AIR 1922 Cal 573 (574) : 24 Cr. L. J. 72 : 50 Cal 94, *Radha Nath v. Emperor*.]

under this section, but as this section is controlled as regards the offence against the State under S. 122, by the provisions of S. 196 of the Code, its operation in this case could be restricted to the offence of dacoity alone.³ A joint trial of several offences in cases not authorised by the Code is an *illegality* and not merely an irregularity.⁴ (See Notes under section 233.)

Section 235
Notes 5-11

6. "Trial" includes conviction. — The word "trial" in this section includes conviction.¹

7. Sub-section (2). — Where the same facts will constitute different offences, this sub-section authorizes a combined trial in respect of all of them.¹ Thus, where a girl of fifteen went out of her husband's hut at night and the accused seized her and took her away, the act will amount to an offence both of kidnapping and abduction and under sub-s.(2) can be tried at one trial.² But, under S. 71, Penal Code, the offender cannot be punished with a more severe punishment than can be awarded for any one of the offences constituted.³

8. "Constitute, when combined, a different offence" — Sub-section (3).—An offence of theft under S. 379 of the Penal Code and an offence of taking a gift to restore stolen property under S. 215 of the Penal Code cannot be said to form, when combined, a different offence.¹ An offence under S. 143 (unlawful assembly) and an offence under S. 353 (assault on a public servant) may, when combined, become an offence under S. 147.² See also the undermentioned case.³

9. Sub-section (4). — See Notes to S. 35 and the undermentioned case.¹

10. Illustration (J). — See the undermentioned case.¹

11. Sections 234, 235 and 236, if mutually exclusive. — See Note 2 under S. 239.

3. ('01) 25 Bom 90 (98) : 2 Bom L R 653, *Queen-Empress v. Anant Puranick*.

4. ('35) AIR 1935 Nag 90 (98) : 36 Cr. L. J. 744, *Diwan Singh v. Emperor*.

('35) 1935 Mad W N 1286 (1287), *Karuppa Goundan v. Emperor*.

Note 6

1. ('10) 11 Cr. L. J. 415 (416) : 6 I. C. 880 : 3 S. L. R. 224, *Imperator v. Baradi*. (Joint trial for two offences under Ss. 147, 332 and 149 is not illegal.)

Note 7

1. ('36) AIR 1936 All 74 (75) : 37 Cr. L. J. 382, *Chhotelal v. Emperor*. (Joint trial is competent for two offences, one under S. 353, Penal Code, and another under S. 295, U. P. Municipalities Act.)

[See ('35) 156 Ind Cas 972 (972) : 36 Cri L Jour 1037 (Sind), *Khimji Khetsi v. Emperor*. (Where the same facts will constitute different offences, the indictment may, and ought to, charge each such offence so as to meet every possible view of the case.)]

2. ('33) AIR 1933 Cal 676(678) : 60 Cal 1394 : 34 Cr L.J. 1219, *Rajabuddin v. Emperor*.

3. ('35) 156 I. C. 972 (972) : 36 Cr. L. J. 1037 (Sind), *Khimji Khetsi v. Emperor*.

Note 8

1. ('93-1900) 1893-1900 Low Bur Rul 226 (228), *Queen-Empress v. Nga Tun Byu*.

2. ('85) 12 Cal 495 (498), *Chandra Kant v. Queen-Empress*.

3. ('37) AIR 1937 Pat 662 (664) : 39 Cri L Jour 156, *Emperor v. Haria Dhobi*. (Robbery, charge of — Hurt caused by offender while trying to get away with the property—Offence of hurt is included in the robbery and where the latter charge is to be tried by a jury, a separate charge for hurt to be tried by the Judge with assessors is not justified — Decision does not appear to be correct.)

Note 9

1. ('93-1900) 1893-1900 Low Bur Rul 226 (228), *Queen-Empress v. Nga Tun Byu*.

Note 10

1. ('26) AIR 1926 Bom 71 (75) : 49 Bom 878 : 27 Cr. L. J. 114, *Emperor v. Abdul Gani*.

Section 235
Notes 12-14

12. Failure to charge under sub-section (1)—Subsequent trial therefor
— Section 403 — See S. 403 and Notes thereto.

13. Joint trial for several charges not forming part of same transaction — Effect. — A joint trial of several charges in respect of acts not forming parts of the same transaction is illegal and is not cured by S. 537.¹ See also S. 233 Note 5, S. 234 Note 7 and S. 537 Note 10.

14. Offences forming part of same transaction—Jurisdiction to try. — The accused were charged under S. 420 read with S. 120B, Penal Code. The conspiracy was entered into at B where the accused lived, but one or two acts of cheating were committed within the jurisdiction of the Court at P. It was held that the Court at P could not be clothed with jurisdiction to try the charge of conspiracy merely because the conspiracy and the different acts of cheating might form part of the same transaction.¹ See also Note 3 under S. 177.

Section 236

236.* If a single act or series of acts is of

* Code of 1882, S. 236, and Code of 1872, S. 455 — Sections same as that of 1898 Code ; Illustration (b) was added in 1898.

Code of 1861 : S. 242.

242. When it appears to the Magistrate that the facts which can be established in evidence show a case falling within some one of two or more sections of the Indian Penal Code, but it is doubtful which of such sections will be applicable, or show the commission of one of two or more offences falling within the same section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads, framed respectively under each of such section or charging respectively each of such offences accordingly.

Note 13

1. ('38) ILR (1938) 1 Cal 98 (103, 113), *Kamala Kanta Ray v. Emperor*. (Per Biswas, J. — Where the contravention of the statute is in respect of the very important and salutary provisions relating to joinder of charges, there is such a breach of the rules of procedure as to amount to an illegality going to the root of the trial, and therefore beyond the curative provisions of S. 537.)
- ('38) AIR 1938 Sind 164 (168) : ILR (1939) Kar 64 : 39 Cr. L. J. 881, *Chuharmal Nirmaldas v. Emperor*.
- ('36) AIR 1936 Lah 507 (507) : 37 Cri L Jour 722, *Bahali v. Emperor*.
- ('35) AIR 1935 Nag 149 (155) : 36 Cr. L. J. 1153 : 31 N. L. R. 318, *R. S. Ruikar v. Emperor*.
- ('14) AIR 1914 Cal 589 (589) : 15 Cri L Jour 472, *Shyambar Koyal v. Emperor*. (An objection as to misjoinder of charges in a criminal case, whenever and wherever taken is fatal to the conviction, and there must be a re-trial.)
- [See ('39) AIR 1939 Bom 129 (143) : 40 Cri L Jour 579, *Ramchandra Rango v. Emperor*. (The necessity of following the procedure relating to joinder of charges laid down by law is obviously dictated by reasons of practical expediency and justice, namely to simplify the inquiry from the point of view of the accused.)
- ('38) AIR 1938 Cal 769 (770) : 40 Cri L Jour 280, *Ali Hydar v. Emperor*. (Joint trial of charges under Ss. 342, 376 and 377 held, must have operated to the prejudice of the accused.)
- ('36) AIR 1936 Bom 154 (159) : 60 Bom 148 : 37 Cr. L. J. 688, *Shapurji Sorabji v. Emperor*. (Whenever there is joinder of charges prohibited by the law of procedure, particularly when there is evidence called to prove the commission of offences extending over a long period, it is always extremely difficult to feel confident that the accused has not been prejudiced.)]

Note 14

1. ('36) AIR 1936 Mad 317 (317) : 37 Cri L Jour 634, *In re Dani*.

such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Section 236
Note 1

Where it is doubtful what offence has been committed.

Illustrations

(a) *A* is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) *A* states on oath before the Magistrate that he saw *B* hit *C* with a club. Before the Sessions Court *A* states on oath that *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

Synopsis

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| 1. Scope of the section. | 6. Murder and concealment of body to screen offender. |
| 2. "Which of several offences." | 7. Murder and culpable homicide not amounting to murder and causing death by negligence. |
| 3. Theft and taking illegal gratification for the return of stolen property. | 8. Principal offence and the abetment thereof. |
| 4. Sections 236 and 239, if mutually exclusive. See Note 2 under S. 239. | 9. Alternative charges. |
| 5. Contradictory statements—Illustration (b). | 10. Sentence. |
| | 11. "Series of acts," meaning of. |

Other Topics (miscellaneous)

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| Alternative charge in respect of common object. See Note 1. | Effect of decision on subsequent trials. See Note 1. |
| Alternative charges — When framed. See Note 1. | Falsity of contradictory statements. See Note 5. |
| Appellate Court — Section applies. See Note 1. | Form of charges. See Note 9. |
| Charges — Penal Code and special law. See Notes 1 and 2. | Judgment on alternative charges. See Notes 1 and 6. |
| Cognate offences. See Note 1. | Offences — Same or of different kind. See Note 1. |
| Contradictory statements — Both not offences — Effect. See Note 5. | Punishment on alternative charges. See Notes 1 and 10. |
| Contradictory statements — Falsity of either unknown. See Note 5. | Section 182 or S. 211, Penal Code. See Notes 1 and 2. |
| Contradictory statements — Same deposition or not on same occasion or different occasions. See Note 5. | Sections 302, 304, 307, 394 or S. 326, Penal Code. See Note 1. |
| Doubt as to facts and doubt as to law. See Notes 1, 2, 7 and 3. | Sections 366 and 376, Penal Code. See Note 1. |
| | Statements under S. 161, Cr. P. Code. See Note 5. |

1. Scope of the section. — This section and the next form another exception to the general rule enacted in S. 233 that every charge shall be tried separately. They deal with a class of cases, which the language of S. 235 may fail to cover.¹ The stage at which

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1. (13) 14 Cr. L. J. 135 (137):9 Nag L R 26:18 I.C. 887, *Mahadeogir v. Emperor*.

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this section applies is *before the evidence is gone into* in the case, in other words, *before the trial begins*. If at that stage the prosecution relies on certain facts, the proof of which is in its possession, and such facts give rise to an inference that the accused must have committed some one of several offences but it is not clear, in the absence of further facts, *which* one of them it is, the case falls under this section and the next.² To take an illustrative case: Suppose before the trial begins the prosecution relies on the following facts as those which can be proved in the case:

- (1) that certain moveable property was stolen from the house of X;
- (2) that the accused was in possession thereof; and
- (3) that the accused is unable to explain such possession.

These facts are not consistent with the innocence of the accused person, but give rise to an inference that he has committed some offence, and that it may either be theft punishable under S. 379 of the Penal Code or the offence of receiving stolen property punishable under S. 411 of the Penal Code. It is, however, doubtful, without further facts, *which one* of the said two offences he has committed. This section applies to such a case and the accused may be charged cumulatively with the offence of theft as well as of receiving stolen property or may be charged in the alternative, with the offence of theft or of receiving stolen property.^{2a}

Where a charge is framed under this section, as in the above illustration, either cumulatively or in the alternative, and the *trial proceeds*, and on the further facts disclosed in the evidence the doubt which existed at the beginning of the trial disappears, the accused should be convicted of the offence which has been *proved* to have been committed by him.³

Where on such a charge the trial proceeds and at the end thereof the Court is *still doubtful on the facts proved* which one of the offences charged has been committed by the accused, though it is clear that one or other of them must have been committed, the Court

2. ('38) AIR 1938 Cal 51 (68, 69) : ILR (1938) 1 Cal 290 : 39 Cr. L. J. 161, *Goloka Behari v. Emperor*.

('36) AIR 1936 Cal 796 (799) : 62 Cal 956 : 37 Cr. L. J. 701, *Istahar Khondkar v. Emperor*. (This matter cannot be affected by consideration whether the prosecution will be able to produce the evidence at the trial, or whether the Court or jury will believe it, if and when produced.)

'36) 37 Cri L Jour 728 (729) : 162 I. C. 943 : 62 Cal 946, *Superintendent, Legal Affairs, Bengal v. Raghu Lal Brahman*.

('31) AIR 1931 Cal 414 (414, 415) : 59 Cal 8 : 32 Cr. L. J. 892, *Mehar Sheikh v. Emperor*. [But see ('36) AIR 1936 Bom 193 (196) : 60 Bom 485 : 37 Cr. L. J. 753, *Emperor v. Abdul Rahiman*. (The observation that the Section deals with cases where all the facts constituting the offence have been alleged and proved is not correct.)]

2a. ('07) 5 Cri L Jour 479 (480) : 17 M L J 219, *In re Kuppan Ambalam*.

3. ('31) AIR 1931 Cal 414 (415) : 59 Cal 8 : 32 Cr. L. J. 892, *Mehar Sheikh v. Emperor*. ('13) 14 Cr. L. J. 278 (280) : 19 I. C. 710 : 1913 Pun Re No. 8 Cr, *Mohammad Shah v. Emperor*. (Appellate Court can also do this.)

('30) AIR 1930 Cal 139 (140) : 57 Cal 801 : 31 Cr. L. J. 610, *Bikram Ali v. Emperor*. (Offence under Sections 395 and 457.)

[See ('29) AIR 1929 Pat 660 (661) : 8 Pat 731 : 31 Cri L Jour 362, *Damodar Ram v. Emperor*. (Sections 380 and 414, Penal Code.)]

should pass judgment *in the alternative*.⁴ The punishment in such a case is for the offence for which the lowest punishment is provided if the same punishment is not provided for all (see s. 72 of the Penal Code). See also Note 10.

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Where, in the above illustrative case, a charge is framed for *theft only*, but in the evidence in the trial it is proved that the accused is guilty only of receiving stolen property, he may be *convicted* of the latter offence though not charged with it, inasmuch as he could, on the facts relied upon at the beginning of the trial, have been charged under this section.⁵ (See S. 237.) The undermentioned cases⁶ have all been decided on this principle.

4. ('37) AIR 1937 All 754 (754) : 39 Cri L Jour 152, *Babu Ram v. Emperor*.
- ('31) AIR 1931 Cal 414 (415) : 59 Cal 8 : 32 Cr. L. J. 892, *Mehar Sheikh v. Emperor*.
- ('14) AIR 1914 Lah 549 (550) : 14 Cr. L. J. 664 : 1913 P R No. 11 Cr, *Partapa v. Emperor*.
5. ('07) 5 Cri L Jour 479 (480) : 17 M L J 219, *In re Kuppan Ambalam*.
6. ('40) AIR 1940 Pat 414 (416) : 41 Cr. L. J. 810 : 21 PLT 121 (123), *Amir Hasan v. Emperor*. (An accused charged under S. 295, Penal Code, can be convicted under S. 297, on the same facts, when they disclose an offence under section 297, though he was not charged under the latter section.)
- ('37) AIR 1937 Rang 250 (251) : 38 Cr. L. J. 989, *Rati Ram v. Emperor*. (Ss. 448 and 341, Penal Code — Offences under the same chapter of Penal Code are not necessary for applicability of section 236.)
- ('36) AIR 1936 All 337 (352) : 58 All 695 : 37 Cr. L. J. 794, *Emperor v. Mathuri*. (Where the accused were charged under Ss. 302 and 457, Penal Code, and the facts proved established an offence under S. 460, Penal Code, they could be convicted under that section, although they were not specifically charged with that offence.)
- ('24) AIR 1924 Rang 256 (260) : 2 Rang 80 : 25 Cr. L. J. 907, *Rampershad v. Emperor*.
- ('11) 12 Cr. L. J. 374 (374) : 11 I. C. 142 (All), *Chunnoo v. Emperor*. (Charge for criminal breach of trust—Conviction for theft can be given.)
- ('23) AIR 1923 Cal 596 (597) : 50 Cal 564 : 24 Cr. L. J. 372, *Tulsi Tolini v. Emperor*. (Offences under S. 379, Penal Code, and S. 54A, Calcutta Municipal Act.)
- ('31) 1931 M W N 861 (864), *Sukkirappa Goundan v. Emperor*. (Ss. 307 and 506.)
- ('32) AIR 1932 All 580 (581) : 34 Cri L Jour 100, *Abdul v. Emperor*. (Accused charged under S. 366, Penal Code, can be convicted of rape.)
- ('29) AIR 1929 Cal 773 (773) : 31 Cr. L. J. 474, *Kalachand Ghose v. Tatu Shaik*. (Sections 379 and 426, Penal Code.)
- ('35) AIR 1935 All 458 (459) : 36 Cr. L. J. 1294, *Gulab Singh v. Emperor*. (Ss. 395 and 458, Penal Code.)
- ('35) AIR 1935 Oudh 4 (5) : 36 Cr. L. J. 112, *Mangal Prasad v. Emperor*. (Sessions Judge can convert conviction from S. 405 to S. 403, Penal Code.)
- ('35) 36 Cri L Jour 244 (245, 246) : 152 I. C. 1036 (Lah), *Emperor v. Narinjan Singh*. (Charge under S. 392—Conviction under S. 379.)
- ('28) AIR 1928 Bom 130 (134) : 52 Bom 385 : 29 Cr. L. J. 403, *Emperor v. Ismail Khadirsab*. (Murder and theft.)
- ('34) AIR 1934 Mad 565 (565) : 36 Cr. L. J. 113, *Rama Boyan v. Emperor*. (Person charged with S. 304 and S. 149 can be convicted under S. 304 with S. 34.)
- ('25) AIR 1925 Mad 1 (6) : 47 Mad 746 : 25 Cr. L. J. 1297 (FB), *In re Theethumalai Goundar*. (Charge framed under Ss. 326 and 149, Penal Code—Conviction under S. 326, Penal Code, alone is not necessarily bad.)
- ('15) AIR 1915 Mad 302 (303) : 15 Cr. L. J. 680 (680), *In re Suryanarayana Rao*.
- ('14) AIR 1914 Mad 425 (428) : 13 Cr. L. J. 739 (741) : 37 Mad 236, *In re Adabala Muthiyalu*. (Charge under S. 397—Conviction for grievous hurt.)
- ('34) AIR 1934 All 872 (873) : 36 Cri L Jour 766, *Dipchand v. Emperor*. (Person charged under S. 353, Penal Code, can be convicted under S. 358.)
- ('32) AIR 1932 Nag 173 (173, 174) : 28 Nag L R 218 : 34 Cr. L. J. 66, *Deorao v. Emperor*. (Charge under S. 457, Penal Code—Conviction can be under S. 411.)
- ('27) AIR 1927 Oudh 196 (197) : 2 Luck 444 : 28 Cr. L. J. 460, *Mathura v. Emperor*. (Facts allowing charge of offence under S. 395 or S. 457 — Conviction for latter is good.)
- ('32) AIR 1932 Pat 302 (303) : 34 Cri L Jour 83, *Emperor v. Rashbehari Lal*. (Charge under Ss. 302/149—Conviction can be under S. 302.)

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- ('31) AIR 1931 Lah 566 (568) : 33 Cri L Jour 315, *Jogindar Singh v. Emperor*. (Trial under Ss. 302/149, I. P. C.—Conviction for hurt to companion of deceased without charge under S. 323, Penal Code, is competent.)
- ('29) AIR 1929 Pat 11 (14, 15) : 7 Pat 758 : 30 Cri L Jour 205, *Bhondur Das v. Emperor*. (Charge under Ss. 326 and 149 of Penal Code—Conviction given under Ss. 326 and 34 not bad.)
- ('29) AIR 1929 Cal 401 (402) : 31 Cri L Jour 59, *Radha Krishna v. Jamnadas Fatepuria*. (Accused tried under Ss. 381 and 411, Penal Code, can be convicted of an offence under S. 54, Calcutta Police Act.)
- ('22) AIR 1922 Mad 110 (111, 112) : 23 Cri L Jour 206, *Muthukanakku Pillai v. Emperor*. (Charge under S. 147, Penal Code—Conviction under S. 352, Penal Code, can be given but not for abetment of assault.)
- ('35) AIR 1935 Pesh 67 (68) : 36 Cr. L J 1438, *Suraj Bhan v. Emperor*. (Offence under Ss. 324/114 can be altered to one under Ss. 324/34 where latter charge could have been based on the facts proved.)
- ('12) 13 Cr L. J. 252 (254) : 14 I. C. 604 (Lah), *Lal Chand v. Emperor*. (Charge under Ss. 232 and 235, Penal Code—Conviction under Ss. 235 and 195, Penal Code, permissible, though the latter section not mentioned in the charge.)
- ('75) 12 Bom H C R 1 (7), *Reg. v. Ramajirao*. (Trial under Ss. 409, 511, 167, 218 and 193, I. P. C.—Conviction for attempting to cheat can be given.)
- ('19) AIR 1919 Pat 305 (305) : 20 Cri L Jour 487, *Mahabir Singh v. Emperor*. (Accused prosecuted only under S. 47, Bihar and Orissa Excise Act, can be convicted in addition under S. 55.)
- ('24) AIR 1924 Bom 450 (451) : 26 Cr. L. J. 211, *Emperor v. C. J. Walker*. (With charge under S. 304, Penal Code, conviction can be under S. 304A.)
- ('15) AIR 1915 Bom 297 (298) : 16 Cr. L. J. 305, *Emperor v. Ramava Chennappa*. (Although no charge under S. 304A is framed at the trial for murder, on reference under S. 307, the High Court is competent to record conviction under S. 304A.)
- ('33) AIR 1933 Oudh 162 (163) : 8 Luck 474 : 34 Cr. L. J. 385, *Basdeo Prasad v. Emperor*. (Trial for offence under S. 395, Penal Code—Conviction under S. 323 can be given—In so far as the Court adverts to the question of prejudice to the accused, it is submitted that it is not relevant and does not affect the decision. See Notes to S. 237.)
- ('27) AIR 1927 Nag 163 (164) : 28 Cr. L. J. 189, *Gulabchand v. Emperor*. (Charge under S. 147, Penal Code—Conviction under S. 160, Penal Code, is not illegal.)
- ('21) AIR 1921 All 261 (262) : 22 Cri L Jour 621, *Sabir Hussain v. Emperor*.
- ('20) AIR 1920 All 72 (74) : 21 Cr. L. J. 410, *Jagdeo Parshad v. Emperor*. (Accused charged under S. 467, Penal Code, can be convicted under S. 471.)
- ('19) AIR 1919 Cal 85 (86) : 20 Cr. L. J. 525, *Arshed Molla v. Emperor*. (Charges under Ss. 396, 397 and 460, Penal Code — Conviction under S. 411, Penal Code, can be given.)
- ('29) AIR 1929 Sind 147 (148) : 30 Cri L Jour 875, *Haroon v. Emperor*. (Charge under S. 395, Penal Code—Conviction under S. 403.)
- ('30) AIR 1930 Oudh 353 (356) : 31 Cri L Jour 1210, *Hazari v. Emperor*. (Charge for offence under S. 397, Penal Code—Conviction for offence under S. 412 is legal.)
- ('15) AIR 1915 Low Bur 39 (45) : 16 Cri L Jour 676 (683) : 8 Low Bur Rul 274, *S. P. Gosh v. Emperor*. (Dacoity and abetment of robbery.)
- ('34) AIR 1934 All 982 (982) : 36 Cr. L. J. 266 : 57 All 398, *Nathu Ram v. Emperor*. (Charge under S. 4B, Explosive Substances Act—Conviction under S. 5 is not illegal.)
- ('67) 1867 Pun Re No. 50 Cr, p. 88 (89), *Nuthooa v. Dewanna*. (Charge for assault —Conviction for rioting not illegal.)
- ('95) 1895 Rat 761 (762), *Queen-Empress v. Bala Kashaba*. (Charge under S. 82(d), Registration Act, III of 1877—Conviction under S. 182, Penal Code, is permissible.)
- ('31) AIR 1931 Sind 9 (12) : 25 Sind L R 1 : 32 Cr. L. J. 517, *Sabjhatullah Shah v. Emperor*. (Charge under S. 20 of the Arms Act — Conviction under S. 19 (f) not bad.)
- ('25) AIR 1925 Cal 581 (582) : 26 Cr. L. J. 356, *Abdul Sheikh v. Emperor*.
- ('25) AIR 1925 Sind 105 (107, 108) : 19 SLR 183 : 25 Cr. L. J. 1057, *Faizullah v. Emperor*. [See ('28) AIR 1928 Bom 521 (521) : 30 Cr. L. J. 329, *Dwarkadas Haridas v. Emperor*.]
- ('38) AIR 1938 Oudh 263 (263) : 39 Cri L Jour 937, *Emperor v. Shankar Dayal*. (It is not illegal to convict a man of an offence under S. 452, Penal Code, in a case in which he has been charged under S. 323, Penal Code—But if the alteration of the charge causes injustice to the accused, the conviction from S. 323, Penal Code, should not be altered to S. 452, Penal Code.)
- [See also (1884) 8 Bom 200 (212), *Queen-Empress v. Appa Subhana*.]
- See also S. 423 Note 31.

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Where, in the illustrative case, a charge is framed for *theft only* and the accused is, after trial, convicted or acquitted of it, he cannot, under the provisions of sub-s.(1) of S. 403, be subsequently tried on the same facts, for receiving stolen property, inasmuch as he *might* have been tried under this section, or convicted under S. 237, of this offence in the previous case itself.⁷ The cases cited below⁸ have all been decided on this principle.

It will be clear from the above decisions that the applicability of this section or the next depends upon the facts relied upon by the prosecution at the beginning of the trial : in other words, the question in each case is "*what were the facts charged ?*"^{8a} Thus, if the facts charged are simply that a girl *under* 16 years of age was forcibly taken away by the accused, there may be a doubt as to whether she was kidnapped or whether she was abducted. A charge might therefore be framed under this section for both offences.⁹ But if the facts charged are that a girl *over* 16 years of age was forcibly taken away by the

7. ('24) AIR 1924 Bom 448 (448) : 26 Cr.L.J. 831, *In re Pundalik Shanker Gujar*.
8. ('27) AIR 1927 Bom 629 (629, 630) : 28 Cr. L. J. 1032, *Emperor v. Kallasani*. (Acquittal under S. 160, Penal Code, subsequent trial for offence under S. 61 (o), Bombay District Police Act, barred.)

('18) AIR 1918 Cal 406 (407) : 19 Cr. L. J. 193 : 45 Cal 727, *Manhari Chowdhury v. Emperor*. (Person in possession of bales of jute charged under Ss. 380 and 411, Penal Code, and acquitted—Proceedings under S. 54A, Calcutta Police Act, against him are not maintainable.)

('21) AIR 1921 Sind 137 (139, 142) : 16 Sind L R 1 : 23 Cr. L. J. 305, *Emperor v. Menghraj Devidas*. (Trial for offence under S. 291, Penal Code, and acquittal—Subsequent trial under Ss. 188 and 290, Penal Code, barred.)

('71) 16 Suth W R Cr 3 (3) : 7 Beng L R App 25, *Kaplan v. G. M. Smith*. (First trial for offence under S. 352—Second trial for hurt barred.)

('85) 8 Mad 296 (298, 299) : 2 Weir 554, *Empress v. Erramreddi*. (Theft and mischief.)

('24) AIR 1924 Mad 478 (479) : 25 Cr.L.J. 244, *In re Chinnappa Naidu*. (Ss. 147 and 427, Penal Code.)

('13) 14 Cr. L. J. 214 (217, 218) : 36 Mad 308 : 19 I. C. 310, *Ganapathi Bhatta v. Emperor*. (Charge under S. 211—Acquittal is bar to subsequent trial under S. 182.)

('13) 14 Cr. L. J. 135 (138) : 18 I. C. 887 : 9 Nag L R 26, *Mahadco Gir v. Emperor*. (Prosecution under S. 203 withdrawn—Subsequent trial under S. 177 on same facts.)

('21) AIR 1921 Pat 22 (22) : 22 Cr.L.J. 63, *Maksuddan Mistry v. Emperor*. (Prosecution for offence under S. 338, I. P. C.—Acquittal—Subsequent prosecution under Motor Vehicles Act, S. 16, on same facts—Second prosecution illegal.)

('15) AIR 1915 Low Bur 60 (61) : 16 Cr. L. J. 267 (267, 268), *Nga Shwe Yi v. Emperor*. (Offences under S. 31 of the Rangoon Police Act and under S. 457 of the Penal Code could on the facts have been charged together.)

('10) 11 Cr. L. J. 731 (733) : 8 I. C. 936 : 4 Sind L R 174, *Emperor v. Bawa Manghnidas*. (An acquittal on a charge of murder is a bar to a second trial on a charge of causing disappearance of evidence of the murder.)

8a. ('38) AIR 1938 Cal 51 (69) : 1 I L R (1938) 1 Cal 290 : 39 Cr. L. J. 161, *Goloke Behari v. Emperor*.

('36) AIR 1936 Cal 796 (799) : 62 Cal 956 : 37 Cr. L. J. 701, *Istahar Khondkar v. Emperor*. (A doubt as to whether the evidence led by the prosecution would be believed by the Court is not within the section.)

9. ('30) AIR 1930 Cal 209 (210) : 57 Cal 1074 : 31 Cr. L. J. 903, *Prafulla Kumar Bose v. Emperor*.

('20) AIR 1920 Cal 568 (569) : 21 Cri L Jour 689, *Kala Nath Barman v. Emperor*. (Forcibly carrying away girl under sixteen—Charges might be framed both for kidnapping and abduction.)

[See ('34) AIR 1934 Cal 85 (86) : 35 Cri L Jour 487, *Ramizulla v. Emperor*.]

[But see ('33) AIR 1933 Cal 676 (677) : 60 Cal 1394 : 34 Cr. L. J. 1219, *Rajabuddin Mondal v. Emperor*. (The reason given for saying that S. 236 does not apply to the case is not clear or correct—The facts alleged were that a girl under 16 was forcibly taken away—Why S. 236 should not apply on these facts is not stated.)]

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accused, the only offence for which the accused could be charged is abduction and not kidnapping.¹⁰ There being no doubt as to which offence was committed, this section does not apply.

It follows from the principle set forth above that this section, and consequently S. 237 or sub-s.(1) of S. 403 will have no application in the following cases:—

- (1) Where, on the facts relied upon at the beginning of the trial, it appears that the accused has committed *more than one* offence, i. e., when he has committed *distinct* offences.¹¹

10. ('30) AIR 1930 Cal 209 (210) : 57 Cal 1074 : 31 Cr. L. J. 903, *Prafulla Kumar Bose v. Emperor*.
11. ('36) AIR 1936 Pat 503 (504) : 37 Cr. L. J. 785, *Sankatha Rai v. Khaderan Mian*. (Offences under S. 160 and S. 323, Penal Code — Acquittal under S. 160 does not bar subsequent prosecution under S. 323.)
- ('36) AIR 1936 Rang 174 (174) : 14 Rang 24 : 37 Cr. L. J. 492, *Abdul Hamid v. Emperor*. (Swearing false affidavit and using false affidavit are distinct offences though committed in course of same transaction — Acquittal in respect of one offence does not bar trial in respect of other offence — S. 236 does not apply.)
- ('35) AIR 1935 Nag 178 (182) : 31 N L R 337 : 36 Cr. L. J. 1216, *Ramsheshan v. Emperor*. (S. 236 refers to one offence, although it may be difficult to determine what the actual offence is.)
- ('95) 23 Cal 174 (177), *Queen-Empress v. Croft*.
- ('87) 1887 Pun Re No. 11 Cr, p. 19 (22), *Khan Muhammad v. Empress*.
- ('11) 12 Cri L Jour 224 (226) : 5 Sind L R 16 : 10 I. C. 168, *Ganesh v. Emperor*.
- ('06) 3 Cr. L. J. 240 (242) : 8 Bom L R 120, *Emperor v. Sakharam Ganu*. (Ss. 376 and 366, Penal Code.)
- ('99) 1 Bom L R 17 (17, 18), *Queen-Empress v. Subedar Krishnappa*. (Offences under S. 400 and under S. 395.)
- ('33) AIR 1933 Lah 959 (959, 960) : 35 Cri L Jour 291, *Maya Shah v. Emperor*. (Stamp Act (1899), Ss. 62B and 64A — Complaint brought under S. 64A — Before accused can be convicted under S. 62B his attention must be drawn to such fact.)
- ('15) AIR 1915 Cal 181 (182) : 16 Cr. L. J. 42 (43), *Harnarain Sardar v. Emperor*. (Ss. 147 and 353, Penal Code.)
- ('88) 1888 Rat 386 (386), *Queen-Empress v. Sarwel*. (S. 302, S. 318, Penal Code.)
- ('01) 1901 All W N 120 (121), *King-Emperor v. Lajja*. (S. 365 and S. 498, Penal Code.)
- ('88) 1888 All W N 95 (95), *Empress v. Narotam*. (Murder and theft.)
- ('25) AIR 1925 Nag 294 (294) : 26 Cr. L. J. 1358, *Akbar Hussain v. Emperor*. (S. 468 and S. 471, Penal Code.)
- ('28) AIR 1928 Oudh 373 (374) : 29 Cr. L. J. 763, *Rameshwar v. Emperor*. (Ss. 392/397 and 325, Penal Code.)
- ('32) 1932 Mad W N 247 (248), *Nachiappa Goundan v. Emperor*. (S. 392 and S. 183, Penal Code—Doubtful.)
- ('01) 6 Cal W N 202 (203), *In the matter of Akbar Momin*. (Ss. 353 and 352, I. P. C.)
- ('01) 5 Cal W N 567 (568), *In the matter of Chinibas Pal*. (Ss. 290 and 447, I. P. C.)
- ('75) 23 Suth W R Cr 59 (59), *Queen v. Salamut Ali*. (Ss. 395/148 and 452, I. P. C.)
- ('01) 29 Cal 481 (482) : 6 C W N 599, *Hossein v. Kalu*. (Ss. 143 and 379, I. P. C.)
- ('97) 20 All 107 (108) : 1897 A W N 210, *Queen-Empress v. Yusuf*. (S. 302 and S. 404 or S. 411, Penal Code.)
- ('27) AIR 1927 All 75 (75) : 27 Cr. L. J. 1351, *Achhut Rai v. Emperor*. (Ss. 302 and 194, Penal Code.)
- ('70) 1870 Rat 34 (34), *Reg. v. Gopala Pursoo*. (Ss. 395 and 412, Penal Code.)
- ('97) 1897 Rat 921 (921), *Empress v. Punya Sakharam*. (Ss. 395 and 398, I. P. C.)
- ('22) AIR 1922 Bom 97 (98, 99) : 46 Bom 657 : 23 Cr. L. J. 259, *Matubhai M. Shah v. Emperor*. (Charge of offence under S. 96, Bombay District Municipal Act — Charge cannot be altered into one under S. 97 read with S. 155.)
- ('33) 1933 Sind 225 (225, 226) : 35 Cr. L. J. 582, *Parasram v. Emperor*. (Charge on one set of facts—Conviction on another set of facts.)
- ('27) AIR 1927 Rang 32 (32) : 4 Rang 355 : 27 Cr. L. J. 1360, *Nga Shwe Zon v. Emperor*. (S. 452, Penal Code, and S. 19 (e), Arms Act.)
- ('25) AIR 1925 Rang 230 (231) : 3 Rang 68 : 26 Cr. L. J. 1119, *G. C. Sircar v. Emperor*. (Ss. 376 and 366.)

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- (132) AIR 1932 Pat 241 (242) : 11 Pat 392 : 33 Cr. L. J. 709, *Bageshwari Ahir v. Emperor*. (Ss. 215 and 417 or 420.)
- (120) AIR 1920 Pat 590 (590, 591) : 21 Cr. L. J. 496, *Raghu Singh v. Emperor*. (Ss. 457 and 456.)
- (169) 6 Bom H C R Cr 43 (44), *Reg. v. Gangaram Malji*. (Ss. 471 and 467.)
- (1900) 13 C P L R Cr 167 (168), *Empress v. Dongria Gaoli*. (Ss. 302 and 401.)
- (133) AIR 1933 Mad 843 (843, 844) : 35 Cri L Jour 76, *Baluchani v. Emperor*. (Ss. 325 and 160.)
- (125) AIR 1925 Mad 706 (706) : 26 Cr. L. J. 1036, *In re Kadlanatha Pillai*. (Ss. 159 (1) and 163, Madras Local Boards Act.)
- (124) AIR 1924 Mad 375 (376) : 47 Mad 61 : 25 Cr. L. J. 551, *In re Sreeramulu*. (Charge under Ss. 147 and 323, Penal Code, cannot be altered into one under S. 160, Penal Code.)
- (114) AIR 1914 Mad 144 (144) : 15 Cr. L. J. 568, *In re Syed Ahmad Musaliyar*. (Ss. 471 and 469, Penal Code.)
- (114) AIR 1914 Mad 61 (61) : 15 Cr. L. J. 440, *Thoppulan v. Santharanarayana Iyer*. (S. 379 and S. 403 or S. 421.)
- (110) 11 Cr. L. J. 340 (340) : 5 I. C. 974 (Mad), *In re Bommaraddi Somareddi*. (Ss. 447, 352 and 379, Penal Code.)
- (110) 11 Cr. L. J. 30 (34) : 4 I. C. 700 (Mad), *In re Loganatha*. (Charge under S. 141, I. P. C.—Conviction for common object different from that set out in the charge.)
- (109) 9 Cr. L. J. 406 (406) : 1 I. C. 867 (Mad), *In re Subramaniya Iyer*. (Ss. 406 and 420.)
- (126) AIR 1926 Lah 691 (691) : 7 Lah 561 : 27 Cr. L. J. 1094, *Ghanus v. Emperor*. (S. 302, Penal Code and offences relating to property.)
- (124) AIR 1924 Lah 109 (110) : 4 Lah 373 : 25 Cr. L. J. 335, *Wallu v. Crown*. (Charge of murder cannot be converted into one of robbery.)
- (123) AIR 1923 Lah 260 (261) : 3 Lah 440 : 23 Cr. L. J. 709, *Arjan Mal v. Emperor*. (Ss. 176/109 and 189, Penal Code.)
- (189) 1889 Pun Re No. 18 Cr, p. 67 (69), *Crown v. Umashankar*. (Ss. 500 and 501, I. P. C.)
- (101) 1901 Pun Re No. 31 Cr, p. 92 (92) : 1902 Pun L R No. 32, *Mangal v. Empress*. (Ss. 457, 379 and 497.)
- (111) 12 Cr. L. J. 169 (170) : 38 Cal 293 : 9 I. C. 965, *Lal Mohan v. Kali Kishore*. (Ss. 147 and 323.)
- (112) 13 Cr. L. J. 502 (503) : 15 Ind Cas 646 (Cal), *Razuddi v. Emperor*. (Charge of grievous hurt by implication under S. 149, Penal Code—Conviction for substantive offence under S. 325, not allowed.)
- (114) AIR 1914 Cal 473 (475) : 41 Cal 537 : 15 Cr. L. J. 4, *Kalicharan v. Emperor*.
- (114) AIR 1914 Cal 631 (632) : 15 Cr. L. J. 188, *Ariff Munshi v. Emperor*. (Ss. 147 and 447.)
- (115) AIR 1915 Cal 292 (294) : 41 Cal 662 : 15 Cr. L. J. 155, *Emperor v. Madan Mondal*. (Charge under Ss. 148, 304/149, 326/149, Penal Code—Acquittal by jury under S. 148—Conviction under S. 326 is illegal.)
- (190) 1890 Rat 529 (530), *Empress v. Nathoo*. (Charge of storing wool under S. 394, City of Bombay Municipal Act, 1888—Conviction for storing cotton held illegal.)
- (103) 30 Cal 288 (290), *Yakub Ali v. Lethu Thakur*. (Charge of rioting—Conviction for house-trespass and hurt is illegal.)
- (1900) 27 Cal 660 (661, 662), *Jatu v. Mahabir*. (Ss. 379 and 143, Penal Code.)
- (199) 3 Cal W N 367 (368), *Monoranjan Chowdhury v. Queen-Empress*. (Charge of abetment of offence under S. 211, Penal Code—Conviction of offence of intentionally giving false evidence is illegal.)
- (126) AIR 1926 Cal 581 (582) : 53 Cal 466 : 27 Cri L Jour 606, *Harun Rashid v. Emperor*. (Abetment of forgery and user of forged document.)
- (127) AIR 1927 Rang 303 (304) : 28 Cr. L. J. 908, *Me Tok v. Emperor*. (Ss. 419/114, I. P. C., and S. 82 (c), Registration Act.)
- (131) AIR 1931 Sind 116 (117) : 25 S L R 9 : 33 Cr. L. J. 41, *Md. Rafiq v. Emperor*.
- (176) 7 N W P H C R 137 (143), *Queen v. Jamurha*. (Ss. 193, 201 and 203, Penal Code.)
- (182) 9 Cal 371 (373), *Manu Miya v. Empress*.
- (187) 1887 Pun Re No. 43 Cr, p. 105 (106), *Sher Shah v. Empress*.
- (133) AIR 1933 Oudh 315 (321) : 8 Luck 518 : 35 Cri L Jour 10, *Daulat Ram v. Emperor*. (Murder and receiving stolen property.)
- (115) AIR 1915 Cal 219 (219) : 15 Cri L Jour 704 (705), *Genu Manjhi v. Emperor*. (Ss. 147 and 323, I. P. C.)
- (112) 13 Cr. L. J. 593 (594) : 40 Cal 168 : 16 I. C. 161, *Sita Ahir v. Emperor*. (Accused charged with rioting under S. 147, I. P. C., with common object of causing hurt to the complainant—He cannot be convicted of causing hurt to another person.)

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Note 1

(2) Where there is no *doubt* as to which offence or offences the facts relied upon at the beginning of the trial amount to.¹²

- ('12) 13 Cr. L. J. 597 (597) : 16 Ind Cas 165 (Cal), *Amanullah v. Emperor*. (Charge of theft—Conviction for extortion not legal.)
- ('32) AIR 1932 Cal 545 (546) : 34 Cr. L. J. 39, *Ali Ahmad v. Emperor*. (Abetment of forgery and using as genuine forged document are different offences—S. 403, sub-s.(1) does not apply.)
- ('02) 4 Bom L R 575 (577), *Municipality of Bombay v. Javer Jagjiven*. (Prosecution under S. 342, Bombay City Municipal Act, and acquittal—Subsequent prosecution under Ss. 308 and 309 of the Act not barred.)
- ('18) AIR 1918 Nag 107 (108) : 20 Cr. L. J. 751, *Hari Singh v. Emperor*. (Ss. 379 and 380, I. P. C.)
- ('34) AIR 1934 Cal 409 (410) : 61 Cal 537 : 35 Cr. L. J. 637, *Akhoy Chand v. Emperor*. (Charge under S. 69 (a), Provincial Insolvency Act—Conviction cannot be passed under S. 69 (b).)
- [See ('88) 1888 All W N 116 (117), *Empress v. Karim Baksh*. (S. 411—S. 380, I.P.C.)
- ('35) AIR 1935 Lah 945 (946) : 37 Cri L Jour 303, *Ali Mohamad v. Emperor*. (Offences under S. 467 and S. 420, Penal Code, are distinct offences and cannot be covered by S. 236.)]
12. ('39) AIR 1939 All 665 (667) : 40 Cr. L. J. 948, *Thakar Singh v. Emperor*.
- ('39) AIR 1939 All 710 (712) : 41 Cri L Jour 111, *Nand Kishore v. Emperor*. (Definite and very clear case of cheating put forward by complainant—No allegation of concealment or removal of property—No evidence produced to show concealment—Conviction under S. 424, Penal Code, is wrong.)
- ('38) AIR 1938 Cal 51 (69) : ILR (1938) 1 Cal 290 : 39 Cr. L. J. 161, *Goloke Behari v. Emperor*. (Section 237 does not deal with a case where the evidence falls short of proving the offence which the prosecution had set out to prove.)
- ('36) AIR 1936 Cal 796 (799) : 62 Cal 956 : 37 Cr. L. J. 701, *Istahar Khondkar v. Emperor*. (Criticising AIR 1925 P C 130.)
- ('15) AIR 1915 Bom 203 (204) : 40 Bom 97 : 16 Cr. L. J. 761, *Jivram Dankarji v. Emperor*. (Acquittal under Ss. 467 and 109, Penal Code, does not bar trial under S. 471 on same facts, inasmuch as no doubt could have arisen in the first trial as to offence constituted.)
- ('30) AIR 1930 All 481 (482) : 31 Cri L Jour 716, *Emperor v. Kanhaiya*.
- ('26) AIR 1926 All 227 (228) : 27 Cr. L. J. 152, *Raghunath Kandu v. Emperor*.
- ('33) AIR 1933 All 30 (31) : 34 Cri L Jour 445, *Qabul v. Emperor*.
- ('31) AIR 1931 Cal 414 (416) : 59 Cal 8 : 32 Cr. L. J. 892, *Meher Sheikh v. Emperor*. (S. 237 also will not apply to such cases.)
- ('98) 2 Weir 301 (302), *In re Perumal Nadan*.
- ('28) AIR 1928 All 139 (140) : 29 Cri L Jour 232, *Har Prasad v. Emperor*. (The offences in this case were however distinct.)
- ('14) AIR 1914 Cal 309 (310) : 15 Cri L Jour 41, *Akram Ali v. Emperor*.
- ('18) AIR 1918 Pat 165 (166) : 19 Cri L Jour 121, *Hayat Khan v. Emperor*.
- ('18) AIR 1918 Lah 49 (50) : 1918 Pun ReNo. 23 Cr: 19 Cr. L. J. 931, *Raj Bahadur v. Emperor*.
- ('07) 5 Cri L Jour 427 (431) : 34 Cal 698 : 11 Cal W N 666, *Jatindra Nath v. Emperor*. (On the facts there could be no doubt as to what the offence was.)
- ('20) AIR 1920 Pat 216 (218, 219) : 21 Cr. L. J. 439, *Pertap Rai v. Emperor*. (Offence charged under S. 149 read with S. 325—Offence merely under S. 325 also cannot be charged.)
- ('20) AIR 1920 Pat 512 (513) : 21 Cr. L. J. 44, *Mt. Sheoradni v. Emperor*.
- ('18) AIR 1918 Pat 628 (629) : 19 Cr. L. J. 202, *Bhowanath Singh v. Emperor*.
- ('12) 13 Cri L Jour 593 (594) : 40 Cal 168 : 16 Ind Cas 161, *Sita Ahir v. Emperor*. (X was charged with causing hurt to A — He cannot be convicted for causing hurt to B which fact is disclosed in evidence—The reason is that the facts charged did not create any doubt as to the offence committed by X.)
- ('10) 11 Cri L Jour 325 (325) : 37 Cal 604 : 6 I. C. 352, *Ram Sewak Lal v. Maneshwar Singh*. (False statement to a public servant in which defamatory statements were made against X—Here the act is one, but constitutes two offences—There is no "doubt" within the meaning of the section—The case was however decided on the ground that they are distinct offences—This is not correct.)
- ('15) AIR 1915 Cal 219 (219) : 15 Cri L Jour 704, *Genu Manjhi v. Emperor*.
- ('10) 11 Cr. L. J. 420 (421) : 6 I. C. 944 : 1910 Pun ReNo. 20 Cr, *Thakur Singh v. Chatter Pal*. (Facts alleged amounting to both an offence under S. 182, Penal Code, as well as under S. 211—S. 236 does not apply — The decision however proceeds on the view that they were distinct offences — This does not seem to be correct.)

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Note 1

- (3) Where the facts relied upon are not inconsistent with the innocence of the accused. i. e., where such facts do not *amount to an offence* at all.¹³
- (4) Where the prosecution is itself not clear as to *what facts it will rely upon*.¹⁴ Thus, where the accused, five in number, are alleged to have assaulted *either* with one object *or* with another, and the facts relied upon to establish an offence are themselves in doubt, this section does not apply.^{14a}

It has been held in the undermentioned cases¹⁵ that the 'doubt' in this section does not mean doubt as to *facts* but means 'doubt' as to questions of *law*, such as which section of the penal law applies. It is submitted that this view is not correct. The illustrations to the section themselves show that the doubts in those cases are not doubts as to questions of law, but only as to questions of fact.^{15a} To this extent, however, the proposition would be correct, namely, that the section has no application where the *facts relied upon by the prosecution are themselves in doubt*.¹⁶ It is not necessary for the

(130) AIR 1930 Pat 26 (27) : 9 Pat 585 : 30 Cr. L. J. 806, *Babu Lal v. Ram Saran*.
13. (31) AIR 1931 Cal 528 (528) : 59 Cal 92 : 32 Cr. L. J. 1167, *Paul De Flonder v. Emperor*.

(20) AIR 1920 Pat 512 (513) : 21 Cr. L. J. 44, *Mt. Shicoraini v. Emperor*. (Charge of kidnapping — Facts alleged not amounting to kidnapping — Conviction for abetment of kidnapping under S. 237 is wrong.)

14. (31) AIR 1931 Cal 414 (415) : 59 Cal 8 : 32 Cr. L. J. 892, *Meher Sheikh v. Emperor*.

(31) AIR 1931 Cal 528 (528) : 59 Cal 92 : 32 Cr. L. J. 1167, *Paul De Flonder v. Emperor*.

(94) 21 Cal 955 (973), *Wafadar Khan v. Empress*. (Facts alleged clear that the five accused assembled but there was a doubt as to the object of the assembly.)

[See also (38) AIR 1938 Sind 63 (65) : 31 S L R 480 : 39 Cr. L. J. 460, *Ghulam Hyder v. Emperor*. (Alternative charge for murder or culpable homicide not amounting to murder is bad.)]

14a. (94) 21 Cal 955 (973), *Wafadar Khan v. Queen-Empress*.

[See also (23) 71 I. C. 247 (247) : 24 Cr. L. J. 119 (Cal), *Hajari Sonar v. Emperor*.]

15. (38) AIR 1938 Cal 51 (68) : 1 L R (1938) 1 Cal 290 : 39 Cr. L. J. 161, *Goloko Behari v. Emperor*. (What, however, seems to be really meant in this case is that the uncertainty must be as to what offence can be held to have been committed on the allegations of the prosecution and not uncertainty as to the extent to which the prosecution will be able to prove its allegations.)

(38) AIR 1938 Sind 63 (65) : 31 S L R 480 : 39 Cr. L. J. 460, *Ghulam v. Emperor*.

(36) AIR 1936 Rang 174 (174) : 14 Rang 24 : 37 Cr. L. J. 492, *Abdul v. Emperor*.

(25) AIR 1925 Cal 903 (904) : 26 Cr. L. J. 594, *Nayan Ullah v. Emperor*.

(75) 7 N W P H C R 137 (143), *Queen v. Jamurha*.

(29) AIR 1929 Rang 209 (210) : 7 Rang 96 : 30 Cr. L. J. 750, *Emperor v. Po Thin Gyi*.

(27) AIR 1927 Rang 254 (255) : 28 Cr. L. J. 759, *Emperor v. Nga Po Wun*.

(01) 1 Low Bur Rul 101 (104), *Crown v. Mi Zan*.

(87) 1887 Pun Re No. 11 Cr, p. 19 (21, 22), *Khan Muhammad v. Empress*.

(18) AIR 1918 Pat 628 (629) : 19 Cr. L. J. 202, *Bhowanath Singh v. Emperor*. (Following 1887 Pun Re No. 11 Cr, 21 Cal 955 and 23 Cal 174.)

(30) AIR 1930 All 481 (482) : 31 Cr. L. J. 716, *Emperor v. Kanhaiya (Quere)*.

15a. (33) AIR 1933 Rang 236 (237, 238) : 11 Rang 354 : 35 Cr. L. J. 41, *Nga Po Kyone v. Emperor*.

(28) AIR 1928 All 139 (140) : 29 Cr. L. J. 232, *Har Prasad v. Emperor*. (Doubt contemplated is doubt owing to absence of proof of some of the facts or doubt on a question of law.)

(31) AIR 1931 Cal 414 (415) : 59 Cal 8 : 32 Cr. L. J. 892, *Meher Sheikh v. Emperor*.

(11) 12 Cr. L. J. 224 (228) : 5 Sind L R 16 : 10 I. C. 168, *Ganesh Krishna v. Emperor*.

16. (37) AIR 1937 All 754 (754) : 39 Cr. L. J. 152, *Babu Ram v. Emperor*.

(31) AIR 1931 Cal 414 (416) : 59 Cal 8 : 32 Cr. L. J. 892, *Meher Sheikh v. Emperor*.

[See (38) AIR 1938 Sind 63 (65) : 31 S L R 480 : 39 Cr. L. J. 460, *Ghulam v. Emperor*.]

See also cases cited in foot-notes 14 and 15, above.

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application of this section that the several offences should fall under the same chapter of the Penal Code.^{16a}

It has also been held in another class of cases that the several offences which the facts may constitute should be *cognate* offences¹⁷ or offences which differ in degree by reason of the difference in intention or by reason of subsidiary aggravating circumstances.¹⁸ This view also, it is submitted, is not correct and is not authorised by the terms of the section.

It was observed in the undermentioned cases¹⁹ that the section applies only where from the evidence *led by the prosecution* it is doubtful which of several offences have been committed by the accused. It is submitted that this view is not correct. Such a case is really covered by section 367, sub-section (3).

See also the case cited below.²⁰

2. "Which of several offences." — This section applies even where the doubt is whether the accused committed one offence only or both that offence and another. Where A gives false information of theft in a house and states that he suspects B of the offence, it is clear that he commits an offence under S. 182 of the Penal Code, but it is doubtful if the information will amount to the making of a false charge against B punishable under S. 211 of the Penal Code. It has been held that this section will apply even to such cases.¹

Under the Code of 1861, a charge under the section corresponding to this section could be framed only in respect of offences under the Indian Penal Code.² Under the present Code this is no longer necessary.³

16a. ('37) AIR 1937 Rang 250 (251) : 38 Cr. L. J. 989, *Rati Ram v. Emperor*.

17. ('24) AIR 1924 Rang 106 (108) : 1 Rang 690 : 25 Cr. L. J. 553, *Mustan v. Emperor*.

('29) AIR 1929 Pat 660 (661) : 8 Pat 731 : 31 Cr. L. J. 362, *Damodar Ram v. Emperor*.

('27) AIR 1927 Nag 163 (164) : 28 Cr. L. J. 189, *Gulabchand v. Emperor*.

('88) 1888 All W N 95 (95), *Empress v. Narotam*.

('88) 1888 All W N 116 (117), *Empress v. Karim Baksh*.

('32) AIR 1932 Oudh 103 (106) : 7 Luck 543 : 33 Cri L Jour 926, *Chandranath v. Emperor*. (Conviction under S. 398, Penal Code, can be altered to one under S. 392.)

('05) 2 Cr. L. J. 590 (594) (Kathiawar), *In re Rabari Bhura Dewait*. (Contradictory statements must be of the same kind.)

18. ('11) 12 Cr. L. J. 224 (226) : 5 Sind L R 16 : 10 Ind Cas 168, *Ganesh Krishna Emperor*. (Per Pratt, J. C.)

19. ('23) AIR 1923 Pat 121 (122) : 23 Cr. L. J. 30, *Govind Mahtan v. Emperor*.

('20) AIR 1920 Pat 512 (513) : 21 Cri L Jour 44, *Mt. Sheoradni v. Emperor*.

20. ('37) AIR 1937 Cal 99 (114) : 38 Cr. L. J. 818 (SB), *Jitendra Nath v. Emperor*.

(Nothing contained in Criminal law Amendment Act bars operation of Ss. 196, 235, 236 and 237, Cr. P. C. — Conviction or acquittal of person or overt act in regard to conspiracy does not bar trial of such person over again under S. 121A, Penal Code.)

Note 2

1. ('13) 14 Cr. L. J. 214 (216, 217) : 36 Mad 308 : 19 I. C. 310, *Ganapathy v. Emperor*.

2. ('71) 8 Bom H C R Cr 115 (117), *Reg v. Ajam Dulla*. (A charge either of criminal breach of trust under S. 409, Penal Code, or of undue exaction of money under S. 16, Regulation XVII of 1827, is irregular.)

3. ('23) AIR 1923 Cal 596 (597) : 50 Cal 564 : 24 Cri L Jour 372, *Tulsi Tolini v. Emperor*. (S. 379, Penal Code, and S. 54A, Calcutta Municipal Act.)

('15) AIR 1915 Low Bur 60 (61) : 16 Cri L Jour 267 (267, 268), *Nga Shwe Yi v. Emperor*. (S. 457, Penal Code and S. 31, Rangoon Police Act.)

('21) AIR 1921 Pat 22 (22) : 22 Cr. L. J. 63, *Maksudan Mistry v. Emperor*. (Trial under S. 338, Penal Code—Second trial under S. 16, Motor Vehicles Act, barred.)

3. Theft and taking illegal gratification for the return of stolen property. — Where the facts relied upon by the prosecution are :

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- (1) that certain property was stolen,
- (2) that A took gratification for its restoration, and
- (3) that he took no steps for its restoration or to cause the offender to be apprehended,

the only inference possible is that A committed an offence under S. 215 of the Penal Code. It cannot be an inference that, because A asked for a gratification for its return, he is the thief. There being therefore no "doubt" such as is contemplated by the section, A cannot be charged for theft along with the offence under S. 215 of the Penal Code.¹ If however, in the above case, there is the additional fact that he restored the property but did not take steps to cause the offender to be apprehended, there will be a doubt as to whether he was not the thief seeing that he was in possession of the stolen property. In such a case an alternative charge for theft or for an offence under S. 215 may be framed.²

4. Sections 236 and 239, if mutually exclusive. — See Note 2 under Section 239.

5. Contradictory statements — Illustration (b). — Illustration (b) was added in the present Code in order to give effect to the view that existed before that a person could be charged with giving false evidence on the basis of two contradictory statements.¹ It applies

('27) AIR 1927 Bom 629 (629) : 28 Cr. L. J. 1032, *Emperor v. Kallasani*. (S. 160, Penal Code and S. 61 (o), Bombay District Police Act.)

Note 3

1. ('27) AIR 1927 Rang 254 (255) : 28 Cri L Jour 759, *Emperor v. Nga Po Wun*. (The ground of the decision namely that the "doubt" must not be one of fact but of law is incorrect. See Note 1.)
- ('29) AIR 1929 Rang 209 (210) : 7 Rang 96 : 30 Cr. L. J. 750, *Emperor v. Po Thin Gyi*. (Do.)
2. ('08) 7 Cri L Jour 464 (469) : 4 Low Bur Rul 199, *Twet Pe v. Emperor*.

Note 5

1. ('99) 1899 All W N 39 (39), *Queen-Empress v. Puran*.
- ('99) 22 All 115 (117) : 1899 A W N 207, *Queen-Empress v. Khem*.
- ('04) 28 Bom 533 (553, 554) : 6 Bom LR 379 : 1 Cr. L. J. 390, *Emperor v. Bankatram*.
- ('21) AIR 1921 Bom 3 (10) : 45 Bom 834 : 22 Cri L Jour 241 (FB), *Purshotam v. Emperor*. (Overruling 18 Bom 377.)
- ('03) 1903 Pun L R No. 60, p. 245 (246), *Sobha Singh v. King-Emperor*.
- ('25) AIR 1925 Oudh 660 (661) : 26 Cri L Jour 1457, *Mt. Patraji v. Emperor*.
- ('10) 11 Cri L Jour 734 (735) : 8 I. C. 947 (Rang), *Maung Thaw Na v. Emperor*.
- ('08) 7 Cri L Jour 302 (303) : 1908 A W N 73, *Emperor v. Tasadduk Husain*.
- [See ('40) 42 Bom L R 745 (746), *Emperor v. Sultanshah Sidisha*. (AIR 1921 Bom 3, followed, Beaumont, C. J., doubting whether a statement made under S. 164 can possibly be regarded as part of the same transaction as a statement made at the trial so as to justify an alternative charge under S. 236.)]

The following decisions were decided prior to the present Code :—

- ('74) 21 Suth W R Cr 72 (76, 85, 86) : 13 Beng L R 324 (FB), *Queen v. Muhammad Humayoon Shah*. (Overruling 8 Suth W R 6; 12 Suth W R 11; 12 Suth W R 31, 69; 9 Suth W R 25, 54.)
- ('85) 7 All 44 (63, 66, 67) : 1884 A W N 258, *Queen-Empress v. Ghulet*. (Overruling 5 All 17.)
- ('66) 6 Suth W R Cr 65 (68, 69) : Beng L R Sup Vol 521 (FB), *Queen v. Mt. Zamiran*.
- ('74) 1 Weir 165 (165), *High Court Proceedings, No. 1810 of 1880*.

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not only where the statements are made on two distinct occasions but also where they are made on the same occasion, as for example, in the same deposition.²

An alternative charge in respect of two contradictory statements can be framed under this section only when the prosecution is unable to prove which of the two statements is false.³

No charge in the alternative can be made, when one of the statements has been made in circumstances in which the person making it is not bound by law to state the truth, as for example:

- (1) when the statement is made in a petition;⁴
- (2) when it is made in an examination by a Magistrate for the purpose of obtaining information, not liable to be on oath;⁵
- (3) when it is made to the police under S. 161 of the Code, as to which see Note 9 to S. 161;
- (4) when an amin reports to a civil Court executing a decree complaining of obstruction;⁶ or
- (5) when it is inadmissible in evidence as being one made under improper influence such as police threat and ill-treatment.⁷

Where an accused person entered in a sale deed, executed by him, the consideration as Rs. 1475 and in a subsequent suit for pre-emption stated in evidence that the consideration was only Rs. 900, it was held that the Court could charge accused under S. 193 or S. 423, Penal Code.⁸

6. Murder and concealment of body to screen offender. — In *Begu v. King-Emperor*,¹ where the facts relied upon by the prosecution, against the accused, were that a murder had been committed and that the accused made away with the evidence of murder by

{ '93 } 15 All 392 (393) : 1893 A W N 146, *Queen-Empress v. Matabadal*.

{ 1864 } 1 Suth W R Cr 15 (15), *Queen v. Narain Dass*.

{ '83 } 1883 Pun Re No. 20 Cr, p. 43 (44 to 46), *Mir Afzal v. Empress*.

{ '88 } 1888 Pun Re No. 32 Cr, p. 65 (67), *Sohan Singh v. Empress*.

{ '69 } 4 Mad H C R 51 (53, 54) : 1 Weir 156, *In re Palany Chetty*.

{ '71 } 6 Mad H C R 342 (344) : 1 Weir 161, *In re Milbourne Ross*.

{ '96 } 2 Weir 300 (300), *Public Prosecutor v. Muthu Vannan*.

{ '67 } 8 Suth W R Cr 79 (79), *Queen v. Oottur Narain Singh*.

{ '68 } 9 Suth W R Cr 52 (53), *Queen v. Denonath*.

{ '69 } 12 Suth W R Cr 23 (23), *Queen v. Kala Khan*.

{ '84 } 10 Cal 405 (406, 407), *Nathu Sheikh v. Queen-Empress*.

2. { '02 } 26 Mad 55 (59, 60, 64, 65) : 1 Weir 166, *In re Palani Palagan*.

{ '84 } 10 Cal 937 (940, 941, 946), *Habibullah v. Queen-Empress*.

[See also { '39 } AIR 1939 Sind 170 (171) : I L R (1939) Kar 280 : 40 Cr.L.J. 707, *Charandas Kanayalal v. Emperor*. (Two conflicting statements by witness — Charge under S. 236 may be framed.)]

3. { '90 } 1890 Pun Re No. 27 Cr, p. 90 (93), *Harnam Singh v. Empress*.

{ '88 } 1888 Pun Re No. 32 Cr, p. 65 (68), *Sohan Singh v. Empress*.

{ '96 } 2 Weir 300 (300), *Public Prosecutor v. Muthu Vannan*.

{ '74 } 22 Suth W R Cr 2 (3), *Queen v. Gonowri*.

4. { '02 } 2 Weir 169 (169), *In re Chennamma*.

5. { 1900 } 27 Cal 455 (457) : 4 C W N 249, *Hari Charan Singh v. Queen-Empress*.

6. { '95 } 17 All 436 (437) : 1895 A W N 102, *Queen-Empress v. Ajudhia Prasad*.

7. { 1865 } 3 Suth W R Cr 6 (8), *Queen v. Nagana Ourut*.

8. { '03 } 1903 Pun L R No. 60, p. 245 (246), *Sobha Singh v. Emperor*.

Note 6

1. { '25 } AIR 1925 P C 130 (131) : 6 Lah 226 : 52 Ind App 191 : 26 Cr.L.J. 1059 (PC).

removing the body for the purpose of screening the offender, it was held by their Lordships of the Privy Council that though the charge against the accused was only under S. 302 of the Penal Code, he could be convicted under S. 201 of the Penal Code, if the evidence established that offence. Their Lordships observed:

"A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge *that might have been made*. That is what happened here. The three men who were sentenced to rigorous imprisonment, were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under S. 237."

The same view has been held in the undermentioned cases.²

7. Murder, culpable homicide not amounting to murder and causing death by negligence. — Where the facts relied upon give rise to an inference of murder or culpable homicide not amounting to murder, a charge may be framed under the section either cumulatively or alternatively¹ for murder and culpable homicide not amounting to murder. In the undermentioned case,² however, it was held that this could not be done. The decision proceeded upon the view that S. 236 did not apply to a 'doubt' as to *facts*. In the cases cited below³ it was held that though a charge might under this section be framed

2. ('40) AIR 1940 Pat 289(289,290):19 Pat 369: 1940 PWN 73(76), *Nebti v. Emperor*.
 ('37) 1937 M W N 544 (546), *Nagan v. Emperor*.
 ('33) AIR 1933 All 178 (179): 54 All 792: 34 Cr. L. J. 107, *Sohan v. Emperor*.
 ('32) AIR 1932 All 71 (72): 33 Cri L Jour 283, *Sawanta v. Emperor*.
 ('32) AIR 1932 Cal 297 (298): 59 Cal 1040: 33 Cr.L.J. 546, *Durlav v. Emperor*.
 ('32) AIR 1932 Mad 748 (757): 56 Mad 63: 33 Cr.L.J. 814, *Public Prosecutor v. Venkatamma*.
 ('31) AIR 1931 Pat 172 (174): 10 Pat 140: 32 Cr.L.J. 975, *Rup Narain v. Emperor*.
 ('30) AIR 1930 Mad 870 (872): 54 Mad 68: 32 Cr.L.J. 263, *Chinna v. Emperor*.
 ('30) AIR 1930 Oudh 113 (121): 5 Luck 255: 31 Cr.L.J. 575, *Mata Din v. Emperor*.
 (Four persons charged with murder — Two convicted of murder — Other two not found to have taken part in murder — Evidence not sufficiently or definitely proving that they were present at, and had taken part in, the murder—They were convicted under S. 201.)
 ('28) AIR 1928 Lah 906 (908): 10 Lah 213: 29 Cri L Jour 746, *Ditta v. Emperor*.
 ('28) 29 Cri L Jour 457 (458): 108 I. C. 905 (Lah), *Dal Singh v. Emperor*.
 ('27) AIR 1927 Sind 241 (244): 21 S L R 206: 28 Cr.L.J. 674, *Tajan v. Emperor*.
 ('26) AIR 1926 Lah 88 (90): 7 Lah 84: 27 Cri L Jour 709, *Rannun v. Emperor*.
 ('26) 27 Cri L Jour 1011 (1012): 96 I. C. 867 (Cal), *Umed Sheikh v. Emperor*.
 ('25) AIR 1925 Sind 306 (307): 18 S L R 185: 26 Cr.L.J. 909, *Andal v. Emperor*.
 ('23) AIR 1923 Bom 262 (263): 25 Cr.L.J. 1349, *Hannappa Rudrappa v. Emperor*.
 ('10) 11 Cr.L.J. 731 (733): 4 S L R 174: 8 I.C. 936, *Emperor v. Bawa Manghnidas*.
 ('08) 8 Cri L Jour 191 (193): 1 S L R 73, *Emperor v. Ghulam*.
 ('02) 1902 Pun Re No. 6 Cr, page 17 (18), *Nazru v. Emperor*.
 [See also ('30) AIR 1930 Lah 460 (461): 32 Cr.L.J. 461, *Emperor v. Faizul Hassan*.
 (Alternative charges under S.201, Penal Code, and S.52, Post Office Act, held legal.)]
 [See however ('95) 22 Cal 638 (639, 640), *Torap Ali v. Queen-Empress*.]

Note 7

1. ('72-92) 1872-92 Low Bur Rul 300 (301), *Mi Ni v. Queen-Empress*. (Murder or in the alternative culpable homicide not amounting to murder.)
 ('15) AIR 1915 Bom 297 (298): 16 Cri L Jour 305, *Emperor v. Ramava Chennappa*. (Charge under S. 302, I. P. C., and conviction under S. 304A.)
 ('24) AIR 1924 Bom 450 (451): 26 Cri L Jour 211, *Emperor v. C. J. Walker*. (With charge under S. 304, Penal Code, conviction can be under S. 304A — Following A I R 1914 Cal 65.)
 2. ('87) 1887 Pun Re No. 11 Cr, page 19 (21), *Khan Muhammed v. Empress*. (Ss. 302 and 304, I. P. C.)
 3. ('38) AIR 1938 Sind 63 (65): 31 S L R 480: 39 Cr. L. J. 460, *Ghulam v. Emperor*.

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Notes 7-9

cumulatively, it cannot be framed *alternatively* in respect of the two offences. It is submitted that the last two views are not correct.

8. Principal offence and the abetment thereof.—The question whether an offence and its abetment could both be charged under the provisions of this section depends, as has been seen in Note 1, on the facts relied upon by the prosecution at the beginning of the trial and on which charges are invited to be framed. A person may be convicted of abetment of an offence, even if he is charged with the substantive offence and *vice versa*, if the facts relied upon could have supported a charge for that offence.¹

The view taken in the undermentioned cases² that an offence of abetment and the principal offence cannot come within this section is, it is submitted, not correct.

9. Alternative charges.—A charge even in the alternative must conform to the provisions of Ss. 233, 234, 235 or S. 239 and each of the alternative charges must be a legal charge.¹

(11) 12 Cri L Jour 224 (226) : 5 Sind L R 16 : 10 I. C. 168, *Ganesh Krishna v. Emperor*. (Alternative charges for offences under the Penal Code and special laws, e. g., Post Office Act, not permissible.)

Note 8

1. ('30) AIR 1930 Nag 145 (148) : 30 Cri L Jour 224, *Punamchand v. Emperor*.
- ('31) AIR 1931 Oudh 274 (276) : 7 Luck 102 : 32 Cr. L. J. 905, *Khuman v. Emperor*.
- ('29) AIR 1929 Cal 807 (808) : 57 Cal 807 : 31 Cr. L. J. 570, *Jananada v. Emperor*.
- ('34) AIR 1934 Pat 561 (563) : 13 Pat 729 : 36 Cri L Jour 17, *Bhikhari v. Emperor*.
- ('20) AIR 1920 Lah 15 (18) : 22 Cri L Jour 161, *Kehr Singh v. Emperor*.
- ('25) AIR 1925 Rang 122 (127, 128) : 3 Rang 11 : 26 Cr. L. J. 492, *A. V. Joseph v. Emperor*.
- ('28) AIR 1928 Pat 146 (153) : 6 Pat 768 : 29 Cri L Jour 301, *Emperor v. Ghulam*.
- ('16) AIR 1916 Cal 431 (443, 445) : 42 Cal 1094 : 17 Cri L Jour 113 (S B), *Indarchand v. Emperor*.
- ('24) AIR 1924 Bom 502 (507) : 49 Bom 84 : 26 Cri L Jour 1000, *Emperor v. Ranchod*.
- ('32) AIR 1932 Cal 455 (456) : 59 Cal 1192 : 33 Cr. L. J. 720, *Debi Prosad v. Emperor*.
- ('28) AIR 1928 Cal 466 (468) : 29 Cri L Jour 1093, *Kadira v. Emperor*.
- ('31) AIR 1931 Mad 225 (227) : 32 Cri L Jour 753, *Sambasiva Mudali v. Emperor*.
- ('12) 13 Cri L Jour 453 (454, 455) : 15 Ind Cas 85 (Mad), *Subbayya v. Emperor*.
- ('35) AIR 1935 All 935 (937) : 37 Cr L J 247, *Samuel John v. Emperor*. (The decision proceeds on the ground that abetment is a minor offence in relation to the substantive offence and that S. 238 applies to such a case.)
- ('35) AIR 1935 Pesh 67 (68) : 36 Cr. L. J. 1438, *Suraj Bhan v. Emperor*. (This power is not conferred by S. 238 and is not based on the principle that abetment is a minor offence but is conferred by Ss. 236 and 237 and depends in every case upon the facts proved.)
- ('32) 1932 Mad W N 1216 (1217), *Ratna Reddi v. Emperor*.
2. ('12) 13 Cri L Jour 223 (223) : 14 Ind Cas 319 (Mad), *In re Krishnan Nair*.
- ('12) 13 Cr L J 203 (203) : 14 I C 203 (Mad), *Singaravelu Pillai v. Emperor*.
- ('24) AIR 1924 Bom 432 (432) : 25 Cri L Jour 1135, *Emperor v. Raghya Naghya*.
- ('29) AIR 1929 Nag 325 (328) : 30 Cri L Jour 944, *Kisandas v. Emperor*.
- ('21) 60 Ind Cas 999 (1000) : 22 Cr. L. J. 311 (Pat), *Darbari Chowdhury v. Emperor*.
- ('27) AIR 1927 Cal 63 (64) : 28 Cri L Jour 2, *Hulaschand v. Emperor*. (S. 237 was not referred to but the case proceeded under S. 238.)
- ('20) AIR 1920 Cal 834 (834) : 22 Cri L Jour 448, *Rajah Khan v. Emperor*.
- ('20) AIR 1920 Pat 512 (513) : 21 Cr L J 44, *Mt. Sheoradni v. Emperor*.
- ('74) 11 Bom H C R 240 (241, 242), *Reg v. Chand Nur*.
- ('23) AIR 1923 Cal 453 (455) : 50 Cal 41 : 24 Cr. L. J. 763, *Emperor v. Profulla*.
- ('10) 11 Cri L Jour 49 (49) : 5 I C 145 : 33 Mad 264, *Padmanabha Payi v. Emperor*.
- ('28) AIR 1928 Lah 382 (390) : 30 Cri L Jour 18, *Pritchard v. Emperor*.
- ('29) AIR 1929 Nag 325 (328) : 30 Cri L Jour 944, *Kisan Das v. Emperor*.

Note 9

1. ('38) AIR 1938 Sind 171 (173) : 1 L R (1939) Kar 204 : 39 Cr. L. J. 890, *Emperor v. Bakumal Hotchand*.

Alternative charges should be framed as in form given in schedule V, No. 28, sub-head II.² When the charges are of distinct offences such as kidnapping and abduction, it is desirable that the accused should be charged separately for kidnapping and abduction.³ Omission to split up the charge into two parts does not, however, amount to material error, unless the accused is thereby prejudiced in his defence.⁴

See also Note 7.

10. Sentence. — Where an accused is convicted of two offences alternatively, the sentence should be considered from the point of view of the maximum sentence provided for the lesser of the two alternative offences.¹ This is so even where a person is charged under two parts of the same section, one carrying a higher and the other a lighter punishment.²

11. "Series of acts," meaning of. — It has been held in the undermentioned case¹ that a statement made in the evidence in a civil suit and a statement made in the evidence in a criminal case cannot be considered to be a "series of acts" within the meaning of the section and that the person making such statement cannot therefore be prosecuted under this section for giving false evidence on the basis of such contradictory statements. It is submitted that this view cannot be accepted as correct. If, as the decision concedes, a statement before the police and a subsequent statement before the Magistrate could form a "series of acts," it is difficult to see how a statement in a civil Court and a statement in a criminal Court are not a "series of acts."

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Notes 9-11

237.* (1) If, in the case mentioned in section

Section 237

* Codes of 1882 and 1872.

Same as that of sub-section (1); Sub-section (2) was newly added in 1898, which ran thus :—

"(2) When the accused is charged with an offence, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged."

Code of 1861 : Ss. 56 to 59.

2. ('72-92) 1872-92 Low Bur Rul 436 (437), *Queen-Empress v. Nga On Gaing*.
3. ('27) AIR 1927 Cal 644 (646) : 28 Cri L Jour 805, *Mafizaddi v. Emperor*.
4. ('30) AIR 1930 Cal 209 (210, 211) : 57 Cal 1074 : 31 Cr. L. J. 903, *Prafulla v. Emperor*. ('34) AIR 1934 Cal 85 (86) : 35 Cri L Jour 487, *Ramizulla v. Emperor*. (It is however desirable to frame distinct charges to avoid prejudice to accused.) ('33) AIR 1933 Cal 676 (677) : 60 Cal 1394 : 34 Cr. L. J. 1219, *Rajabuddin v. Emperor*. ('34) AIR 1934 Sind 164 (166, 167) : 36 Cri L Jour 231, *Allahrakhio v. Emperor*.

Note 10

1. ('17) AIR 1917 All 29 (30) : 18 Cri L Jour 790 (791), *Hira Nand v. Emperor*. ('20) AIR 1920 All 110 (111) : 42 All 302 : 21 Cr. L. J. 783, *Rama Singh v. Emperor*. ('88) 1888 Pun Re No. 32 Cr, page 65 (70), *Sohan Singh v. Empress*. ('03) 1903 Pun L R No. 60, page 245 (246, 247), *Sobha Singh v. King-Emperor*. ('30) AIR 1930 Mad 870 (873) : 54 Mad 68 : 32 Cr. L. J. 263, *Gangappa v. Emperor*. [See also ('72-92) 1872-92 L B R 324 (325), *Maung Po Thin v. Empress*. ('37) AIR 1937 All 754 (754) : 39 Cr L J 152, *Babu Ram v. Emperor*.] 2. ('90) 1890 Pun Re No. 27 Cr, page 90 (93), *Harnam Singh v. Empress*. ('99) 1899 Pun Re No. 3 Cr, page 7 (8, 9), *Santa Singh v. Empress*.

Note 11

1. ('24) AIR 1924 Sind 1 (3, 4) : 16 SLR 285 : 25 Cr. L. J. 1195, *Saleh Shah v. Emperor*.

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Notes 1-2

236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

(2) [Omitted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.]

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence.

Synopsis

- | | |
|--------------------------|---|
| 1. Legislative changes. | 3. Conviction for offence requiring complaint by specified persons. |
| 2. Scope of the section. | 4. Powers of appellate Court. See S. 423 and Notes thereunder. |
| 2a. Illustration. | |

Other Topics (miscellaneous)

Abetment and principal offences. See S. 236 Note 8.
 Cognate offences. See S. 236 Note 1.
 Conviction for offences not charged. See Note 2.
 Different offence — Conviction for. See Note 2.
 Distinct offences. See Note 2.

1. Legislative changes.

Changes made in the Code of 1898 —

Sub-section (2) was newly added.

Changes made in 1923 —

Sub-section (2) was omitted and inserted as sub-s.(2A) to S. 238 by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

2. Scope of the section. — The general rule is that an accused person cannot be convicted of an offence of which he was not charged, and of which consequently he has had no notice. This section, however, enables the Court to convict a person of an offence which is disclosed in the evidence and for which he *might have been charged under the provisions of section 236*, although he was *not charged* with it. The reason of the rule is that the facts relied upon by the prosecution at the beginning of the trial, of which he has notice, are sufficient notice of all offences which such facts will constitute.

The section will apply, therefore, only in cases falling within S. 236.¹ For cases in which a conviction has been given under this section without framing a charge therefor, see Note 1 to S. 236.² In cases where S. 236 has no application as, for instance, where the offence

Section 237 — Note 2

1. ('39) AIR 1939 All 665 (667) : 40 Cri L Jour 948, *Thakur Singh v. Emperor*. ('38) AIR 1938 Cal 51 (68) : ILR (1938) 1 Cal 290 : 39 Cr L J 161, *Goloke v. Emperor*. ('36) AIR 1936 Cal 796 (799) : 62 Cal 956 : 37 Cr. L. J. 701, *Ishtahar v. Emperor*.
2. For cases in which conviction can be given, see cases cited under Note 1 to S. 236.

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Notes 2-4

which of several offences such facts would constitute. See also the undermentioned case.⁷

The Chief Court of Oudh has also held that it is not illegal to convict a person of an offence under S. 452, Penal Code, in a case in which he has been charged under S. 323, in the light of the wording of this section and S. 236, but that the question to be decided in each case is whether the accused has or has not been prejudiced in his trial by the fact that the charge was framed under the wrong section.⁸

Where a Court finds it necessary to make use of the section to convict an accused person of an offence with which he has not been charged, it should be particularly careful to formulate in its own mind the charge upon which, had it been duly framed, it would be prepared to convict.⁹

2a. Illustration. — The illustration to the section only applies to the class of cases referred to in S. 236 and does not refer to cases in which there is *no doubt* as to what offence has been committed on the facts relied on by the prosecution, but it is merely doubtful which offence will be proved (see Note 1 under S. 236). This section is therefore no authority for holding that in such cases, on a charge of one offence, a person can be convicted of a different offence.¹

3. Conviction for offence requiring complaint by specified persons. — Where a person is charged with offence *A* on facts on which he might have been charged also with offence *B* under S. 236, but the latter offence is one which could not be taken cognizance of by the Court in the absence of a complaint by the aggrieved person, it has been held that he could not be convicted of offence *B* under this section in the absence of such complaint.¹

See also Note 6 to S. 199.

4. Powers of appellate Court. — See S. 423 and Notes thereunder.

7. ('33) AIR 1933 All 30 (31) : 34 Cri L Jour 445, *Qabul v. Emperor*. (Charge for murder—Conviction under S. 194, Penal Code, not illegal as it falls under S. 237, but the accused should nevertheless be asked to plead to the charge.)

8. ('38) AIR 1938 Oudh 263 (263) : 39 Cr. L. J. 937, *Emperor v. Shankar Dayal*.

9. ('16) AIR 1916 All 294 (294) : 17 Cri L Jour 64 (64), *Abdul Rab v. Emperor*.

Note 2a

1. ('36) AIR 1936 Cal 796 (801) : 62 Cal 956 : 37 Cr. L. J. 701, *Ishtahar Khondkar v. Emperor*. (AIR 1930 Privy Council 130 is criticised in this decision as suggesting the contrary—It is doubtful if this interpretation of the Privy Council case is justified.)

Note 3

1. ('40) AIR 1940 All 201 (201) : 41 Cr. L. J. 499, *Haidar Ali v. Emperor*. (Prosecution under Ss. 366 and 376, Penal Code — Conviction for offence under S. 498, Penal Code, not legal in absence of complaint by husband.)

('18) AIR 1918 Lah 385 (385, 386) : 1918 Pun Re No. 2 Cr : 19 Cri L Jour 300, *Roda Singh v. Emperor*. (Under S. 199, Cr. P. C., complaint by husband for offence under S. 498, I. P. C., is contemplated—Accused charged with theft cannot be convicted under S. 498, I. P. C.)

('26) AIR 1926 Rang 169 (171) : 4 Rang 131 : 27 Cr L J 1075, *U Nyan Neinda v. Emperor*. (Prosecution for offence under S. 121A directed — Facts disclosing another offence under Chapter VI of the Penal Code, requiring complaint or order under S. 196—Conviction under the latter not valid.)

238.* (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2A)† When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

Illustrations

(a) A is charged, under S. 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under S. 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under S. 406.

(b) A is charged, under S. 325 of the Indian Penal Code, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under S. 335 of that Code.

Sub-section (2A) was inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

- | | |
|--|---|
| 1. Scope and principle of the section. | 4. When minor offence requires complaint — Sub-section (3). |
| 2. "Minor offence." | 5. Powers of appellate Courts and High Court. |
| 3. Attempt — Sub-section (2A). | |

* Code of 1882 — Section same as that of 1898 Code.

Code of 1872 : S. 457.

457. When a person is charged with an offence and part of the charge is not proved, but the part which is proved amounts to a different offence, he may be convicted of the offence which he is proved to have committed, though he was not charged with it.

When offence proved included in offence charged.

Illustrations

(a) Same as illustration (a) above.

(b) A is charged with murder. He may be convicted of culpable homicide, or of causing death by negligence.

Code of 1861 — Nil.

† See Note 1 under section 237.

Section 238
Note 1

Other Topics (miscellaneous)

- | | |
|---|--|
| Converse of the section, i. e. conviction for major offence, not charged. See Note 1. | Major and minor offences — Examples of offences not coming under the category. See Note 2. |
| Evidence insufficient for major offence. See Note 1. | Trial with assessors. See Note 1. |
| Grievous hurt and rioting. See Note 2. | Trial with jury. See Note 1. |

1. Scope and principle of the section. — The section contemplates a conviction of a minor offence included in the offence charged in either of two cases. The first is where the offence charged consists of several particulars, a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved.¹ The second is where facts are proved which reduce the offence charged to a minor offence.² Illustration (a) to the section is an example of the first class of cases and illustration (b), of the second.³

The principle on which the section proceeds is that where an offence consists of several particulars, a combination of some only of which constitutes a complete minor offence, the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when the circumstances constituting the major charge do not necessarily and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter.⁴

The section is an exception to the rule that a person cannot be convicted of an offence with which he is not charged.⁵ Therefore, though under this section an accused person can be convicted of an offence different from that he was accused of, it should be done only in cases where the accused is not prejudiced in any way by the conviction on the new charge.⁶ Thus, where the accused is charged under S. 457,

Section 238 — Note 1

1. ('38) AIR 1938 Rang 281 (282) : 1938 R L R 139 : 39 Cr.L.J. 761, *Maung Ba v. The King*. (Charge under S. 353, Penal Code, of assaulting public servant — Magistrate finding that person assaulted was not public servant — He can be convicted under S. 352, Penal Code—Dissenting from 6 C W N 202.)
2. ('93) 7 C P L R Cr 17 (18), *Empress v. Sheodayal*. (Trial on charge of murder—Conviction under S. 330, Penal Code, without framing charge thereon is incorrect.)
3. ('93) 7 C P L R Cr 17 (18), *Empress v. Sheodayal*.
4. ('74) 11 Bom H C R 240 (241), *Reg. v. Chand Nur*. (Charge for murder — Conviction for abetment of it is bad unless the accused is charged specifically with it.)
- (1903) 7 C P L R Cr 17 (18), *Empress v. Sheodayal*. (Charge under S. 302, Penal Code—Conviction under S. 330 not legal.)
- (1900) 13 C P L R Cr 167 (168), *Empress v. Dongria Goali*. (Charge of murder — Conviction for dishonest misappropriation of property possessed by the deceased is not good, if the charge for the offence has not been framed.)
- (1924) AIR 1924 Bom 502 (504, 507) : 49 Bom 84 : 26 Cr. L. J. 1000, *Emperor v. Ranchhod Sursang*. (Conviction of accused under S. 307 read with S. 34 or S. 114 is legal though they were charged only with offences under Ss. 304, 148 and 149, Penal Code.)
- (1924) AIR 1924 Bom 432 (432) : 25 Cr. L. J. 1135, *Emperor v. Raghya Naghya*. (Charge under principal offence—Conviction for abetment cannot stand.)
5. ('25) AIR 1925 Cal 903 (904) : 26 Cr.L.J. 594, *Nayan Ullah v. Emperor*.
6. ('22) AIR 1922 Pat 5 (7) : 23 Cr. L. J. 114, *Balkesar Singh v. Emperor*.

Penal Code, for criminal trespass with intent to commit theft and where he denies the trespass, he cannot be convicted of criminal trespass with intent to commit adultery under S. 456, Penal Code, because, upon the case for prosecution and on the line of defence adopted by the accused, the latter cannot be said to have any knowledge of the charge of which he is convicted and would therefore be prejudiced in his defence.⁷ But where in such a case the accused himself admits trespass but states that it was with the intention of committing adultery and not theft, he cannot be held to be, in any way, prejudiced, inasmuch as in order to sustain a conviction under S. 456, it is not necessary to *specify* any criminal intention. It is sufficient if a guilty intention is proved such as is contemplated in S. 441 of the Penal Code.⁸

Though the section enables a Court to convict a person of a minor offence, when charged with a major offence, there is no provision of law which allows the converse case, *viz.*, the conviction for a major offence on a charge of a minor one.⁹

The powers given by this section are not controlled by the sections of the Code which prescribe the procedure to be followed in trying the offence charged and have nothing to do with the form of the trial nor with the convicting authority.¹⁰ Thus, the section invests a jury empanelled to try an offence triable by a jury to find as an incident that the facts proved amount to a minor offence and return a verdict of guilty or not guilty of such offence,¹¹ though such offence may not be triable by jury but is triable only with assessors.¹² In the same way,

Section 238
Note 1

- (17) AIR 1917 Cal 824 (825) : 44 Cal 358 : 17 Cr.L.J. 424, *Karali Prasad v. Emperor*.
(21) AIR 1921 Pat 217 (218), *Jadav Mahton v. Emperor*. (But if the accused is prejudiced, he must be retried.)
(13) 14 Cr.L.J. 212 (213) : 19 I. C. 308 (Cal), *Sital Chandra v. Emperor*. (Charge under S. 324, Penal Code—Conviction under S. 352—Accused held prejudiced in the circumstances of the case and conviction set aside and retrial ordered.)
[See (40) AIR 1940 Lah 112 (113) : 41 Cr. L. J. 540, *Dhanpat Rai v. Emperor*.
(36) AIR 1936 Pesh 172 (175) : 37 Cr. L. J. 1039, *Bawar Shah v. Emperor*. (Charge of murder and offence under S. 396 — Conviction under S. 304 (2) and S. 379 is not illegal—Accused held not prejudiced in their defence.)]
7. (22) AIR 1922 Pat 5 (7) : 23 Cr.L.J. 114, *Balkesar Singh v. Emperor*.
(14) AIR 1914 Cal 663 (663) : 41 Cal 748 : 15 Cr.L.J. 190, *Mahomed Hossein v. Emperor*.
8. (17) AIR 1917 Cal 824 (825) : 44 Cal 358 : 17 Cr.L.J. 424, *Karali Prasad v. Emperor*. See also S. 223 Note 5.
9. (99) 1 Bom L R 513 (514), *Queen-Empress v. Durgya*. (Under S. 398, Penal Code, on a charge under S. 325, Penal Code.)
(12) 13 Cr.L.J. 429 (430) : 1911 Upp Bur Rul 98 : 14 I. C. 973, *Nga Kaung Nyein v. Emperor*. (Under S. 458 on a charge under S. 392.)
(21) AIR 1921 Low Bur 36 (37) : 11 Low Bur Rul 45, *Nga Po Kyin v. Emperor*. (Under S. 468 on a charge under S. 465.)
(1900-'02) 1 Low Bur Rul 287 (288), *Crown v. Chit Te*.
10. (21) AIR 1921 Bom 59 (60, 61) : 45 Bom 619 : 22 Cr. L.J. 51, *Changouda v. Emperor*.
(26) AIR 1926 Bom 134 (135) : 27 Cr. L. J. 650, *Emperor v. Gulab Chand*.
11. (37) AIR 1937 Pat 662 (664) : 39 Cr. L. J. 156, *Emperor v. Haria Dhobi*. (Offence charged robbery with grievous hurt—Jury can find accused guilty under S. 323 only, though no charge is framed under this section or under S. 325.)
(1865) 3 Suth W R Cr 41 (41), *Queen v. Satoo Sheikh*.
See also S. 299 Note 5.
12. (37) AIR 1937 Pat 662 (664) : 39 Cr. L. J. 156, *Emperor v. Haria Dhobi*.
(02) 26 Mad 243 (246, 247, 248, 249) : 2 Weir 463, *Pattikadan Ummaru v. Emperor*. (Verdict under S. 325, Penal Code, on a charge under Ss. 392, 397).

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Notes 1-2

it empowers a Court trying an accused person for an offence with the aid of assessors to convict him for a minor offence triable by jury; care should, however, be taken to frame a charge for the minor offence, where the facts indicate a reasonable possibility of the minor offence being made out, so that from the beginning the trial may proceed according to the provisions of the Code and the parties concerned may have an opportunity to object to the trial if so advised.¹³ But the section has no application to cases where there is no *conviction* by the jury of the minor offence. Thus, where on a charge under S. 304, Penal Code, the jury returned a verdict of not guilty, but returned a verdict of "guilty but not voluntarily" under S. 326, the verdict amounts to only a verdict of "not guilty" under S. 326 and this section has no application to such a case.¹⁴

2. "Minor offence."—The words "minor offence" are not defined anywhere in the Code and ought to be taken in their ordinary sense and not in any technical sense.¹ In the undermentioned case^{1a} a single Judge of the Bombay High Court observed as follows:

"I do not think the argument relied upon is sound. It seems to me to proceed on the unwarranted assumption that the test by which an offence is deemed in S. 238 (1) to be major or minor is the gravity of the punishment incurred. The sub-section does not refer to the gravity of punishment at all; it merely refers to the number of particulars constituting the offence: if a number of particulars is needed to constitute the offence, then for the purposes of S. 238(1), it may be called the major offence: if a combination of some only of such particulars constitutes a complete offence then that offence is referred to in S. 238 (1) as the minor offence. I do not overlook that S. 238, sub-section (2) speaks of the proof of additional facts reducing an offence to a minor offence, and this does not accord with the view that the minor offence must always consist of fewer particulars than the major offence. But this is only a new form that the situation takes."

It is submitted that the view propounded would make the word "minor" in sub-section (1) superfluous, and is not correct. Further, it

('95) 20 Bom 215 (217, 218), *Queen-Empress v. Devji Govindaji*. (Verdict under S. 304 on a charge under S. 302.)

('01) 25 Bom 680 (689, 693, 694): 3 Bom L R 278 (FB), *King-Emperor v. Parbhu Shankar*. (Verdict under S. 325 on a charge under Ss. 302 and 304.)

('26) AIR 1926 Bom 134 (135): 27 Cr. L. J. 650, *Emperor v. Gulabchand* (Verdict under S. 411 on a charge under S. 412.)

(1865) 2 Suth W R Cr 13 (13), *Queen v. Sakhat Sheikh*. (Verdict under S. 379 on charge under S. 395.)

('28) AIR 1928 Mad 275 (275): 29 Cri L Jour 351, *Arumuga Kone v. Emperor*. (Verdict under S. 325 on a charge under Ss. 434, 392 and 397.)

('14) AIR 1914 Mad 425 (428): 37 Mad 236: 13 Cri L Jour 739, *In re Adabala Muthiyalu*. (Verdict under S. 326 on a charge under S. 397.)

('29) AIR 1929 Nag 295 (296): 31 Cri L Jour 557, *Narayan Singh v. Emperor*. (Verdict under S. 325 on a charge under S. 307.)

('10) 11 Cr. L. J. 630 (630): 8 I. C. 373: 13 Oudh Cas 295, *Shubrat v. Emperor*. (Verdict under Ss. 376 and 109—Attempt on a charge under S. 376.)

('15) AIR 1915 Low Bur 39 (45): 16 Cr. L. J. 676 (682, 683): 8 L B R 274, *S. P. Gosh v. Emperor*. (Verdict under Ss. 392 and 109 on a charge under S. 392.)

See also S. 269 Note 3.

13. ('21) AIR 1921 Bom 59 (60, 61): 45 Bom 619: 22 Cr. L. J. 51, *Changouda v. Emperor*. (Conviction under S. 326 on a charge under S. 302.)

14. ('08) 7 Cr. L. J. 362 (366, 367): 12 C W N 530, *Emperor v. Khudiram Das*.

Note 2

1. ('95) 22 Cal 1006 (1010), *Queen-Empress v. Sita Nath*.

1a. ('36) AIR 1936 Bom 193 (196): 60 Bom 485: 37 Cr. L. J. 753, *Emperor v. Abdul Rahiman*.

is not clear what is meant by the last sentence in the above passage. See the undermentioned cases² for illustrations of major and minor

Section 238
Note 2

2. In the following cases the first is a minor offence, the second offence charged being the major one :

- ('40) AIR 1940 Cal 321 (321) : 41 Cri L Jour 744, *Raja Mca v. Emperor*. (S. 323 and S. 332, Penal Code.)
- ('36) AIR 1936 Bom 193 (197) : 60 Bom 485 : 37 Cr. L. J. 753, *Emperor v. Abdul Rahiman*. (On a charge of cheating in pursuance of a conspiracy, the accused may be found guilty of cheating without a conspiracy—Latter is a minor offence.)
- ('32) AIR 1932 Mad 501 (501) : 33 Cr. L. J. 598, *Kuppusamy Mudali v. Emperor*. (S. 143, Penal Code—S. 147, Penal Code.)
- ('80) 5 Cal 184 (187), *Bhokteram v. Heera Kolita*—(S. 182, Penal Code — S. 211, Penal Code.)
- ('14) AIR 1914 Sind 66 (66, 67) : 8 Sind L R 179 : 16 Cri L Jour 104, *Emperor v. Khubomal*. (Do.)
- ('05) 32 Cal 180 (184) : 2 Cr. L. J. 171, *Emperor v. Sarda Prosad*. (Do.)
- ('24) AIR 1924 Bom 502 (504, 507) : 49 Bom 84 : 26 Cri L Jour 1000, *Emperor v. Ranchhod Sursang*. (S. 307 read with S. 34 or S. 114—S. 307.)
- ('22) AIR 1922 All 114 (114), *Hanuman v. Emperor*. (S. 323, Penal Code—S. 147, Penal Code.)
- ('23) AIR 1923 Lah 326 (327) : 26 Cr. L. J. 598, *Indar Singh v. Emperor*. (S. 323, Penal Code—S. 148, Penal Code.)
- ('31) AIR 1931 Lah 566 (568) : 33 Cri L Jour 315, *Jogindar Singh v. Emperor*. (S. 323, Penal Code—Ss. 302 and 149, Penal Code.)
- ('07) 5 Cr. L. J. 424 (426) : 34 Cal 325, *Dasarath Mandal v. Emperor*. (S. 323, Penal Code—S. 304 or S. 325.)
- ('12) 13 Cr. L. J. 481 (482) : 39 Cal 896 : 15 I. C. 481, *Kunja Bhuniya v. Emperor*. (S. 323, Penal Code—S. 325, Penal Code.)
- ('28) AIR 1928 Mad 275 (275) : 29 Cri L Jour 351, *Arumuga Kone v. Emperor*. (S. 324, Penal Code—Ss. 434, 392, 397.)
- ('34) AIR 1934 Oudh 251 (253) : 35 Cri L Jour 943, *Mohammad Nabi Khan v. Emperor*. (S. 325, Penal Code—S. 304, Penal Code.)
- ('29) AIR 1929 Nag 295 (296) : 31 Cri L Jour 557, *Narayan Singh v. Emperor*. (S. 325, Penal Code—S. 307, Penal Code.)
- ('26) AIR 1926 Cal 695 (696) : 27 Cr. L. J. 926, *Emperor v. G. C. Wilson*. (S. 334, Penal Code—S. 304, Penal Code.)
- ('14) AIR 1914 Mad 425 (428) : 37 Mad 236 : 13 Cri L Jour 739, *In re Adabala Muthiyalu*. (S. 326, Penal Code—S. 397, Penal Code.)
- ('75) 23 Suth W R Cr 61 (62), *Queen v. Lukhinarain*. (S. 335, Penal Code — Ss. 304, 325 and 323, Penal Code.)
- ('26) AIR 1926 Cal 1059 (1060) : 53 Cal 599 : 27 Cri L Jour 1314, *Torap Ali v. Emperor*. (Ss. 341, 352, Penal Code—Ss. 366, 498 and 147, Penal Code.)
- ('84) 7 Mad 454 (456, 457) : 2 Weir 551, *Queen-Empress v. Papadu*. (S. 352, Penal Code—S. 147, Penal Code.)
- ('22) AIR 1922 Mad 110 (111, 112) : 23 Cri L Jour 206, *Muthukanakhu Pillai v. Emperor*. (Do.)
- ('95) 22 Cal 1006 (1008, 1009), *Queen-Empress v. Sitanath Mandal*. (S. 365, Penal Code—Ss. 366, 376, Penal Code.)
- ('93) 17 Bom 369 (372), *Queen-Empress v. Khoda Uma*. (S. 379, Penal Code—S. 395, Penal Code.)
- (1864) 1 Suth W R Cr L 13 (13). (Ss. 143 and 148, Penal Code—S. 302, Penal Code.)
- ('95) 1895 Rat 797 (797), *Queen-Empress v. Bhavjya*. (S. 392, Penal Code—S. 398, Penal Code.)
- ('29) AIR 1929 Sind 147 (148) : 30 Cri L Jour 875, *Haroon v. Emperor*. (S. 403, Penal Code—S. 395, Penal Code.)
- ('98) 21 All 127 (128) : 1898 A W N 205, *Queen-Empress v. Mathura Prasad*. (S. 408, Penal Code—S. 409, Penal Code.)
- ('26) AIR 1926 Bom 134 (135) : 27 Cr. L. J. 650, *Emperor v. Gulabchand Dosoji*. (S. 411, Penal Code—S. 412, Penal Code.)
- ('67) 7 Suth W R Cr 73 (74), *Queen v. Jogeshur Bagdee*. (Do.)
- ('28) AIR 1928 All 139 (140) : 29 Cri L Jour 232, *Har Prasad v. King-Emperor*. (S. 411, Penal Code—S. 413, Penal Code.)
- ('86) 1886 Rat 293 (294), *Queen-Empress v. Balu*. (S. 414, Penal Code — S. 457, Penal Code.)

Section 238
Note 2

offences. As to what are not major and minor offences, see the cases cited below.³

Abetment. — Abetment is not a minor offence having regard to the manner in which sub-section (2A) expressly makes mention of an attempt to commit an offence and is silent as to abetment of an offence.

- (25) AIR 1925 Pat 389 (389) : 26 Cri L Jour 682, *Banamali Kumar v. Emperor*. (S. 426, Penal Code—S. 430, Penal Code.)
- (87) 1887 Pun Re No. 9 Cr, p. 14 (16), *Alla Bakhsh v. Empress*. (S. 447, Penal Code—S. 457, Penal Code.)
- (13) 14 Cr. L. J. 424 (425) : 20 Ind Cas 408 (All), *Rup Deb v. Emperor*. (S. 447, Penal Code—S. 32 of the Forest Act.)
- (17) AIR 1917 Cal 824 (826) : 17 Cr. L. J. 424 (426) : 44 Cal 358, *Karali Prasad v. Emperor*. (S. 456, Penal Code—S. 457, Penal Code.)
- (21) AIR 1921 Pat 217 (218), *Jadab Mahlon v. Emperor* (Do.)
- (28) AIR 1928 Oudh 402 (403) : 3 Luck 680 : 29 Cr. L. J. 893, *Emperor v. Shiva Datta*. (S. 290, Penal Code—S. 278, Penal Code.)
- (25) AIR 1925 Oudh 89 (89) : 25 Cri L Jour 1087, *Munnay Mirza v. Emperor*. (S. 426—S. 452, Penal Code.)
- [See (35) AIR 1935 Pat 129 (130) : 36 Cr. L. J. 829, *Nihora Kahar v. Emperor*. (S. 441—S. 454, Penal Code.)]
- (12) 13 Cri L Jour 750 (751) : 17 I. C. 62 : 6 S L R 116, *Emperor v. Chagan Rajaram*. (S. 320 (8) Penal Code—S. 304, Penal Code.)]
3. (39) AIR 1939 All 665 (667) : 40 Cri L Jour 948, *Thakur Singh v. Emperor*. (S. 300, I. P. C. — S. 385, Penal Code.)
- (38) AIR 1938 Cal 51 (69) : I L R (1938) 1 Cal 290 : 39 Cr. L. J. 161, *Goloke Behari v. Emperor*. ((1) Conspiracy with two different objects alleged — It is not certain that a conspiracy with only one of these objects is a minor offence—(2) where an offence is alleged to constitute the object of a conspiracy as charged, a conspiracy to commit a minor offence need not be a minor offence. (3) An offence alleged to constitute the object of a conspiracy is not necessarily a minor offence to the offence of conspiracy.)
- (24) AIR 1924 Mad 375 (376) : 47 Mad 61 : 25 Cr. L. J. 554, *In re Sreeramulu*. (S. 160, Penal Code—Ss. 147 and 323, Penal Code.)
- (12) 13 Cri L Jour 18 (18) : 5 Sind L R 123 : 13 Ind Cas 206, *Imperator v. Rino*. (S. 202—S. 201.)
- (33) AIR 1933 Cal 294 (295) : 34 Cri L Jour 524 (SB), *Madhusingh v. Emperor*. (S. 302—S. 396, Penal Code.)
- (25) AIR 1925 Cal 903 (904) : 26 Cr. L. J. 594, *Nayan Ullah v. Emperor*. (Ss. 304 and 149, I. P. C.—S. 304, Penal Code.)
- (29) 1929 Mad WN 185 (185), *In re Ponniah Rowther*. (S. 323, I.P.C.—S. 397, I.P.C.)
- (94) 7 C P L R Cr 17 (19), *Empress v. Sheodayal*. (S. 330, I.P.C.—S. 302, I.P.C.)
- (26) AIR 1926 Cal 895 (896) : 27 Cr. L. J. 926, *Emperor v. G. C. Wilson*. (S. 334 — S. 352, Penal Code.)
- (94) 2 Weir 302 (302), *In re Savari Ayce*. (S. 363, I. P. C.—S. 302, I. P. C.)
- (06) 3 Cr. L. J. 240 (242) : 8 B.L.R. 120, *Emperor v. Sakharam*. (S. 366—S. 376.)
- (30) AIR 1930 Lah 544 (544) : 32 Cr. L. J. 301, *Mangloo v. Emperor*. (S. 369—S. 392.)
- (85) 1885 Rat 211 (212), *Queen-Empress v. Dala Tala*. (Ss. 380, 456—S. 395.)
- (12) 13 Cr. L. J. 597 (597) : 16 I.C. 165 (Cal), *Amanullah v. Emperor*. (S. 384—S. 379.)
- (24) AIR 1924 Lah 109 (110) : 4 Lah 373 : 25 Cr. L. J. 385, *Wallu v. Emperor*. (S. 397, I. P. C.—S. 302, I. P. C.)
- (1900) 13 C P L R Cr 167 (168), *Empress v. Dongria Gaoli*. (S. 404—S. 302.)
- (26) AIR 1926 Lah 691 (691) : 7 Lah 561 : 27 Cr. L. J. 1004, *Ghanus v. Emperor*. (S. 412—S. 302.)
- (26) AIR 1926 Lah 132 (134) : 26 Cr. L. J. 1361, *Achpal v. Emperor*. (S. 412, I. P. C.—S. 396, Penal Code.)
- (30) AIR 1930 Rang 158 (159) : 8 Rang 13 : 31 Cr. L. J. 799, *U Ka Doe v. Emperor*. (S. 427, Penal Code—S. 409, I. P. C.)
- (31) AIR 1931 Cal 414 (414) : 59 Cal 8 : 32 Cr. L. J. 892, *Mehar Sheikh v. Emperor*. (Ss. 448, 323, I. P. C.—S. 395, Penal Code.)
- (22) AIR 1922 Bom 97 (98) : 46 Bom 657 : 23 Cr. L. J. 259, *Matubhai M. Shah v. Emperor*. (S. 96, Bombay District Municipal Act—S. 97 read with S. 155 of the same Act.)
- (34) AIR 1934 All 872 (872, 873) : 36 Cri L Jour 766, *Dipchand v. Emperor*. (S. 353, Penal Code—S. 323, I. P. C.—Opinion tentatively expressed.)

It, therefore, cannot come under this section.⁴ See also s. 236 Note 8.

**Section 238
Note 2**

Rioting and unlawful assembly.—A charge of rioting under s. 147 or of being a member of an unlawful assembly under s. 149, does not by itself or by being charged together with a charge of hurt, include as a minor offence an act of violence by an individual accused so as to authorise under this section a conviction under s. 323⁵ or s. 325⁶ or s. 326⁷ or for assault under s. 352⁸ or for criminal trespass.⁹ The High Court of Madras has, however, held that a conviction on the substantive charge only, on a charge coupled with s. 149, Penal Code, is not necessarily bad, the legality of the conviction depending on whether the accused has or has not been materially prejudiced by the form of the charge.¹⁰ The Nagpur Judicial Commissioner's Court has also held that a person can be convicted of the offence of causing hurt although the charge is formulated as for the commission of an offence punishable under s. 307, Penal Code, read with s. 149.¹¹ The Lahore High

4. ('35) AIR 1935 Pesh 67 (68) : 36 Cr.L.J. 1438, *Suraj Bhan v. Emperor*. (The power of an Appellate Court to change a conviction of a substantive offence into a conviction of an abetment is not conveyed by S. 238 and is not based on the principle that an abetment is a minor offence forming part of the major or substantive offence, but is conveyed by Ss. 236 and 237 and depends in every case upon the facts proved.)

('27) AIR 1927 Cal 63 (64) : 28 Cri L Jour 2, *Hulas Chand v. Emperor*.

('27) AIR 1927 All 35 (36) : 49 All 120 : 27 Cr. L. J. 1118, *Mahabir v. Emperor*.

('24) AIR 1924 Bom 432 (432) : 25 Cr. L. J. 1135, *Emperor v. Raghya Nagya*.

[But see ('40) AIR 1940 Lah 112 (113) : 41 Cr. L. J. 540, *Dhanpat Rai v. Emperor*. (There may no doubt be cases in which sub-s. (2) is applicable to abetment but the sub-section cannot apply where the facts that would constitute abetment would be quite different from those which would constitute the principal offence.)

('35) AIR 1935 All 935 (937) : 37 Cri L Jour 247, *Samuel John v. Emperor*. (Charge of rape—Conviction of offence of abetment of rape is legal—Case falls within S. 238 (2)—No charge of abetment necessary.)]

See also S. 423 Note 31.

5. ('36) 19 N L J 18 (21), *Gangabishan v. Emperor*. (Where the charge framed against the accused is one under S. 147, he cannot be convicted under S. 323, without a specific charge in that behalf.)

('07) 5 Cr. L. J. 424 (426) : 34 Cal 325, *Dasrath Mandal v. Emperor*.

('18) AIR 1918 Mad 496 (496, 497) : 18 Cr. L. J. 860, *In re Mongalu Aorodhono Hathu*. (Napier, J., *contra*.)

('11) 12 Cri L Jour 82 (82) : 9 I C 455 (Cal), *Kanta Neya v. Emperor*.

[See ('03) 30 Cal 288 (290), *Yakub Ali v. Lethu Thakur*. (Charge for rioting and conviction for same offence—Appellate Court convicting accused under Ss. 448 and 323—Held conviction bad.)]

6. ('07) 5 Cr. L. J. 427 (432) : 34 Cal 698 : 11 C W N 666, *Jatindra v. Emperor*.

('12) 13 Cri L Jour 502 (503) : 15 Ind Cas 646 (Cal), *Reazuddi v. Emperor*.

('20) AIR 1920 Pat 216 (218, 219) : 21 Cr. L. J. 439, *Pertab Rai v. Emperor*.

('80) 5 Cal 871 (873), *Government of Bengal v. Mahaddi*.

7. ('15) AIR 1915 Cal 292 (294) : 41 Cal 662 : 15 Cr. L. J. 155, *Emperor v. Madan*.

('01) 6 Cal W N 98 (101), *Ram Sarup Rai v. Emperor*.

8. ('29) AIR 1929 Pat 712 (713) : 9 Pat 642 : 30 Cr. L. J. 891, *Mallu Gope v. Emperor*.

9. ('75) 23 Suth W R Cr 59 (59), *Queen v. Salamat Ali*.

('14) AIR 1914 Cal 631 (632) : 15 Cri L Jour 188, *Ariff Munshi v. Emperor*.

('18) AIR 1918 Mad 496 (496) : 18 Cr. L. J. 860, *In re Mongalu Aorodhono Hathu*.

10. ('25) AIR 1925 Mad 1 (6) : 47 Mad 746 : 25 Cr.L.J. 1297 (FB), *In re Theethu-malai Gounder*. (Ss. 149 and 326—Conviction under S. 326.)

('22) AIR 1922 Mad 110 (111) : 23 Cr. L. J. 206, *Muthukanakku Pillai v. Emperor*. (S. 147—Conviction under S. 352.)

11. ('36) 19 N L J 18 (21), *Gangabishan v. Emperor*. (The fact that the charge was framed under S. 307 read with S. 149 will not preclude the Court from con-

Section 238
Notes 2-4

Court was also inclined to a similar view in the case cited below.¹²

3. Attempt — Sub-section (2A). — Under Act XVIII of 1923, sub-s.(2) of S. 237 has been transferred to this section and re-enacted as sub-s.(2A), as more appropriate here than under S. 237.

Under this sub-section, when a person is charged with an offence, he may be convicted of an attempt to commit such offence although he is not separately charged with the attempt.¹

4. When minor offence requires complaint—Sub-section (3). — This section must be read subject to Ss. 198 and 199 which require the complaint of the aggrieved person, before the Court can take cognizance of offences referred to therein.

A person charged with one offence cannot, therefore, be convicted of a minor offence if the latter requires a complaint by a particular person mentioned in Ss. 198 and 199 of the Code, when there is no such complaint. Thus, a prosecution for adultery under S. 497 or for enticing away a married woman under S. 498 requires a complaint by the husband and therefore, a person charged with rape or abduction cannot be convicted either under S. 497¹ or under S. 498² in the absence of a complaint by the husband. Similarly, no conviction can be made under S. 498 when the complaint was specifically made under S. 497 only.³ So also, no conviction can be made under S. 500 for defamation in the absence of a complaint by the person aggrieved, where the complaint was under Ss. 353 and 504⁴ or under S. 501, Penal Code.⁵ It has

victing the accused of the offence punishable under S. 307 or any other minor offence constituted by the same facts.)

12. ('25) AIR 1925 Lah 286 (286) : 26 Cr L J 820, *Rohela v. Emperor*. (13 Cr.L.J. 502 and 5 Cri L Jour 427, doubted—Actual decision proceeding on evidence.)

Note 3

1. ('36) AIR 1936 Oudh 44 (47) : 37 Cr.L.J. 12, *Sheo Narain Singh v. Emperor*. ('75) 12 Bom H C R 1 (7), *Reg. v. Ramajirav Jivbajirav*.
- ('99) 26 Cal 863 (867) : 3 C W N 653, *Lala Ojha v. Queen-Empress*.
- ('24) AIR 1924 Cal 18 (43) : 25 Cri L Jour 1313, *Bilinghurst v. Blackburn*.
- ('32) AIR 1932 Cal 723(725, 726):60 Cal 179:34 Cr.L.J. 177, *Hanuman v. Emperor*.
- ('25) AIR 1925 Mad 480(482):48 Mad 774 : 26 Cr. L. J. 755, *In re Doraisamy Iyer*.
- ('10) 11 Cr. L. J. 630 (630) : 8 I. C. 373: 13 Oudh Gas 295, *Shubrati v. Emperor*.
- ('17) AIR 1917 Pat 699(699):4 Pat L J 391:17 Cr.L.J. 272 (272), *Sadho v. Emperor*.
- ('34) AIR 1934 Pat 561(563):13 Pat 729:36 Cr.L.J. 17, *Bhikhari Singh v. Emperor*.
- ('14) AIR 1914 Cal 473 (475) : 41 Cal 537 : 15 Cr. L. J. 4, *Kalicharan Mukerjee v. Emperor*. (A case under the Bengal Excise Act.)
- ('14) AIR 1914 Cal 649 (653) : 41 Cal 545 : 15 Cr. L Jour 35, *Booth v. Emperor*.

Note 4

1. ('82) 5 All 233 (235) : 1883 A W N 1, *Empress of India v. Kallu*.
- ('02) 29 Cal 415 (416) : 6 C W N 677, *Chemon Garo v. Emperor*.
- ('03) 30 Cal 910 (915, 916) : 8 C W N 17 (FB), *Tara Prosad Laha v. Emperor*.
- ('13) 14 Cr.L.J. 284 (286):19 I. C. 716:1912 UBR 155, *Nga Po Thaw v. Emperor*.
2. ('40) AIR 1940 All 201 (201) : 41 Cri L Jour 499, *Haider Ali v. Emperor*.
- ('07) 5 Cr. L. J. 164 (167):31 Bom 218:9 Bom LR 148, *Emperor v. Isap Mohammad*.
- ('04) 27 Mad 61 (62) : 2 Weir 236, *Bangaru Asari v. Emperor*.
- ('12) 13 Cri L Jour 287 (288) : 14 I. C. 671 (Bom), *Emperor v. Iman Khan*.
- ('02) 30 Cal 910 (915) : 8 C W N 17 (FB), *Tara Prosad Laha v. Emperor*. (In view of this decision, 20 Cal 483, wherein the deposition of the husband was held to be a complaint, cannot be taken as laying down good law.)
3. ('73) 1873 Pun Re No. 18 Cr 20 (21), *Sher Singh v. Crown*.
4. ('87) 10 All 39 (42, 43) : 1887 A W N 264, *Queen-Empress v. Deokinandan*.
5. ('89) 1889 Pun Re No. 18 Cr, p. 67 (69), *Emperor v. Uma Shanker*.

been held in the undermentioned case⁶ that the Court cannot convict an accused person of a minor offence for the taking cognizance of which a complaint under S. 195 is necessary, without such complaint. See also Note 6 to S. 190, Note 6 to S. 196A, Note 6 to S. 198 and Note 6 to section 199.

Section 238
Notes 4-5

5. Powers of appellate Courts and High Court. — An appellate Court may exercise the powers under this section and may alter a conviction for a major offence into one for a minor offence.¹ It is competent for the High Court, even in a reference under S. 307 of the Code, to convict the accused of any offence of which the jury could have convicted him.² See also Note 31 to S. 423 and Note 16 to section 307.

What persons
may be charged
jointly.

239.* The following persons may be charged and tried together, namely :

Section 239

* Code of 1898, original S. 239.

What persons may be charged jointly. 239. When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence, and another of abetment of, or attempt to commit such offence, they may be charged and tried together or separately, as the Court thinks fit; and the provisions contained in the former part of this Chapter shall apply to all such charges.

Illustrations

(a) *A* and *B* are accused of the same murder. *A* and *B* may be charged and tried together for the murder.

(b) *A* and *B* are accused of a robbery, in the course of which *A* commits a murder with which *B* has nothing to do. *A* and *B* may be tried together on a charge, charging both of them with the robbery, and *A* alone with the murder.

(‘23) AIR 1923 Oudh 4(6):26 Oudh Cas 44:23 Cr.L.J. 641, *Gaya Barhai v. Emperor*.
6. (‘25) AIR 1925 All 129(130):47 All 114:26 Cr.L.J. 446, *Narain Singh v. Emperor*.

Note 5

1. (‘39) AIR 1939 All 710 (712) : 41 Cr. L. J. 111, *Nand Kishore v. Emperor*. (The powers conferred upon the appellate Court by S. 423 are limited by the provisions of Ss. 236, 237 and 238.)
- (‘38) AIR 1938 Rang 281 (282) : 1938 R L R 139 : 39 Cr. L. J. 761, *Maung Ba v. The King*. (Conviction under S. 353, I. P. C., for assaulting public servant — Appellate Court finding that person assaulted was not public servant — Conviction can be altered to one under S. 352, I. P. C.)
- (‘36) AIR 1936 Oudh 44 (47) : 37 Cr. L. J. 12, *Sheo Narain Singh v. Emperor*. (Do.)
- (‘22) AIR 1922 All 143 (143) : 23 Cri L Jour 198, *Hanuman v. Emperor*. (From conviction under S. 147, I. P. C., to one under S. 323, I. P. C.)
- (‘24) AIR 1924 All 662 (663) : 25 Cr. L. J. 900, *Bandhu v. Emperor*. (Conviction under S. 302, I. P. C., altered into one under S. 307, I. P. C.)
- (‘91) 14 All 25 (29) : 1891 A W N 170, *Queen-Empress v. Hughes*. (Conviction under S. 366, I. P. C., altered into one under S. 361, I. P. C.)
- (‘86) 1886 Rat 293 (294), *Queen-Empress v. Balu*. (Conviction under S. 457, I.P.C., altered into one under S. 414, I. P. C.)
- (‘27) AIR 1927 Oudh 296 (296) : 2 Luck 503 : 28 Cr. L. J. 673, *Jawad Hussain v. Emperor*. (Conviction under S. 353, I. P. C., to one under S. 189, I. P. C.)
2. (‘77) 3 Cal 189 (192), *Empress v. Harai Mirzha*. (Conviction under S. 143 on charge under Ss. 326 and 149, I. P. C.)
- (‘08) 8 Cri L Jour 143 (144) : 10 Bom L R 632, *Emperor v. Chandrakrishna*. (Conviction under S. 379, I. P. C., on charge under S. 395, I. P. C.)
- (‘95) 22 Cal 1006 (1009), *Queen-Empress v. Sitantath Mondal*. (Conviction under S. 365, I. P. C., on a charge under Ss. 366 and 376, I. P. C.)
- (‘14) AIR 1914 Mad 425 (428) : 37 Mad 236 : 13 Cri L Jour 730, *In re Adabala Muthiyalu*. (Conviction under S. 326, I. P. C., on a charge under S. 397, I. P. C.)

Section 239

- (a) persons accused of the same offence committed in the course of the same transaction;
- (b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;
- (c) persons accused of more than one offence of the same kind, within the meaning of section 234 committed by them jointly within the period of twelve months;
- (d) persons accused of different offences committed in the course of the same transaction;
- (e) persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;
- (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and
- (g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges.

This section was substituted for original S. 239, by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

(c) *A* and *B* are both charged with a theft, and *B* is charged with two other thefts committed by him in the course of the same transaction. *A* and *B* may be both tried together on a charge, charging both with the one theft, and *B* alone with the two other thefts.

Codes of 1882 and 1872—S. 239 and S. 458, respectively, were same as that of 1898 Code. Code of 1861—Nil.

Synopsis

Section 239
Note 1

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| <ol style="list-style-type: none"> 1. Scope and applicability of the section. 2. Whether Ss. 234, 235, 236 and 239 are mutually exclusive. 2a. Clauses of S. 239, if mutually exclusive. 3. "May be tried together." 4. "Accused of the same offence" — Clause (a). 5. Abetment and attempt—Cl. (b). 5a. Offences of the same kind — Clause (c). 6. "Same transaction" — Clauses (a) and (d). 7. Acts done in pursuance of conspiracy. 8. Acts in prosecution of a common object. 9. Several persons giving false evidence in the same case. | <ol style="list-style-type: none"> 10. Printing and publishing seditious matter. 11. Defamation by different persons. 12. Continuing offence. 13. Kidnapping and abduction. 14. Keeping gaming house and using it. 15. Charge need not refer to transaction being same. 16. Clause (e). 17. Clause (f). 18. Clause (g). 19. Simultaneous trials. 20. Criminal breach of trust and receiving stolen property. 21. Effect of illegal trial. See Note 10 under S. 537 and Note 5 under S. 233. 22. Objection as to joinder. |
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Other Topics (miscellaneous)

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| <p>Accused need not act together from start to finish. See Note 6.</p> <p>Bribery. See Note 8.</p> <p>Contempts of Courts by different persons. See Note 6.</p> <p>Dacoities. See Notes 3 and 6.</p> <p>Different accused tried for different offences in same transaction. See Notes 6 and 7.</p> <p>Different objects. See Notes 7 and 8.</p> <p>Distinct and separate offences. See Note 6.</p> <p>False information. See Note 6.</p> <p>Forgery. See Notes 5 and 6.</p> <p>Forgery and perjury. See Note 9.</p> <p>Kidnapping with other offences. See Note 6.</p> | <p>Legislative amendments. See Notes 16 and 17.</p> <p>Local and special Acts. See Note 6.</p> <p>Murder with other offences. See Note 4.</p> <p>Murder and S. 201, I.P.C. See Note 6.</p> <p>Not in same transaction. See Note 19.</p> <p>Offence under Ss. 401 and 413, I. P. C. See Notes 6 and 16.</p> <p>Receivers of stolen property — Several and distinct. See Note 17.</p> <p>Receiving stolen property. See Notes 6, 17 and 16.</p> <p>Security proceedings. See Notes 1 and 6.</p> <p>Sections 411 and 458, I.P.C. See Note 6.</p> |
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1. Scope and applicability of the section. — This is the last exception to the rule enacted in S. 233 that every offence must be tried separately. It is only under this section that the joint trial of several accused persons is permissible.¹

The section applies only to *trials* and not to enquiries. It is not illegal, therefore, to jointly commit several accused persons for offences not falling within the provisions of this section,² though it should, as a matter of prudence, be avoided.³

Section 239 — Note 1

1. ('38) AIR 1938 P G 130 (133) : 39 Cr.L.J. 452 : 65 I A 158 : 32 S L R 476 : I L R (1938) 2 Cal 295 (PC), *Babulal v. Emperor*.
- ('36) AIR 1936 Sind 47 (48) : 37 Cr. L. J. 716, *Dholimal v. Emperor*.
- ('08) 8 Cr. L. J. 11 (13) : 4 Nag L R 71, *Emperor v. Balwant Singh*.
2. ('97) 1897 Rat 915 (915), *Queen-Empress v. Raghu Hari*.
- ('02) 26 Mad 592 (594) : 2 Weir 262, *In the matter of Govindu*.
- ('19) AIR 1919 Mad 45 (47) : 20 Cr.L.J. 379 : 42 Mad 561, *In re Nalluri Chenchiah*.
[But see ('97) 1897 Rat 925 (926), *Queen-Empress v. Daulata Dhondi*. (Where it was quashed on account of prejudice caused.)]
- See also S. 207 Note 5 and S. 233 Note 1.
3. ('69) 11 Suth W R Cr 16 (16), *Queen v. Kureem*.

Section 239
Notes 1-2

Inquiries under chapter VIII stand on a somewhat different footing. Under S. 117 of the Code, such inquiries have to be made as nearly as may be practicable in the manner prescribed for conducting trials. Section 239 will apply to such inquiries and a joint inquiry of several persons proceeded against under chapter VIII would be illegal if the case does not come within the terms of this section.^{3a}

The section is subject to the rules as to jurisdiction laid down in chapter XV and consequently a Magistrate cannot try persons for offences committed outside his jurisdiction, though otherwise the case may fall within the provisions of this section.⁴

The provisions of the section refer to persons *accused*, that is to say, charged. The provisions are, therefore, intended to deal with the position as it exists at the time of charge, and not with the *result* of the trial. Hence, a joint trial of several persons under this section is not vitiated merely by the fact that at the end of the trial the facts found happen to be different from those on the footing of which the charges were originally framed.⁵

2. Whether Sections 234, 235, 236 and 239 are mutually exclusive.

Section 239 and Ss. 234 to 236. — It has been generally held that the provisions of this section and Ss. 234 to 236 may be applied cumulatively to a case, so that where two or more persons can be jointly tried under this section for certain offences, it is permissible to add as against one of such persons charges which could be added under Ss. 234 to 236 if he were being tried alone.

Illustrations

1. *A* is accused of theft and *B* is accused of having received the stolen property. *A* and *B* can be tried together under clause (e) of this section. *A* is also accused of having committed another offence which forms part of the same transaction as the theft. There is no objection to the joinder of a charge for this other offence against *A* in the same trial. (Section 235).¹

2. *A* and *B* commit a certain offence and as such are liable to be tried together under clause (a) of this section. There is no objection to joining against

(81) 1881 Pun Re No. 22 Cr, p. 47 (49), *Queen v. Haibat*.

3a. ('04) 1 Cr. L. J. 58 (60, 61) : 8 C W N 180, *Pran Krishna Saha v. Emperor*.

('91) 1891 Rat 585 (586), *Queen-Empress v. Gaiba*.

('91) 1891 Rat 556 (557), *Queen-Empress v. Bapu*.

('07) 5 Cr. L. J. 197 (199) : 5 C. L. J. 231 : 11 C W N 472, *Kamal Narain v. Emperor*.

4. ('29) AIR 1929 Mad 839 (840) : 30 Cr. L. J. 1161 : 52 Mad 991, *Sachidanandan v. Gopala Aiyengar*.

See also S. 177 Note 3.

5. ('40) AIR 1940 Nag 249 (250) : 41 Cr. L. J. 734, *Bhagolal v. Emperor*.

('40) AIR 1940 Nag 340 (343) : 1940 N L J 459 (462), *Parmanand v. Emperor*.

('40) AIR 1940 Pat 499 (501) : 41 Cr. L. Jour 452, *Nathu Chaudhury v. Emperor*.

('38) AIR 1938 P. C. 130 (133) : 39 Cr. L. J. 452 : 65 I A 158 : 32 S L R 476 : I L R (1938) 2 Cal 295 (PC), *Babulal v. Emperor*.

('38) AIR 1938 Sind 171 (173) : I L R (1939) Kar 204 : 39 Cr. L. J. 890, *Emperor v. Balumal*. (The trial is bad not because the accused has been wrongly convicted but because he has been wrongly charged.)

('36) 37 Cr. L. J. 728 (729) : 62 Cal 946 (950) : 162 I. C. 943, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Raghu Lal*.

('22) AIR 1922 Cal 107 (113) : 49 Cal 575 : 23 Cr. L. J. 657, *Abdul Salim v. Emperor*.

Note 2

1. ('36) AIR 1936 All 337 (342, 343) : 37 Cr. L. J. 794 : 58 All 695, *Emperor v. Mathuri*.

A under S. 234 another charge for a different offence of the same kind committed by him in the course of the same year.²

3. Where *A* and *B* are tried together under this section, there is no objection to an additional charge being framed against one of them under S. 236 (in the cumulative or in the alternative) and tried at the same trial.³

But a contrary view has been held in the undermentioned cases.⁴
See also Note 5a.

But the provisions of this section are not controlled by Ss. 234 to 236.⁵ In other words, the circumstances under which a joint trial is permissible under this section cannot be restricted by considerations based on Ss. 234 to 236.

Sections 235 and 236. — Sections 235 and 236 may apply to the same case. Thus, where several charges have been rightly joined against the same accused under S. 235, there can be no objection to one of such charges being in the alternative under S. 236.⁶

2. ('34) AIR 1934 All 811 (812, 813) : 35 Cr. L. J. 1224, *Niranjan v. Emperor*. [See however ('25) AIR 1925 Rang 198 (199) : 26 Cr. L. J. 319, *Ah Kit v. Emperor*. (*A* accused of three offences under S. 234—*B* accused of abetment of two of these offences—There is misjoinder of charges—If *B* had been charged with abetment of all the three offences, the joint trial would have been legal.)]
3. ('36) 62 Cal 946 (950) : 37 Cri L Jour 728 : 162 Ind Cas 943, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Raghu Lal*. (In case of joint trial under this section, Court can convict a person of an offence with which he was not expressly charged, by applying the provisions of S. 237.)
- ('29) AIR 1929 Cal 298 (293) : 56 Cal 1106 : 30 Cri L Jour 1015, *Tota Meah v. Emperor*. (In the case of a joint trial of accused persons an alternative charge against one of them is legal.)
- ('10) 11 Cri L Jour 244 (245) : 5 Ind Cas 769 (Cal), *Janki v. Emperor*. (Fifteen accused charged under S. 395, Penal Code, and three of them also charged under Ss. 411 and 412—No misjoinder.)
- ('08) 8 Cri L Jour 191 (193) : 1 S. L. R. 73, *Emperor v. Ghulam*. (Accused 1 to 3 charged under S. 302 — Accused 3 further charged in alternative under S. 201—Trial not illegal.)
4. ('29) AIR 1929 All 202 (203) : 30 Cri L Jour 687 : 51 All 544, *Janeshar Das v. Emperor*. (The words at the end of the section are more by way of limitation than extension.)
- ('25) AIR 1925 Lah 537 (538) : 26 Cri L Jour 1097, *Chhajju v. Emperor*. (Where the accused was charged under Ss. 413 and 401, Penal Code, with other persons who were charged under S. 401 the accused cannot be tried with the others as cl. (d) does not apply as the offences are not in the same transaction and cl. (e) does not apply as offence under S. 401 does not include theft as one of its elements.)
- ('24) AIR 1924 All 316 (317) : 46 All 54 : 25 Cr. L. J. 466, *Puttoo Lal v. Emperor*. (Ss. 234 and 239 cannot be combined.)
5. ('38) AIR 1938 P C 130 (133) : 39 Cr. L. J. 452 : 65 I A 158 : 32 S. L. R. 476 : ILR (1938) 2 Cal 295 (PC), *Babulal v. Emperor*. (Clause (d) is expressly an exception to S. 233 and enables a plurality of offences to be dealt with in the same trial—But it does not import either expressly or by implication the limitation set out in S. 234 according to which not more than three offences of the same kind committed within the space of twelve months can be tried together or the limitation contained in S. 235 (1) under which more offences than one committed by the same person can only be tried together if they are in one series of acts so connected together as to form the same transaction, in which case there is no specific limit of number.)
- ('38) AIR 1938 Bom 481 (483) : ILR (1939) Bom 42 : 40 Cri L Jour 118, *Emperor v. Karamalli Gulamalli*. (S. 239 not controlled by S. 234.)
- ('26) AIR 1926 Oudh 161 (165) : 26 Cr. L. J. 1602, *Bishambhar Nath v. Emperor*. (Section 234 does not control S. 239, cl. (d).)
6. ('32) AIR 1932 All 25 (26) : 33 Cr. L. J. 122 : 54 All 337, *Kashi Nath v. Emperor*.
- ('31) AIR 1931 All 49 (50) : 53 All 233 : 32 Cr. L. J. 1007, *Shib Charan v. Emperor*. [See however ('34) AIR 1934 Mad 673 (674) : 35 Cri L Jour 1503 : 58 Mad 178, *In re Srirangachariar*. (Held that Ss. 235 (1) and 236 are mutually exclusive and if a case is governed by one of them it cannot be governed by the other —

Section 239 Note 2

Section 239
Note 2

Section 234 and Ss. 235 and 236. — A, B and C are offences of the same kind, as for example, several acts of breach of trust. D is an offence which forms part of the same transaction as A, as for example, falsification of accounts to conceal the offence A. Similarly, E and F are parts of the same transaction as B and C respectively. Under S. 234, A, B and C could be tried in one trial as being offences of the same kind. Under S. 235, A and D could be tried together at one trial as forming parts of the same transaction. So also, B and E and C and F. But can A, B, C, D, E and F be all tried together in the same trial by virtue of Ss. 234 and 235 read together? The general view is that they cannot.⁷ Where, however, several acts of misappropriation are lumped together in a single charge under S. 222 (2), it has been held that the acts of falsification of accounts committed for the purpose of concealing the former offence will constitute parts of the same transaction as such offence and can be tried at the same trial.⁸

Where a person is charged with several offences under S. 234, there is no objection to his being tried on additional charges framed under S. 235 (2) or S. 236.⁹

But the observation really only means in this case that S. 236 does not apply to distinct offences while S. 235 does not apply to offences which are not distinct offences—The decision does not negative the proposition that if one of the offences involved in a transaction is doubtful a charge can be framed in respect of it under S. 236.]]

7. ('37) AIR 1937 Sind 1 (2) : 30 Sind L R 391 : 38 Cri L Jour 324, *Emperor v. Muhammad Ismail*.

('35) AIR 1935 Nag 178 (180) : 31 N. L. R. 337 : 36 Cr. L. J. 1216, *Ramsheshan v. Emperor*.

('33) AIR 1933 Nag 327 (328) : 34 Cri L Jour 673, *Rameshwar v. Emperor*.

('32) AIR 1932 Sind 64 (65) : 26 S.L.R. 191 : 33 Cr.L.J. 650, *Emperor v. Attursing*.

('31) AIR 1931 Oudh 86 (87) : 32 Cr.L.J. 540:6 Luck 441, *Dubri Misir v. Emperor*.

('27) AIR 1927 Nag 22 (23) : 27 Cr. L. J. 1099, *Emperor v. Dhaneshram*.

('26) AIR 1926 All 261 (261, 262) : 27 Cr. L. J. 143 : 48 All 236, *Faujdar Mahto v. Emperor*. (Two acts of kidnapping and two acts of cheating — Each act of kidnapping and each act of cheating forming a separate transaction.)

('26) AIR 1926 Bom 110 (111) : 27 Cr. L. J. 305 : 49 Bom 892, *Emperor v. Manant*.

('22) AIR 1922 All 214 (214) : 23 Cr.L.J. 258 : 44 All 540, *Shuja-ud-din v. Emperor*.

('15) AIR 1915 Cal 296 (296) : 41 Cal 722 : 15 Cr.L.J.153, *Raman Behary v. Emperor*.

('13) 14 Cr. L. J. 428 (429) : 40 Cal 318 : 20 I. C. 412, *Emperor v. Jiban Krishna*.

('10) 11 Cr. L. J. 285 (286) : 32 All 219 : 5 I. C. 896, *Shco Saran v. Emperor*.

('08) 8 Cr. L. J. 4 (5) : 30 All 351 : 1908 A W N 152 : 5 All L J 400, *Emperor v. Mata Prasad*.

('07) 5 Cr. L. J. 341 (342) : 30 Mad 328 : 17 M L J 141 : 2 M L T 177, *Kasi Visvanathan v. Emperor*.

('05) 2 Cr. L. J. 34 (36) : 1905 Pun Re No. 2 Cr : 1905 Pun L R No.44, *Bhagwati Dial v. King-Emperor*. (Where the accused was charged, tried and convicted in the same trial for (a) forgery of three cheques (b) cheating in respect of each cheque and (c) falsifying account books to conceal the forgery of each cheque—Held that the trial was illegal.)

[See also ('03-04) 2 Low Bur Rul 10 (11, 14), *Nga Lun Mg. v. King-Emperor*.

('92-96) 1 Upp Bur Rul 33 (33), *Nga Po Chun v. Queen-Empress*.]

[But see ('34) AIR 1934 Pat 232 (234) : 35 Cr.L. J. 876: 13 Pat 170, *Ram Kishoon Pershad v. Emperor*. (Ss. 234 and 235 can be treated as cumulative.)]

8. ('35) AIR 1935 Cal 312 (315) : 62 Cal 808, *Kashiram v. Hurdut Rai Gopal Rai*.

('31) AIR 1931 Pat 349 (350) : 10 Pat 463 : 32 Cr. L. J. 1026, *Michel John v. Emperor*.

('20) AIR 1920 Pat 775 (776) : 60 I. C. 422: 22 Cr. L. J. 230, *Gajadhar v. Emperor*.

[See also ('29) AIR 1929 Lah 843 (844) : 30 Cr. L. J. 958, *Mangal Sen v. Emperor*.]

[But see ('35) AIR 1935 Nag 178 (181) : 31 N. L. R. 337 : 36 Cr. L. J. 1216, *Ram Sheshan v. Emperor*. (Charge under S. 222 (2) does not make the different acts of criminal misappropriation or criminal breach of trust the same transaction.)]

9. ('09) 9 Cr.L.J. 226 (244):33 Bom 221: 10 BomLR 973, *In re Bal Gangadhar Tilak*.

2a. Clauses of Section 239, if mutually exclusive.—A and B commit an offence and are liable to be tried jointly under clause (a) of this section. A and C commit different offences in the course of the same transaction. They can be jointly tried for such offences under clause (d). But A, B and C cannot be jointly tried at the same trial by combining clauses (a) and (d). In this sense the clauses of this section are mutually exclusive. But they are not mutually exclusive in the sense that more than one clause may apply at the same time to a case. Thus, where A is accused of an offence and B of the abetment thereof, the case comes under clause (b), but if the offence and the abetment form parts of the same transaction, the case will also fall under clause (d).¹

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Notes 2a–3.

3. “May be tried together.”—Before the amendment of 1923, the section contained the words “as it thinks fit,” and it was held that it was in the discretion of the Court to adopt, in each case, whichever course it regarded as most conducive to the ends of justice.¹ The omission of the said words in the present section does not, however, make any difference and the words “may be tried together” show that it is still in the discretion of the Court to adopt whichever course it thinks best.² The manner in which this discretion should be exercised depends on the facts of each case.³ Wherever the applicability of the section is doubtful, it is far better that it should not be applied than that it should.⁴ Nor should joinder of charges be resorted to when

Note 2a

1. ('38) AIR 1938 Sind 164 (167) : 39 Cr. L. J. 881 : ILR (1939) Kar 64, *Chuharmal v. Emperor*.

Note 3

1. ('24) AIR 1924 All 233 (234) : 27 Cri L Jour 193, *Abdullah v. Emperor*.
('23) AIR 1923 All 91 (107) : 45 All 226 : 25 Cr. L. J. 497, *Emperor v. Har Prasad*.
('23) 76 I. C. 966 (967) : 25 Cr. L. J. 294 (Cal) (FB), *Emperor v. Charu Chunder*.
('15) AIR 1915 Cal 688 (689) : 16 Cri L Jour 3 (4), *Superintendent and Remembrancer of Legal Affairs, Bengal v. Monmohan Roy*. (S. 239 is merely an enabling section.)
('90) 13 Mad 426 (427) : 1 Weir 290, *Queen-Empress v. Sami*.
('20) AIR 1920 Nag 255 (256) : 16 Nag L R 9 : 21 Cr. L. J. 769, *Govinda Sambhuji v. Emperor*. (Overruled in A I R 1937 Nag 17 (F B) on another point.)
2. ('38) AIR 1938 Bom 481 (483) : 40 Cr. L. J. 118 : ILR (1939) Bom 42, *Emperor v. Karamalli Gulamalli*.
('37) AIR 1937 Cal 22 (22) : 38 Cri L Jour 750, *Bhola Sardar v. Emperor*.
('36) AIR 1936 Cal 753 (759) : 38 Cr. L. J. 545, *Rash Behari v. Emperor*. (Even where Ss. 235 and 239 justify a joinder, it should not be resorted to if there is a risk of embarrassment to the defence — A I R 1925 Cal 341, relied on.)
('36) AIR 1936 Sind 47 (48) : 37 Cr. L. J. 716, *Dholiomal Karoomal v. Emperor*. (Trying Magistrate should exercise the discretion judicially—High Court is competent to interfere if discretion is exercised arbitrarily.)
3. ('36) AIR 1936 Cal 753 (759) : 38 Cr. L. J. 545, *Rash Behari v. Emperor*. (The High Court, on a consideration of the circumstances of the case, has power to hold that the accused should not have been tried jointly and can set aside the conviction and sentences without directing a retrial, should it think fit.)
('15) AIR 1915 Cal 743 (743) : 16 Cri L Jour 348, *Dwarka Singh v. Emperor*.
4. ('36) AIR 1936 Rang 474 (475) : 38 Cri L Jour 183, *Nga Po Htwe v. Emperor*. (Separate trials should be ordered—Acquitting one of the accused is wrong.)
('27) AIR 1927 Mad 177 (178) : 50 Mad 735 : 27 Cr. L. J. 1381, *Samiullah v. Emperor*. [See also ('38) AIR 1938 Sind 164 (165) : 39 Cr. L. J. 881 : I L R (1939) Kar 64, *Chuhar Mal v. Emperor*. (Offence in S. 239 includes minor and alternative offences under Ss. 235 and 236 — 33 Bom 221, followed.)]

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Notes 3-4

there is a risk of embarrassing the defence by such joinder.⁵ Where four dacoities were committed at four different places within two years and the accused, fourteen in number, were alleged to have taken part in one or more of them, it was held that it would have been more proper to try them separately for the dacoities in which they took part rather than try them jointly for an offence under S. 400, Penal Code.⁶

An exercise of discretion under the section, even if improper, will not be interfered with, unless it has occasioned a failure of justice.⁷

4. "Accused of the same offence" — Clause (a). — The word "offence" has been defined in S. 4 (1) (o) as meaning "any act or omission made punishable by any law for the time being in force." The words "same offence" would, therefore, signify one and the same physical act of crime and not different acts constituting crimes called by the same name or punishable under the same section.¹ Thus, several persons being together in possession of the same stolen property² or several persons together subscribing their names to a false written statement³ commit the same offence. See also the undermentioned cases.⁴ Where five or more persons actuated by a single motive made several attacks against

5. ('39) AIR 1939 Cal 321 (322) : 40 Cri L Jour 649, *Nanda Ghosh v. Emperor*. (Girl confined in accused's house and ravished at night by him—Later, girl taken out along with other accused and all taking her ornaments — Whole incident not a single offence—Occurrence though single transaction, separate charges must be framed for separate offences.)

('37) AIR 1937 Cal 22 (22) : 38 Cri L Jour 750, *Bhola Sardar v. Emperor*.

('36) AIR 1936 Cal 753 (759) : 38 Cri L Jour 545, *Rash Behari v. Emperor*.

('25) AIR 1925 Cal 341 (345) : 52 Cal 253 : 26 Cri L Jour 487, *Alimuddin Naskar v. Emperor*. (Ss. 235 and 239 are merely enabling sections.)

6. ('11) 12 Cr. L. J. 260 (261) : 10 I. C. 833 (Lah), *Ghulam Mustafa v. Emperor*.

7. ('36) AIR 1936 Sind 47 (49) : 37 Cr. L. J. 716, *Dholiomal Karoomal v. Emperor*. (Discretion exercised judicially—High Court will not interfere.)

('22) AIR 1922 Cal 107 (112) : 49 Cal 573 : 23 Cr. L. J. 657, *Abdul Salim v. Emperor*.

Note 4

1. ('39) 43 C W N 196 (197), *Durgamoni Dassi v. Emperor*. (There is no provision of law under which persons charged under S. 368, Penal Code, for separate acts of concealment of the same girl can be tried together.)

('39) AIR 1939 Rang 390 (391) : 41 Cr. L. J. 153, *Nga Sar Kee v. The King*. ("The same offence" means an offence arising out of the same act or series of acts.)

('16) AIR 1916 Nag 73 (75) : 18 Cr. L. J. 339 (342) : 13 NLR 35, *Gunwant v. Emperor*.

2. ('34) AIR 1934 All 811 (812) : 35 Cri L Jour 1224, *Niranjan v. Emperor*.

3. ('84) 1884 All W N 52 (53), *Empress v. Mcharban Singh*.

4. ('38) AIR 1938 Mad 615 (616) : 39 Cr. L. J. 816, *In re Veera Reddi*. (Proceedings under S. 110, Cr. P. C.—Four charges of attempt to commit rape framed against A, B and C for which they were jointly responsible—Joint trial of all is desirable — Addition of other charges of a trivial nature not material where accused not prejudiced.)

('19) AIR 1919 Cal 367 (368) : 46 Cal 712 : 20 Cr. L. J. 122, *Kailash Chandra v. Emperor*. (Two persons together cheating another.)

('17) AIR 1917 Mad 524 (525) : 17 Cr. L. J. 30 (31), *Appadurai Iyer v. Emperor*. (Three persons jointly entrusted with money and committing criminal breach of trust in respect thereof in collusion.)

('24) AIR 1924 All 233 (234) : 27 Cr. L. J. 193, *Abdullah v. Emperor*. (Wilful murder by members of unlawful assembly in prosecution of common object of assembly.)

('33) AIR 1933 Rang 271 (272) : 34 Cr. L. J. 1185, *U Po Yone v. Emperor*. (Complaint of dacoity with murder—All can be tried together.)

('35) AIR 1935 Rang 299 (300) : 36 Cri L Jour 1380, *Nga Tha Aye v. Emperor*. (Offences of murder and grievous hurt committed by accused in course of the same transaction and in furtherance of the common intention—All can be tried in one trial.)

certain persons, it was held that they committed a *single riot* and not a number of separate riots.⁵

The term 'offence' under this section has been held to include minor and alternative offences.⁶ See also Note 2.

In the undermentioned case,⁷ when A made a false charge against X of stealing goats, and next day B made a false charge against X of stealing the same goats, it was held that A and B committed the *same* offence. It is submitted that this is not correct. A and B cannot be said to have committed the *same act of crime* though they may be said to have committed similar acts forming part of the same transaction. The same observations will apply to the case cited below.⁸

Where a single offence has been committed and the allegation of the prosecution is that *either* A *or* B committed the crime, it cannot be said that A and B committed the same offence. They cannot, therefore, be tried together at one trial under this section.⁹ So also where A is charged with committing murder by stabbing X while B is charged in the alternative with abetting A in stabbing X and with stabbing X himself, A and B should be tried separately.¹⁰

5. Abetment and attempt — Clause (b). — Under clause (b), persons accused of an offence and persons accused of abetment¹ or of an attempt to commit such offence,² may be jointly tried. The trial of offenders and their accomplices would therefore come under this clause;³

5. ('25) AIR 1925 Oudh 65 (66) : 25 Cri L Jour 1169, *Prag v. Emperor*.

6. ('38) AIR 1938 Sind 164 (165) : 39 Cr.L.J. 881:ILR (1939) Kar 64, *Chuharmal v. Emperor*.

7. ('03) 27 Mad 127 (129) : 1 Weir 192, *Mallappa Reddi v. Emperor*.

8. ('17) AIR 1917 Pat 522 (523) : 18 Cr.L.J. 687, *Emperor v. Lahu Gope*. (Where five tenants who acted in concert are charged with the offence of mischief committed in respect of different plots in their respective possessions, they can be said to have committed only one offence.)

9. ('39) AIR 1939 Rang 390 (391) : 41 Cr. L. J. 153, *Nga Sar Kec v. The King*.

('13) 14 Cr. L. J. 563 (564):7 Low Bur Rul 68:21 I. C. 163, *Azim-Ud-din v. Emperor*.

('34) AIR 1934 Rang 193 (194) : 35 Cri L Jour 1312, *Intaj Khan v. Emperor*.

('23) AIR 1923 Rang 67 (68) : 24 Cri L Jour 750, *Kyon Dwe v. Emperor*.

[See ('99) 3 Cal W N cclxxvii (cclxxviii), *Baldeo Lal v. Empress*.]

10. ('37) AIR 1937 Rang 512 (512) : 39 Cr. L. J. 198, *Nga Mya Sein v. The King*.

Note 5

1. ('12) 13 Cri L Jour 255 (256) : 14 Ind Cas 607 (Cal), *Priya Nath v. Emperor*. (Licensed vendor punishable by implication under S. 56, Bengal Excise Act, may be tried together with his agent who commits the offence, for the case is of abetment by implication.)

('15) AIR 1915 Cal 743 (743) : 16 Cr. L. J. 348 (348), *Dwarka Singh v. Emperor*.

('84) 1884 All W N 52 (53), *Empress v. Mehrban Singh*.

('82) 1882 Pun Re No. 32 Cr, p. 39 (40), *Thakur Singh v. Empress*.

('24) AIR 1924 Mad 384 (385, 386) : 25 Cr. L. J. 792, *Arumuga v. Emperor*.

('30) AIR 1930 Mad 102 (103) : 31 Cr. L. J. 457, *Subbayya Pillai v. Sesha Iyer*.

('14) AIR 1914 Oudh 275 (278) : 17 Oudh Cas 276 : 15 Cr.L.J. 643, *Abbas v. Emperor*.

('04) 1 Cr. L. J. 714 (716) : 8 C W N 717 : 31 Cal 1007, *Prossunno v. Emperor*.

[But see ('20) AIR 1920 All 358 (358) : 42 All 24 : 20 Cr. L. J. 634, *Kadhe Mal v. Emperor*. (User of forged document—Abetment of forgery.)]

2. ('20) AIR 1920 Lah 364 (365) : 1919 Pun Re No. 30 Cr : 21 Cri L Jour 306, *Akbar v. Emperor*. (Offence of rape and an attempt to commit rape can be tried jointly when committed in the same transaction.)

3. ('26) AIR 1926 Mad 638 (640) : 50 Mad 274 : 27 Cr. L. J. 394, *In re Sogiamuthu Padayachi*.

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so also would a trial of two persons, one for attempt to commit an offence and another for abetment of the offence.⁴

See also the undermentioned case.⁵

5a. Offences of the same kind — Clause (c). — A and B are accused of jointly committing two distinct offences of the same kind but not forming part of the same transaction. Can they be tried together? Under the section as it stood before the amendments of 1923 there was no provision corresponding to clause (c) of the present section and there was a divergence of opinion on the question. According to one set of cases,¹ the words at the end of the section "and the provisions contained in the former part of this chapter shall apply to all such charges" did not refer to Ss. 234 to 238 but only to Ss. 221 to 232, that therefore the word "person" in S. 234 could not be read as including "persons," that neither S. 234 nor S. 239 consequently applied to the case and that therefore they could not be tried together. According to another class of cases,² the words quoted above include also Ss. 234 to 238, that in this view the word "person" in S. 234 must be read as including "persons" and that the joint trial was not bad. Clause (c) now makes it clear that such a trial is permissible.³ For the clause to apply, the offences charged must be of the same kind⁴ and they must have been committed by the accused persons jointly.⁵

Offences under section 41 (h) and (j) of the Factories Act, 1911, are offences of the same kind within the meaning of this section.⁶

6. "Same transaction" — Clauses (a) and (d). — Where A commits offence X, B commits offence Y and C commits offence Z, and X, Y and Z form parts of the same transaction, A, B and C can, at one trial, be tried for the offences of X, Y and Z respectively.¹ There

4. ('11) 12 Cr. L. J. 106 (107) : 9 I C 618 : 38 Cal 453, *Kali Das v. Emperor*.

5. ('38) AIR 1938 Sind 164 (167) : 39 Cr. L. J. 881 : I L R (1939) Kar 64, *Chuharmal v. Emperor*. (Joint trial of persons accused of offence and those accused of abetment may be justified not only under cl. (b) but also under other clauses, as for example, where both the offences constitute the same transaction.)

Note 5a

1. ('17) AIR 1917 Lah 78(79) : 1917 Pun Re No. 17 Cr. : 18 Cr. L. J. 282, *Tulsi v. Emperor*.

('16) AIR 1916 Cal 124 (124) : 17 Cr. L. J. 224, *Rahiman Bibi v. Mubarak Mondal*.

('08) 8 Cri L Jour 11 (14) : 4 N L R 71, *Emperor v. Balwant Singh*.

('14) AIR 1914 L B 263 (264) : 16 Cri L Jour 44 : 7 L B R 272, *Po Mya v. Emperor*.

('18) AIR 1918 Nag 139 (140) : 20 Cr. L. J. 7, *Shyad Lal v. Emperor*.

('06) 3 Cri L Jour 126 (128) : 33 Cal 292 : 10 C W N 32, *Budhai Sheikh v. Tarah Sheikh*. (A and B looting on two occasions.)

('11) 12 Cr. L. J. 266 (267) : 10 Ind Cas 331 (Lah), *Mahbub Ali v. Emperor*.

('08) 8 Cri L Jour 191 (198) : 1 Sind L R 73, *Emperor v. Gulam*.

('21) AIR 1921 All 246 (247) : 22 Cri L Jour 657, *Ram Prasad v. Emperor*.

2. ('19) AIR 1919 Mad 487(493) : 20 Cr. L. J. 354, *Kumaramuthu Pillai v. Emperor*.

('18) AIR 1918 Pat 168 (169) : 19 Cr. L. J. 673 : 3 Pat L J 124, *Kailash Pd. v. Emperor*.

('17) AIR 1917 All 404 (404) : 38 All 457 : 18 Cr. L. J. 47, *Emperor v. Bechan Pande*.

('23) AIR 1923 Mad 181 (181) : 23 Cri L Jour 719, *In re Kovaganti*.

3. ('39) 1939 Mad W N 1253 (1253), *In re Kandan*.

4. ('38) AIR 1938 Sind 164 (165) : 39 Cr. L. J. 881 : I L R (1939) Kar 64, *Chuharmal v. Emperor*.

('13) 14 Cri L Jour 116 (117) : 18 I. C. 676 (All), *Shankar v. Emperor*.

5. ('11) 12 Cri L Jour 208 (209) : 10 I. C. 63 (Lah), *Karm Singh v. Emperor*.

6. ('32) AIR 1932 Pat 188 (189) : 33 Cri L Jour 274, *Agarwala v. Emperor*.

Note 6

1. ('40) AIR 1940 Nag 249(250) : 1940 NLJ 309 : 41 Cr. L. J. 734, *Bhagolal v. Emperor*.

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is no limit to the number of offences which can be charged when they come under clause (d) of this section² but they should all form part of one and the same transaction.³ The words "same transaction" have the same meaning as they have in s. 235.⁴ As seen in Note 2 to that section, the test whether the several offences are parts of the same transaction is to see whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action.⁵ Where there is such continuity of purpose or design and continuity of action, the different acts may be regarded as

- (138) AIR 1938 All 91 (95) : 39 Cr.L.J. 364, *Mirza Zahid Beg v. Emperor*. (Where the offence of causing death and the offence of destroying evidence relating thereto are closely connected in point of time, there is no misjoinder of charges, if a joint trial of the several accused takes place in respect of them.)
- (135) AIR 1935 Rang 299 (300) : 36 Cr.L.J. 1318, *Nga Tha Aye v. Emperor*. (Murder and grievous hurt in course of same transaction.)
- (132) AIR 1932 All 25 (26) : 54 All 337 : 33 Cr. L. J. 122, *Kashinath v. Emperor*. (Several charges rightly joined against same accused under S. 235(1)—There is no objection to another accused being joined under S. 239 as regards one of those charges.)
- (119) AIR 1919 Cal 367(368):46 Cal 712:20 Cr.L.J. 122, *Kailash Chandra v. Emperor*.
- (108) 8 Cri L Jour 75 (80) (Lah), *Ishar Das v. Emperor*.
- (108) 8 Cr.L.J. 191 (195, 200) : 1 Sind L R 73, *Emperor v. Ghulam*. (Ss. 201 and 302.)
- (105) 2 Cri L Jour 582 (584) : 7 Bom L R 637, *In re Shriniwas Krishna*.
- (127) AIR 1927 Cal 149 (152) : 53 Cal 929 : 27 Cr.L.J. 1268, *Ashutosh v. Watson*. (S. 72, Provincial Insolvency Act and S. 102, Presidency Towns Insolvency Act.)
- (129) AIR 1929 Mad 450 (450) : 52 Mad 532 : 30 Cr.L.J. 983, *Sriramulu Naidu v. Emperor*. (Where a person commits forgery and another abets forgery and uses the forged document as genuine, the offences are parts of the same transaction.)
- (105) 2 Cal L J 47n (47n), *Kunja Behary v. Emperor*. (Ss. 363 and 372, Penal Code.)
- (129) AIR 1929 Cal 160 (161) : 30 Cr. L. J. 619, *Kali Kumar v. Nawab Ali*. (All the offences committed by persons, whether substantive offences or abetment of those offences, can be tried together provided they were committed by the persons in the course of the same transaction.)
- (128) AIR 1928 All 20 (21) : 50 All 412 : 28 Cri L Jour 1001, *Darab v. Emperor*. (Some persons are charged with offences punishable under Ss. 3 and 4, Gambling Act, and others are charged under S. 4 only—Their joint trial is legal.)
- (110) 11 Cr.L.J. 30 (33, 35) : 4 Ind Cas 700 (Mad), *In re Loganatha Iyer*. (Persons associated from the first in the series of acts which form the same transaction.)
- (106) 4 Cr. L. J. 178 (179) : 1906 P L R No. 113, p. 364, *Chhail Bihari v. Emperor*. (C, who held a licence for sale of opium, allowed B, who did not hold license, to sell opium—The accused can be jointly tried and convicted of an offence under S. 9, Opium Act.)
- [See also (131) 1931 Mad W N 397 (399), *Govindaraja Mudaliar v. Emperor*. (Ss. 5 and 6 and R. 27C, Motor Vehicles Act and S. 337, Penal Code.)]
2. (138) AIR 1938 P C 130 (133) : 39 Cr.L.J. 452 : 65 I A 158 : 32 S L R 476 : I L R (1938) 2 Cal 295 (PC), *Babulal v. Emperor*.
3. (138) AIR 1938 Sind 164 (167) : 39 Cr.L.J. 881 : I L R (1939) Kar 64, *Chuharmal v. Emperor*.
4. (131) AIR 1931 Pat 52 (53) : 32 Cri L Jour 478, *Ganesh Prosad v. Emperor*.
5. (140) AIR 1940 Nag 249 (250):41 Cr.L.J. 734, *Bhagolelal v. Emperor*. (Association and community of purpose among the accused.)
- (140) AIR 1940 Pat 499 (501):187 I.C. 361(363):41 Cr.L.J. 452, *Nathu v. Emperor*.
- (138) AIR 1938 Nag 283 (285):40 Cr.L.J. 197:ILR(1939)Nag 686, *Nana v. Emperor*.
- (137) AIR 1937 Lah 793 (794):39 Cr.L.J. 141, *Khazan v. Emperor*. (One of the accused illegally possessing revolver while preparing for dacoity—Accused can be jointly charged and tried for offences under S. 399, Penal Code, and S. 19(f), Arms Act.)
- (136) AIR 1936 Pat 20 (21) : 37 Cri L Jour 240 : 15 Pat 138, *Ajablal v. Emperor*. (Person escaping from lawful custody with rescuer's help—Intention of all is to secure release—Various acts bringing about escape form part of same transaction.)
- (105) 2 Cr.L.J. 578(581) : 30 Bom 49:7 Bom L R 633, *Emperor v. Datto Hanmant*.
- (127) AIR 1927 Sind 39(45):21 Sind L R 107:27 Cr. L. J. 1233, *Emperor v. Lukman*.
- (120) AIR 1920 Pat 230 (231, 232):5 PatLJ 11:21 Cr.L.J. 161, *Gobinda v. Emperor*.

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a transaction.⁶ Where there is no identity or community of purpose and no concert but the accused persons separately commit offences, whether of the same kind or not, they cannot be regarded as parts of the same transaction and a joint trial is bad.⁷ As has been seen in the

- (1933) AIR 1933 Nag 136 (140) : 29 Nag L R 251 : 34 Cri L Jour 505, *Mrs. Rego v. Emperor*. (Murder, the fabrication of evidence to suggest burglary and false information given by one of them are so connected together as to form one transaction.)
- (1908) 8 Cri L Jour 191 (195) : 1 S L R 73, *Emperor v. Ghulam*.
- (1905) 2 Cri L Jour 480 (497) : 29 Bom 449 : 7 Bom L R 527, *Emperor v. Jethalal*.
- (1910) 5 I. C. 847 (849) : 33 Mad 502 : 11 Cri L Jour 258, *Choragudi v. Emperor*.
6. (1939) AIR 1939 Nag 263 (264) : ILR (1939) Nag 644 : 41 Cr.L.J. 27, *Provincial Government, C. P. & Berar v. Dinanath*. (Prosecution alleging unity of criminal behaviour actuated by common intention on the part of all accused to extort confession—All accused are triable jointly—Necessity of a joint trial is strengthened if there is the additional element of proximity in time as well.)
- (1938) AIR 1938 Oudh 216 (216) : 39 Cr.L.J. 853, *Wali Jan v. Emperor*. (Quarrel between three accused on one side and one G on other side—G beaten, and while going to thana for reporting, her buffalo forcibly taken by three accused and another to cattle pound—*Held*, incidents formed part of the same transaction —Joint trial by joining charges under S. 323, Penal Code, and S. 22, Cattle Trespass Act, in one trial *held* not illegal.)
- (1936) AIR 1936 Nag 250 (251) : ILR (1937) Nag 165 : 38 Cri L Jour 482, *Chhotey Miyan v. Emperor*. (Offence under S. 34, C. P. Excise Act—Bottling of liquor in order that the liquor should be kept and sold in pursuance of the unlawful designs of the accused — There is such continuity of action as is required by S. 239 — That bottling of liquor was done some time previous to the selling of it is immaterial.)
- (1933) AIR 1933 Nag 136 (140):34 Cr.L.J. 505:29 NLR 251, *Mrs. Rego v. Emperor*.
- (1918) AIR 1918 Bom 117 (121) : 43 Bom 147 : 20 Cr.L.J. 71, *Emperor v. Madhav Laxman*. (Kulkarni and Patil of village conspiring and cheating certain persons on same day by asking them to pay in excess of what was legally due as assessment—Joint trial not illegal as offences form part of same transaction.)
- (1917) AIR 1917 Lah 78 (79, 80) : 18 Cr. L. J. 282 (283, 284) : 1917 Pun Re No 17 Cr, *Tulsi v. Emperor*. (Sections 467, 472 and 420.)
- (1919) AIR 1919 Mad 487 (493):20 Cr.L.J. 351, *Kumaramuthu Pillai v. Emperor*. (Sections 348 and 380.)
- [See (1940) AIR 1940 Nag 340(343):1940 N L J 459(462), *Parmanand v. Emperor*. (Joinder of charges under Ss. 302 and 331 with charges under S. 330 *held* justified.)
- (1939) AIR 1939 Cal 321 (322) : 40 Cr.L.J. 619, *Nanda Ghose v. Emperor*, (Where a girl is kidnapped by A and later on A along with others take away her ornaments, although the whole occurrence might be regarded as one single transaction, separate charges should be framed for the separate offences that went to make up the transaction.)]
7. (1940) 44 C W N 315 (316), *Asmat v. Emperor*. (A joint trial of a person charged with theft under S. 379, Penal Code, with others charged under S. 147, Penal Code, with having rescued him, is illegal—The theft and the subsequent rescue cannot be said to be acts committed in the course of the same transaction.)
- (1940) 1940 M W N 97 (99), *Pateyya v. Emperor*. (Sudden clash between rival communities in village — Joint trial for hurt, mischief, house-breaking and dacoity of several persons—*Held*, all the events that took place on that particular day in the village could not be said to be parts of the same transaction — Joint trial not proper.)
- (1940) AIR 1940 Pat 499 (501) : 187 I. C. 361 (363) : 41 Cr. L. J. 452, *Nathu Chaudhury v. Emperor*. (Servants of same master doing different acts at different places and on different occasions, not necessarily same transaction — Mere existence of common purpose in the various acts does not necessarily make them parts of the same transaction.)
- (1940) AIR 1940 Rang 113 (113) : 41 Cr. L. J. 790, *S. Pillay v. Shaik Thumbay*. (Person charged under S. 486, Penal Code, charged and tried jointly with person charged under S. 485, Penal Code, in absence of evidence connecting goods in possession of former with counterfeit die in possession of latter.)
- (1938) AIR 1938 Cal 769 (770) : 40 Cr. L. J. 280, *Ali Hyder v. Emperor*. (It is doubtful if an offence under S. 376, Penal Code, committed by five persons before the end of September 1936 can be held to be part of the same transaction as an offence under S. 377 committed by three of them between the end of December 1936 and the end of June 1937.)

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- ('38) AIR 1938 Mad 743 (744, 745): 39 Cr.L.J. 861, *Emperor v. Krishnan*. (Trial for violating R. 30 (a), Madras Motor Vehicles Rules framed under S. 16, Motor Vehicles Act — Several offences committed on different dates by several owners and drivers—Joint trial is objectionable.)
- ('37) AIR 1937 Cal 22 (22): 38 Cr. L. J. 750, *Bhola Sardar v. Emperor*. (A, B, C and D abducting a woman and raping her in a field — Woman then taken to E's house and raped there by him — Then woman made over to F who raped her — Joint trial of all is illegal as acts committed by A, B, C and D on the one hand, and E and F on the other were not parts of same transaction.)
- ('37) AIR 1937 Nag 188 (189): 38 Cr.L.J. 542: I L R (1939) Nag 297, *Ghasiram Tularam v. Emperor*. (Selling opium without licence and importing foreign opium into British India.)
- ('36) AIR 1936 Pat 248 (248): 37 Cr.L.J. 513, *Ganauri Mia v. Emperor*. (Trespass and riot — Person found in possession of another's shop after riot — No finding as to whether person is put in possession by rioters or riot was in furtherance of an intention to put the trespasser in possession — Joint trial of person accused for trespass with those accused of rioting is not proper.)
- ('33) AIR 1933 Pat 91 (92): 11 Pat 779: 34 Cr. L. J. 215, *Ganesh Parshad v. Emperor*. (Two petitioners tried for the misappropriation of various items of money which were independent transactions carried out by them independently of one another.)
- ('20) AIR 1920 Cal 927 (928): 22 Cr.L.J. 333: *Gopal Kahar v. Emperor*. (Information to police given by two persons separately on different dates.)
- ('18) AIR 1918 Cal 471 (471): 18 Cr. L. J. 833 (833), *Emperor v. Fazal Sheikh*. (Two persons executed one kabuliyat and two others executed another kabuliat on the same day.)
- ('23) AIR 1923 Rang 132 (132): 4 Upp Bur Rul 127: 25 Cr.L.J. 319, *King-Emperor v. Nga Sein*. (Disobedience of a lawful order under S. 19, Burma Village Act.)
- ('33) AIR 1933 Nag 368 (369): 34 Cr.L.J. 1175, *Emperor v. Amolak*. (Illicit grazing of cattle — Thirteen accused — No prior consultation or community of purpose proved.)
- ('84) 1 Weir 707 (707), *In re Raya*. (Labourers charged for individual breaches of their contracts.)
- ('08) 8 Cr. L. J. 243 (248): 1903 Pun Re No. 12 Cr, *Mangal Singh v. Emperor*.
- ('12) 13 Cr. L. J. 240 (240): 14 I. C. 432 (Mad), *Public Prosecutor v. Irusan*. (Joint trial of several persons for separate and distinct offences under S. 162B, Local Boards Act, is illegal.)
- ('26) AIR 1926 Lah 248 (249): 7 Lah 168: 27 Cr. L. J. 465, *Aisha v. Emperor*. (Disobedience of an order under the Municipal Act.)
- ('83) 1883 All W N 25 (25), *Empress v. Debdiel*. (Contempt of Court by several persons.)
- ('27) AIR 1927 Mad 177 (177): 50 Mad 735: 27 Cr. L. J. 1381, *In re Samiullah Sahib*. (Theft by several persons of fish from waters.)
- ('14) AIR 1914 Lah 42 (44): 1913 Pun Re No. 20 Cr: 15 Cr. L. J. 11, *Emperor v. Nanakchand*. (Joint trial of sixty-eight persons individually charged with using short weights.)
- ('22) AIR 1922 All 428 (429): 23 Cri L Jour 596, *Fateh Chand v. Emperor*.
- ('23) AIR 1923 Cal 11 (13): 50 Cal 159: 24 Cr.L.J. 206, *Asutosh Das v. Purnachandra*. (No evidence of conspiracy between two opposite parties as to the charge of publication of the defamatory matter—The two cannot be charged together.)
- ('26) AIR 1926 Cal 320 (321): 27 Cri L Jour 263, *Keramat Mandal v. Emperor*. (Offence under S. 376, Penal Code, by two accused at one place—The woman taken to another place by one of the accused where he alone committed rape—Joint charge of rape at different places against both is improper.)
- ('14) AIR 1914 Lah 575 (576): 1914 Pun Re No. 21 Cr: 16 Cr. L. J. 136, *Emperor v. Chuni*. (Case under S. 110, Cr. P. C.)
- ('10) 11 Cri L Jour 293 (294): 6 Ind Cas 242 (Mad), *Musalappa v. Emperor*. (S. 21 (d), Madras Forest Act, and S. 147, Penal Code.)
- ('03) 29 Cal 385 (386, 387): 6 C W N 468, *Gobind Koeri v. Emperor*. (S. 128, Railways Act and S. 225, Penal Code.)
- ('18) AIR 1918 Lah 148 (149): 1917 Pun Re No. 44 Cr: 19 Cri L Jour 100, *Jai Singh v. Emperor*. (S. 395, Penal Code and Arms Act.)
- ('33) AIR 1933 Sind 352 (353): 35 Cri L Jour 153, *Pirano Lalho v. Emperor*. (Joint trial of person charged under Ss. 215 and 411, Penal Code, with another under S. 411, there being no connexion between the two, is illegal.)
- ('07) 12 Cal W N xv (xvi), *Jajnaram v. Emperor*. (Ss. 224, 342, 225 and 147.)

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- (1905) 2 Cr. L. J. 393 (394) : 1 C L J 475, *Emperor v. Esua Sheikh*. (Distinct and separate offences committed by separate sets of persons at different times.)
- (1914) AIR 1914 Low Bur 263 (264) : 16 Cr. L. J. 44 (45) : 7 Low Bur Rul 272, *Po Mya v. Emperor*.
- (1915) AIR 1915 Mad 534 (535) : 15 Cr. L. J. 695 (695), *In re Anantha Padiyara*. (Illegal trespass and on being ejected collecting unlawful assembly for forcing entry are distinct offences.)
- (1909) 10 Cr. L. J. 452 (453) : 4 I. C. 1 (Cal), *Laskari v. Emperor*. (There was no continuity in the idea or method of the rioters.)
- (1906) 4 Cri L Jour 479 (480) : 3 Low Bur Rul 214, *Emperor v. Madhub Chandra*. (S. 188, Penal Code, read with S. 3 of the Epidemic Diseases Act, and S. 419, Penal Code.)
- (1925) AIR 1925 Cal 413 (414) : 26 Cr. L. J. 467, *Surendra Lal v. Emperor*. (Joint trial of one charged under S. 201 and another under S. 304, Penal Code, was held illegal.)
- (1908) 4 Nag L R 71 (73, 74) : 8 Cri L Jour 11, *Emperor v. Balwantsing*.
- (1934) AIR 1934 Pesh 112 (113, 114) : 35 Cri L Jour 1410, *Faiz Alam v. Emperor*. (Accused charged under S. 211, Penal Code, tried along with other persons charged with attempting to bribe doctor—Joint trial held not legal.)
- (1930) AIR 1930 Rang 114 (116, 117) : 7 Rang 821 : 31 Cri L Jour 387, *Maung Ba Chit v. Emperor*. (Ss. 120B, 379 and 413, Penal Code.)
- (1934) AIR 1934 Lah 630 (631) : 36 Cr. L. J. 676, *Dhan Singh v. Emperor*. (S. 174 and S. 406.)
- (1918) AIR 1918 Nag 139 (140) : 20 Cr. L. J. 7, *Shyad Lal v. Emperor*.
- (1932) AIR 1932 Lah 486 (488) : 33 Cr. L. J. 584, *Arjan Das v. Emperor*. (Ss. 401 and 413.)
- (1906) 33 Cal 292 (294) : 10 C W N 32 : 3 Cr. L. J. 126, *Budhai Sheikh v. Emperor*.
- (1906) 3 Cri L Jour 76 (76, 77) : 1905 Pun Re No. 51 Cr, *Jagga v. Emperor*. (Ss. 411 and 458, Penal Code.)
- (1905) 2 Cri L Jour 30 (31) (Lah), *Gurditta v. Emperor*. (Ss. 411 and 457.)
- (1993) 1893 Pun Re No. 13 Cr, p. 61 (63), *Chanda v. Empress*. (Ss. 363 and 368, Penal Code.)
- (1930) AIR 1930 Lah 896 (896) : 32 Cr. L. J. 139, *Mangha Ram v. Emperor*. (Two persons abducting girl—Third person not taking part in abduction—Cheating third person by false representation as to caste of girl—Transactions cannot be said to be same.)
- (1882) 1882 All W N 215 (215), *Empress v. Daya Ram*. (Ss. 457 and 411.)
- (1917) AIR 1917 Lah 191 (192) : 18 Cri L Jour 112 (112), *Muhammad v. Emperor*. (Ss. 411 and 457.)
- (1924) AIR 1924 All 316 (317) : 46 All 54 : 25 Cr. L. J. 466, *Puttoo Lal v. Emperor*. (Ss. 323 and 342.)
- (1883) 1883 All W N 188 (188), *Empress v. Harnam*. (Ss. 193 and 471, Penal Code.)
- (1883) 1883 All W N 158 (158), *Empress v. Jurawan*. (Ss. 411 and 457, Penal Code.)
- (1882) 1882 All W N 178 (178), *Empress v. Lekha*. (Ss. 395 and 401, Penal Code.)
- (1930) AIR 1930 Pat 159 (160) : 32 Cri L Jour 9, *Raghu Dusadh v. Emperor*.
- (1905) 1905 Pun Re No. 38 Cr, p. 77 (78) : 1905 P L R No. 115, *Sahibsing v. Emperor*.
- (1905) 29 Bom 449 (453) : 7 Bom L R 527 : 2 Cr. L. J. 480, *Emperor v. Jethalal*.
- (1906) 4 Cri L Jour 285 (286) : 1907 P L R No. 117 : 1906 Pun Re No. 10 Cr, *Nawab Singh v. Emperor*. (Ss. 302 and 201, Penal Code.)
- (1916) AIR 1916 Mad 571 (571, 572) : 16 Cri L Jour 298 (299), *In re Mekalakati Subbadu*. (Offences in different villages on different nights.)
- (1925) AIR 1925 Lah 537 (538) : 26 Cr. L. J. 1097, *Chhajju v. Emperor*. (Ss. 401 and 413.)
- (1926) AIR 1926 Lah 132 (133) : 26 Cri L Jour 1361, *Achpal v. Emperor*. (A person cannot be tried upon a charge under S. 412, jointly with others who are being tried for the offence of dacoity under S. 396.)
- (1903) 1903 Pun Re No. 17 Cr, p. 44 (47) : 1903 P L R No. 149, *Singhara v. King-Emperor*. (Ss. 368 and 419, Penal Code.)
- (1902) 2 Weir 304 (304), *In re Ponaganti Musalayya*.
- (1882) 2 Weir 303 (303) : 5 Mad 20, *Puli Sanki Reddi v. Queen*.
- (1920) AIR 1920 Cal 927 (928) : 22 Cri L Jour 333, *Gopal Kahar v. Emperor*. (Two persons giving separate false information on different dates.)
- (1883) 2 Weir 303 (303), *In re Porasu Nayako*. (The accused persons acted independently and made separate defences — Held the joint trial was illegal.)
- (1904) 1 Cri L Jour 713 (714) : 8 C W N 715 : 31 Cal 1053, *Hira Lal v. Emperor*. (H and S, who were both concerned in an offence committed on a certain date, were jointly tried for that offence, as also for another offence committed by S only on a previous date.)

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same Note, proximity of *time* is not essential to constitute the acts, parts of the same transaction.⁸ Nor is it necessary that the accused should have acted together from start to finish.⁹ On the other hand, the mere fact that several offences of the same kind, such as dacoity, are committed at about a particular time, will not necessarily make them parts of the same transaction.¹⁰

What does or does not form part of the same transaction is a question of fact in each particular case.¹¹

- (‘21) AIR 1921 Lah 236 (236) : 22 Cr. L. J. 145, *Ghasila Mal v. Emperor*.
 (‘25) AIR 1925 All 301 (303) : 26 Cr. L. J. 734, *Tufail Ahmad v. Emperor*. (Injury caused by firing fireworks in public road—Persons causing injury cannot be tried together.)
 (‘82) 1822 All W N 180 (180), *Empress v. Dalla*. (Six persons tried for six dacoities committed on different dates, the dacoities do not form part of the same transaction.)
 (‘21) AIR 1921 All 408 (409) : 22 Cri L Jour 397, *Ram Sahai v. Emperor*. (Five dacoities were committed in the same district within the period of one week—In each dacoity some persons were common but others were not.)
 (‘11) 12 Cr. L. J. 208 (209) : 10 Ind Cas 63 (Lah), *Karam Singh v. Emperor*. (A cheating X, B cheating Y and C cheating Z.)
 (‘02) 1902 Pun Re No. 16 Cr, p. 45 (46), *Khushala v. Emperor*. (Cheating different persons at different times.)
 (‘12) 13 Cr. L. J. 506 (507) : 15 I. C. 650 (Cal), *Girwar Narain v. Emperor*. (Two persons charged for criminal misappropriation.)
 (‘28) AIR 1928 All 417 (417) : 30 Cr. L. J. 214, *Sewak v. Emperor*. (A harbouring two absconding offenders L and N and S with the same offence with respect to two different persons H and P.)
 (‘29) AIR 1929 Lah 142 (142, 143) : 29 Cr. L. J. 1080, *Sultan Ahmed v. Emperor*. (Persons charged under Ss. 457 and 436 cannot be tried jointly with those charged under Ss. 411 and 414, Penal Code.)
 (‘10) 11 Cri L Jour 477 (477) : 7 I. C. 390 (Mad), *Shanmooga Tevan v. Emperor*. (Four accused were charged and tried together for two offences of dacoity committed on 30th May and 2nd June 1909, not forming part of the same transaction.)
 (‘31) AIR 1931 Rang 90 (92-94) : 32 Cr. L. J. 930 : 8 Rang 632, *Meeriah v. Emperor*. (One of three accused charged with misappropriating sum of money and second with smaller portion of that sum and third with abetting the two — Each act of misappropriation being complete in itself, the three cannot be tried jointly.)
 8. (‘36) AIR 1936 Nag 250 (251) : 1 L R (1937) Nag 165 : 38 Cr. L. J. 482, *Chhotey Miyan v. Emperor*. (What has to be looked to is continuity of action and unity of purpose—Identity of time is not essential — Offence under S. 34, C. P. Excise Act — Bottling of liquor done so that it may be kept and sold in pursuance of unlawful design—There is continuity of action, although bottling was done some time previous to selling of liquor.)
 (‘06) 4 Cri L Jour 420 (421, 422) : 2 N L R 147, *Emperor v. Hari Raot*. (Mere interval of time does not by itself import want of continuity—Case under S. 235.)
 (‘05) 2 Cr. L. J. 578 (581) : 30 Bom 49 : 7 Bom L R 633, *Emperor v. Datto Hanmant*.
 (‘25) AIR 1925 Mad 690 (692) : 26 Cr. L. J. 1513 : 49 Mad 74, *In re Mallu Dora*.
 (‘17) AIR 1917 Lah 78 (79) : 18 Cr. L. J. 282 (283) : 1917 Pun Re No. 17 Cr, *Tulsi v. Emperor*.
 (‘31) AIR 1931 Pat 52 (53) : 32 Cri L Jour 478, *Ganesh Prasad v. Emperor*.
 9. (‘11) 12 Cri L Jour 268 (269) : 10 Ind Cas 349 (Mad), *Madaswamy Chetty v. Emperor*. (It is enough to show that as each batch of the accused joined the principal accused, they adopted his intention.)
 10. (‘34) AIR 1934 Oudh 325 (326) : 35 Cri L Jour 1048, *Gunno v. Emperor*.
 11. (‘38) AIR 1938 Sind 164 (166) : 39 Cr. L. J. 881 : 1 L R (1939) Kar 64, *Chuharmal v. Emperor*. (The meaning and nature of transaction is a question which commonsense and the ordinary use of language must decide on the particular facts of the case.)
 (‘37) AIR 1937 All 714 (717) : 1 L R (1937) All 779 : 39 Cr. L. J. 38, *Emperor v. Bishan*.
 (‘36) AIR 1936 Pat 20 (22) : 37 Cri L Jour 240 : 15 Pat 138, *Ajablal v. Emperor*.
 (‘27) AIR 1927 Cal 330 (331) : 28 Cri L Jour 347, *Tamez Khan v. Rajjabali*.
 (‘25) AIR 1925 Mad 690 (699) : 26 Cr. L. J. 1513 : 49 Mad 74, *In re Mallu Dora*.

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In order to say whether several persons can be jointly tried as having committed offences forming parts of the same transaction, the Court has to look to the accusation, i. e., the prosecution case *as set forth in the charges themselves*, and if according to that case the offences are such as could be regarded as parts of the same transaction, it would be justified in holding a joint trial. It need not consider what the *final* result of the case would be.¹²

See also Note 2 under S. 235.

7. Acts done in pursuance of conspiracy. — It has been seen in Note 2 to S. 235 that where there is a conspiracy having a definite object in view, and several offences are committed in pursuance of such conspiracy, the several offences will generally form parts of the same transaction. This principle will also apply where the several offences are committed by *different* persons.¹ In *Babulal Chaukhan*

12. ('38) AIR 1938 P C 130 (133, 134) : 39 Cr.L.J. 452 : 65 IA 158 : 32 S L R 476 : I L R (1938) 2 Cal 295 (PC), *Babulal v. Emperor*. (Affirming AIR 1936 Cal 753.)
(40) AIR 1940 Nag 249 (250) : 1940 N L J 309 (311) : 41 Cr. L. J. 734, *Bhagolelal v. Emperor*. (AIR 1938 P C 130, followed.)
(40) AIR 1940 Pat 499 (501) : 187 I. C. 361 (363) : 41 Cr.L.J. 452, *Nathu v. Emperor*.
(39) AIR 1939 Nag 263 (264) : I L R (1939) Nag 644 : 41 Cri L Jour 27, *Provincial Government, C. P. and Berar v. Dinanath*.
(38) AIR 1938 Cal 258 (261) : I L R (1938) 1 Cal 588 : 39 Cri L Jour 596, *Akhil Bandhu v. Emperor*. (But it does not follow, that a Magistrate must wait till the stage of framing of charges before he makes up his mind whether to split a case up. Such a course is most inconvenient, and it should ordinarily be possible for a Magistrate to decide the question of joinder after the case has been opened by the Public Prosecutor.)
(37) AIR 1937 Cal 269 (270) : 38 Cr. L. J. 1018, *Sanyasi Gain v. Emperor*. (But the accusation must be real and not a mere excuse for joinder of charges.)
(36) AIR 1936 Bom 379 (381) : 38 Cri L Jour 9, *Baburao v. Emperor*.
(25) AIR 1925 Mad 690 (699) : 26 Cr. L. J. 1513 : 49 Mad 74, *In re Mallu Dora*. (Provided that the accusation is a real one and not a mere excuse for a joinder of charges which cannot otherwise be charged.)
(06) 30 Bom 49 (54) : 2 Cr.L.J. 578 : 7 Bom L R 633, *Emperor v. Datto Hanmant*.
(24) AIR 1924 All 233 (236) : 27 Cri L Jour 193, *Abdullah v. Emperor*.
(34) AIR 1934 All 61 (65) : 35 Cri L Jour 1349, *Ram Das v. Emperor*. (Legality of joint trial depends upon accusation and not upon result of trial.)
(29) AIR 1929 Bom 128 (129, 130) : 30 Cri L Jour 588 : 53 Bom 344, *Emperor v. Gopal Raghunath*.
(22) AIR 1922 Cal 107 (113) : 23 Cr.L.J. 657 : 49 Cal 573, *Abdul Salim v. Emperor*.
(29) AIR 1929 Cal 160 (161) : 30 Cr. L. J. 619, *Kali Kumar v. Nawabali*.
(28) AIR 1928 Cal 675 (677) : 29 Cri L Jour 1022 : 55 Cal 858, *Satya Narain v. Emperor*. (Following A I R 1922 Cal 107.)
(32) AIR 1932 All 73 (75, 76) : 33 Cr. L. J. 373, *Mohamed Yakub v. Emperor*.
(33) 1933 Mad W N 528 (533), *Satyanarayana v. Emperor*.
(25) AIR 1925 Rang 296 (299) : 26 Cr. L. J. 1329 : 3 Rang 95, *Abdul v. Emperor*.
[But see ('39) AIR 1939 Mad 406 (407) : 40 Cri L Jour 855, *Avanashi Goundan v. Palani Madari*. (Observation that once it is found that the common unlawful object had not been established there is no justification for a joint trial, is against the view held by the various High Courts and Privy Council, and, it is submitted, is incorrect.)
(36) AIR 1936 Nag 97 (99) : ILR (1936) Nag 152 : 38 Cr. L. J. 106, *Id. Ismail v. Emperor*.]

Note 7

1. ('40) AIR 1940 Pat 499 (502) : 41 Cr. L. J. 452, *Nathu Chaudhury v. Emperor*. (Before joint trial can be justified it must be established that each one of the accused was so connected with the other accused that the act done by one of them may be said to have been done conjointly with the others—A I R 1938 P C 130 followed.)

v. *Emperor*,² the Privy Council observed as follows :

"If several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it."

The offence of conspiracy and acts done in pursuance of the conspiracy form one and the same transaction.³ The transaction continues so long as the conspiracy continues.⁴ But separate acts of crime not committed in pursuance of the conspiracy but being isolated acts committed individually during the continuance of the conspiracy are not parts of the same transaction with the conspiracy itself and acts alleged to be the subject of the conspiracy. In other words, a conspiracy and acts done in furtherance of its common object have no community with separate acts which may be committed by a conspirator for individual gain.⁵

8. Acts in prosecution of a common object. — All offences committed in prosecution of a common object will generally be parts

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- (39) AIR 1939 Bom 129 (140) : 40 Cr. L. J. 579, *Ramchandra Rangov. Emperor*.
 ('37) AIR 1937 Cal 269 (271) : 38 Cri L Jour 1018, *Sanyasi Gain v. Emperor*.
 (Accused tried in same trial for murder and for conspiracy also along with others — Existence of conspiracy proved — Evidence showing that conspirators took part in certain occurrences as result of conspiracy — Inclusion of such occurrences in one trial and joint trial of accused held not illegal.)
 ('36) AIR 1936 Cal 753 (759, 760) : 38 Cr. L. J. 515, *Rash Behari v. Emperor*.
 ('22) AIR 1922 Cal 107 (112) : 23 Cr. L. J. 657 : 49 Cal 573, *Abdul Salim v. Emperor*.
 ('15) AIR 1915 Lah 16 (22) : 16 Cr. L. J. 351 (398, 399) : 1915 Pun Re No. 17 Cr, *Balmokand v. Emperor*.
 ('94) 16 All 88 (93) : 1894 A W N 23, *Queen-Empress v. Moss*. (S. 418, Penal Code.)
 ('29) AIR 1929 Bom 128 (130) : 30 Cr. L. J. 588 : 53 Bom 344, *Emperor v. Gopal*.
 ('24) AIR 1924 Rang 98 (99) : 25 Cri L Jour 270 : 1 Rang 604, *Emperor v. Nga Aung Gyaw*. (Conspiring to boycott.)
 ('18) AIR 1918 Bom 117 (119, 121) : 20 Cr. L. J. 71 : 43 Bom 147, *Emperor v. Madhav*.
 2. ('38) AIR 1938 P C 130 (133) : 39 Cr. L. J. 452 : 32 Sind L R 476 : 65 I A 158 : ILR (1938) 2 Cal 295 (P C). (There is no limit of number of offences specified in S. 239 (d).)
 3. ('38) AIR 1938 Cal 258 (260) : 39 Cr. L. J. 596 : I L R (1938) 1 Cal 588, *Akhil Bandhu v. Emperor*. (Conspiracy and offences committed in pursuance of conspiracy.)
 ('38) AIR 1938 Sind 171 (174) : 39 Cr. L. J. 890 : I L R (1939) Kar 204, *Emperor v. Balumal*.
 ('36) AIR 1936 Cal 753 (760) : 38 Cri L Jour 545, *Rash Behari v. Emperor*.
 ('16) AIR 1916 Cal 188 (196) : 42 Cal 957 : 16 Cr. L. J. 497, *Amritlal v. Emperor*.
 (If A, B and C conspire to make or have in their possession or under control an explosive substance within the meaning of the Explosive Substances Act and if in pursuance of such conspiracy, A makes or has in his possession or under his control an explosive substance, they may be charged and tried together under S. 120B, Penal Code, and S. 4 (b) of Act VI of 1908.)
 ('34) AIR 1934 All 61 (65) : 35 Cri L Jour 1349, *Ram Das v. Emperor*.
 ('33) 1933 Mad W N 528 (534), *Satyanarayana v. Emperor*.
 ('30) AIR 1930 Rang 114 (116, 117) : 7 Rang 821 : 31 Cr. L. J. 387, *Maung Ba Chit v. Emperor*.
 4. ('15) AIR 1915 Cal 719 (724) : 16 Cr. L. J. 9 (10) : 42 Cal 1153, *Harsh Nath v. Emperor*. (The term 'transaction' is not synonymous with the term 'offence'.)
 5. ('37) AIR 1937 All 714 (717, 718) : ILR (1937) All 779 : 39 Cr. L. J. 38, *Emperor v. Bishan Sahai*.

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of the same transaction.¹ Where A, B and C, Police Inspectors, received bribes on different occasions from D and E with the same object, namely to hush up the case against them, it was held that A, B, C, D and E could be tried at one trial for the offences of taking and giving bribes respectively.²

Where two opposite parties, each consisting of five or more persons, attack each other, each of the parties forms an unlawful assembly, with a different common object and they cannot be tried together as one unlawful assembly.³ Similarly, where A as well as B

Note 8

1. ('39) AIR 1939 Nag 263 (264) : ILR (1939) Nag 644 : 41 Cr. L. J. 27, *Provincial Government, C. P. and Berar v. Dinanath*. (Where several persons are accused of wrongful confinement and the use of force, in order to extort a confession, the unity of criminal behaviour and the common intention prompting it would render all that was done in furtherance of the common object, as a part of one transaction. The acts of violence done are so related to one another in point of purpose, as to constitute one continuous action.)
 2. ('38) AIR 1938 Nag 283 (285, 286) : 40 Cr. L. J. 197 : ILR (1939) Nag 686, *Nana v. Emperor*. (Accused tried for rioting, charged with having attacked excise party seeking to make raid on certain houses in village — Whole affair taking place in the village, one event succeeding another rapidly—Joint trial of accused is illegal.)
 3. ('37) AIR 1937 Lah 793 (794) : 39 Cri L Jour 141, *Khazan v. Emperor*. (Illegal possession of revolver as a preparation for committing dacoity—Charge under S. 399, Penal Code, can be tried with offence under S. 19 (f), Arms Act.)
 4. ('36) AIR 1936 Bom 379 (382) : 38 Cri L Jour 9, *Baburao v. Emperor*. (Criminal breach of trust by two persons in respect of same sum of money — Complaint suggesting community of design and objective — Such persons can be charged and tried jointly.)
 5. ('36) AIR 1936 Pat 20 (23) : 37 Cri L Jour 240 : 15 Pat 138, *Ajablal v. Emperor*. (Intention of all the accused persons to secure release of a man from custody—Various acts which bring about such escape form part of the same transaction.)
 6. ('24) AIR 1924 All 233 (234) : 27 Cr. L. J. 193, *Abdullah v. Emperor*. (Joint trial for murder committed by members of an unlawful assembly in prosecution of common object of assembly is legal.)
 7. ('28) AIR 1928 All 222 (227) : 30 Cr. L. J. 530, *Emperor v. Jhabbar Mal*. (Successive articles were written in a newspaper in pursuance of a common policy and all the persons who had a hand in the publication are jointly triable.)
 8. ('24) AIR 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cri L Jour 1082, *Kushai Malie v. Emperor*. (Where four accused were engaged in a crime from 25th June, but the fifth joined them only on the 7th July next—*Held*, that the trial of the four along with the fifth for an act before 7th July is legal.)
 9. ('25) AIR 1925 Cal 580 (581) : 26 Cri L Jour 369, *Patit Paban Ray v. Emperor*. (Reaping paddy on different dates by persons not all the same from different plots decreed to complainants, in order to assert a right over them is one transaction.)
 10. ('31) AIR 1931 Mad 225 (226) : 32 Cr. L. J. 753, *Sambasiva Mudalier v. Emperor*. (Where the accused, six in number, were charged with having opened a sluice in the feeder channel of a river against an order of the P. W. D. first in the evening, and again in the next morning.)
 11. ('16) AIR 1916 Cal 41 (42) : 16 Cr. L. J. 120 (121) : 42 Cal 760, *Deputy Superintendent and Remembrancer of Legal Affairs, Bengal v. Kailash Chandra*. (Wrongful confinement of X on several dates with the object of extorting money.)
[See ('38) AIR 1938 Mad 858 (861) : 40 Cri L Jour 355, *Arumugam v. Emperor*. (All members of a gang of persons who were consciously associated for the express purpose of committing theft can be tried together for being members of a gang—It does not matter how and when they were arrested.)]
- See also S. 235 Note 2.
2. ('29) AIR 1929 Bom 296 (299) : 53 Bom 479 : 31 Cr. L. J. 65, *Emperor v. Ring*.
 3. ('69) 12 Suth W R Cr 75 (76), *Queen v. Surroop Chunder Paul*.
 4. ('06) 4 Cr. L. J. 75 (76) : 1906 Pun Re No. 5 Cr, *Ala Dya v. Emperor*.
 5. ('80) 6 Cal 96 (102) : 6 C L R 521, *Hossein Buksh v. Empress*.
 6. ('69) 1 N W P H C R 293 (297, 298), *Queen v. Mahomed Hossain*.

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cause hurt to each other in a fight, they cannot be tried together for the offence of causing hurt to each other.⁴ The fighting cannot be considered as a "transaction."⁵ It was, however, held in the under-mentioned case⁶ that, where the object of two opposite parties is to take forcible possession of the same piece of land, they could both be tried together in one trial. It is submitted that this view is not correct. It has also been held in the case cited below⁷ that a mere common purpose, e. g., to drive the complainant out of a house, is not sufficient to make two perfectly distinct offences parts of the same transaction. Where two motor buses coming from opposite directions collided and some persons were injured thereby, it was held that, though the accused, the drivers of the two buses, had no similar or identical purpose in view, the transaction was the same and they both could be tried together.⁸

In the undermentioned case⁹ several persons were charged with being members of an unlawful assembly and having in prosecution of the common object, committed various offences and they were tried jointly. In the course of the trial it was found that the common object was not established. It was held that there was no justification for a joint trial once it was found that the common unlawful object had not been established. It is submitted that the decision is incorrect, as the provisions relating to joinder are intended to deal with the position as it exists at the time of the charge and not with the result of the trial and the propriety of a joint trial depends on the case as set forth in the charges. See Note 6.

9. Several persons giving false evidence in the same case.

— Where A and B each gives false evidence in the same case the offences cannot, without anything more, be said to form parts of the

(172-92) 1872-1892 Low Bur Rul 331 (331), *Queen-Empress v. Nga Shwe Tan*.

(172-92) 1872-1892 Low Bur Rul 275 (275), *Queen-Empress v. Nga Shwe Ya*.

(81) 1881 All W N 28 (28), *Empress v. Bandho Singh*.

(81) 1881 All W N 28 (28), *Empress v. Lochan*.

(84) Oudh S C No. 75, p. 86 (86), *Lal Triloki Nath Singh v. Queen-Empress*.

(25) AIR 1925 Lah 149 (150) : 25 Cri L Jour 551, *Muhammad v. Emperor*.

(82) 1882 All W N 160 (161), *Empress v. Pulandhar*.

(67) 8 Suth W R Cr 47 (52) : Beng L R Sup Vol Cr 750 (FB), *Queen v. Sheikh Bazu*.

(81) 1881 Pun Re No. 26 Cr, p. 56 (57), *Empress v. Nawab*.

(81) 1881 Pun Re No. 22 Cr, p. 47 (49), *Empress v. Haibat*.

(82) 1882 Pun Re No. 15 Cr, p. 18 (18), *Empress v. Saifulla*.

(68) 9 Suth W R Cr 33 (35), *Queen v. Durzoolbazu*.

[See (40) 1940 M W N 97 (99), *Pateyya v. Emperor*. (Sudden clash between rival communities not the result of any previously concerted action—Number of attacks in various places in village at different times of the day—All events cannot be regarded as parts of same transaction—Joint trial is illegal.)]

See also S. 233 Note 6.

4. (103) 2 Low Bur Rul 106 (107), *Nga Tha Dun Aung v. King-Emperor*.

[See also (108) 12 Cal W N cliii (cliv), *Kundro Mohan Panigrahi v. Emperor*.]

5. (92) 20 Cal 537 (547, 550), *Queen-Empress v. Chandra Bhuiya*.

6. (20) AIR 1920 All 135 (135) : 21 Cri L Jour 562, *Emperor v. Mangat*.

7. (32) AIR 1932 Bom 277 (278) : 33 Cri L Jour 619, *Krishnaji v. Emperor*.

8. (31) 1931 Mad W N 556 (557, 558), *N. K. Ballah v. Emperor*.

9. (39) AIR 1939 Mad 406 (407) : 40 Cr. L. J. 855, *Avanashi Goundan v. Palani Madari*.

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same transaction.¹ But where the giving of false evidence by A and B is in furtherance of one sustained and continuous plot for screening the offender and is an incident in the whole transaction, A and B can be tried together.² In other words, if the offences of giving false evidence by each of several persons form parts of the same transaction, they can be tried together.³

10. Printing and publishing seditious matter. — In cases of sedition, the printer and publisher are concerned in the same transaction in regard to the publication of the seditious matter and can be tried at one trial.¹

11. Defamation by different persons. — Where A filed one petition and B filed another making the same defamatory allegations

Note 9

1. ('36) AIR 1936 Nag 263 (265) : I L R (1937) Nag 102 : 38 Cri L Jour 455, *Nathusingh v. Emperor*.
 ('12) 13 Cr. L. J. 23 (24) : 13 Ind Cas 215 : 5 Sind L R 129, *Imperator v. Alu*.
 ('81) 1881 All W N 83 (83) : *Empress v. Chand Khan*.
 ('71) 3 N W P H C R 133 (134), *Queen v. Amcer Ali Khan*.
 ('72-'92) 1872-92 Low Bur Rul 129 (129), *Amcer Ahmad v. Queen-Empress*.
 ('90) 2 Weir 304 (304), *In re Ponaganti Musalayya*.
 ('67) 3 Mad H C R App 32 (32) : 1 Weir 161.
 ('83) 6 Mad 252 (253) : 1 Weir 116, *Kotha Subba Chetty v. Queen*.
 ('84) 10 Cal 405 (407), *Nathu Sheikh v. Queen-Empress*. (Where four persons were charged with perjury in the same proceedings and the Sessions Judge while professing to try each of them separately heard the evidence of the witnesses only once, held that this was substantially a joint trial of all the accused and was an improper mode of procedure.)
 ('23) AIR 1923 Lah 89 (90) : 23 Cr. L. J. 439, *Lachman Singh v. Emperor*.
 ('88) 1888 Pun Re No. 39 Cr, p. 100 (101), *Bagga Singh v. Empress*.
 ('71) 16 Suth W R Cr 47 (47) : 7 Beng L R App 66, *Queen v. Maharaj Misser*.
 ('68) 9 Suth W R Cr 66 (66), *Queen v. Khoab Lall*.
 ('67) 7 Suth W R Cr 51 (51), *Queen v. Bhairo Misser*.
 ('68) 5 Bom H C R Cr Cas 55 (56), *Reg. v. Bhavani Shankar Haribhai*.
 ('85) 1885 All W N 29 (29), *Empress v. Din Dayal*.
 ('82) 1882 All W N 44 (44), *Empress v. Rahmat Khan*.
 ('82) 1882 All W N 160 (161), *Empress v. Lalak Singh*.
 ('82) 1882 All W N 161 (163) : 5 All 17, *Empress of India v. Niaz Ali*.
 ('82) 1882 All W N 124 (124), *Empress v. Changu*.
 ('82) 1882 All W N 64 (64), *Empress v. Piari Lal*.
 ('70) 2 N W P H C R 21 (23), *Queen v. Ruttee Ram*.
 ('03) 26 Mad 592 (594) : 2 Weir 262, *In the matter of Govindu*.
 ('70) 1870 Rat 31 (32), *Reg. v. Jeevajee Abajee*.
 ('06) 4 Cr. L. J. 489 (489) : 3 Low Bur Rul 231, *Emperor v. Shwe So*.
 ('04) 4 Bom L R 53 (54, 55), *King-Emperor v. Krishna Rao*.
 ('16) AIR 1916 Nag 73 (76) : 18 Cr. L. J. 339 (342) : 13 Nag L R 35, *Gunwant v. Emperor*. (Dissenting from 13 Cri L Jour 833.)
 ('82) 4 All 293 (295) : 1882 All W N 37, *Empress v. Anant Ram*.
 2. ('12) 13 Cr. L. J. 833 (839) : 17 I. C. 705 (Bom), *Emperor v. Ganesh Narayan*.
 3. ('36) AIR 1936 Nag 263 (264) : 38 Cr. L. J. 455 : ILR (1937) Nag 102, *Nathusingh v. Emperor*. (Perjury can be committed in course of one transaction and then joint trial is legal—Persons verifying false statement and witness perjuring in pursuance of same design — Offence committed is in the course of the same transaction — Joint trial is valid.)
 ('27) AIR 1927 Bom 177 (181, 183) : 51 Bom 310 : 28 Cr. L. J. 373, *Sejmal Punam Chand v. Emperor*. (Common purpose to make a false statement, joint trial of two accused is legal.)
 ('26) AIR 1926 All 334 (336, 337) : 48 All 325 : 27 Cr. L. J. 445, *Rafi-Uz-Zaman v. Chhotey Lal*. (There was identity of purpose though not community of purpose.)

Note 10

1. ('28) AIR 1928 Bom 139 (139) : 29 Cr. L. J. 683, *Shantaram Mirjekar v. Emperor*.

against the complainant, and both the petitions were signed by the same pleader, it was held that the acts formed part of the same transaction.¹ Where A and B associate together in circulating on different occasions defamatory statements, the object of both of them being to defame the complainant about the same matter, they can be tried jointly at one trial under this section.²

12. Continuing offence. — It has been held by Spencer, Offg. C. J., in the undermentioned case¹ that if an offence is a continuing one, such as waging war, it can be regarded as a continuous or same transaction. Reilly, J., in the same case has taken a contrary view, namely, that a continuing offence may or may not be a single transaction. Krishnan, J., to whom the case was referred on difference of opinion between these two Judges has held that the waging of war is really a continuing offence, which begins with the first act of war and goes on till the war is ended, but the various incidents in a war may be so disconnected as to form different transactions, the question whether they form parts of the same transaction or not being one to be judged on the facts of each case.

13. Kidnapping and abduction. — In the undermentioned cases,¹ a joint trial of A for an offence under S. 366 and of B for an offence under S. 368 has been held to be bad, while a contrary view has been taken in the cases cited below.² The question is, however, really one of fact depending upon the facts of the particular case as to whether the two offences could be regarded as parts of the same transaction.

14. Keeping gaming house and using it. — It has been generally held that a person keeping a common gaming house and

Note 11

1. ('22) AIR 1922 Cal 76 (77) : 23 Cr. L. J. 685, *Banga Chandra De v. Annada Charan Chowdhury*.
2. ('40) AIR 1940 Nag 249 (250) : 1940 Nag L J 309 (311) : 41 Cr. L. Jour 734, *Bhagolelal v. Emperor*. (A writing a defamatory poem, B financing it and C printing it — Conspiracy alleged in the complaint — Joint trial is legal.)
- ('30) AIR 1930 Sind 62 (63) : 30 Cr. L. Jour 1073, *Ali Mahomed v. Emperor*.
- ('35) AIR 1935 All 769 (770) : 36 Cr. L. Jour 1296, *Parsotam Das v. Emperor*. (Printer, publishers and distributors of notice containing defamatory matter tried together.)

Note 12

1. ('25) AIR 1925 Mad 690 (692, 697) : 49 Mad 74 : 26 Cr. L. J. 1513, *In re Mallu Dora*.

Note 13

1. ('33) AIR 1933 Cal 563 (564) : 34 Cr. L. J. 682, *Mozam Dafadar v. Emperor*.
- ('29) AIR 1929 Lah 496 (496), *Nawabkhan v. Emperor*. (Distinguishing AIR 1928 Lah 751 and A I R 1924 Cal 389.)
2. ('36) AIR 1936 All 253 (254) : 37 Cr. L. J. 496, *Bhawani Pathak v. Emperor*. (Accused charged under Ss. 366 and 344/109, Penal Code — Another accused charged under Ss. 368 and 344 — Acts forming parts of same transaction — Accused can be tried in one trial.)
- ('32) AIR 1932 Oudh 28 (29) : 33 Cr. L. J. 275, *Emperor v. Zamin*.
- ('28) AIR 1928 Lah 751 (751) : 29 Cr. L. J. 496, *Dosa v. Emperor*. (AIR 1924 Cal 389, Followed — Distinguished in A I R 1929 Lah 496.)
- ('24) AIR 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cr. L. J. 1082, *Kushai v. Emperor*. (Do.)
- ('32) AIR 1932 Lah 203 (203) : 33 Cr. L. J. 190, *Pritam Singh v. Emperor*. (Quere.)

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persons using it could be tried together as the two offences are inter-dependent and form a complement of each other.¹

15. Charge need not refer to transaction being same. — It is not necessary that the charge should contain a statement that the transaction is one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered as the test.¹

16. Clause (e). — This clause was newly added in 1923. Before its introduction it was held that the joint trial for theft and receiving the stolen property was illegal unless they formed parts of the *same transaction*.¹ Now such a joint trial is expressly provided for by this clause.² A receiver from a receiver of stolen property should not be

Note 14

1. ('29) AIR 1929 All 937 (938, 939) : 31 Cr. L. J. 35, *Ruro Mal v. Emperor*.
- ('19) AIR 1919 Pat 139 (139) : 20 Cr. L. J. 768, *Nathu Thakur v. Emperor*.
- ('27) AIR 1927 Lah 699 (700) : 28 Cr. L. J. 825, *Miran Bakhsh v. Emperor*.
- ('19) AIR 1919 Lah 204 (204, 205) : 1919 Pun Re No. 6 Cr : 20 Cr. L. J. 219, *Bhana Mal v. Emperor*. (Dissenting from AIR 1914 Lah 566 and 11 Cr.L.J. 211.)
- ('22) AIR 1922 Lah 458 (458) : 3 Lah 359 : 23 Cr. L. J. 621, *Khilinda Ram v. Emperor*.
- ('13) 14 Cr. L. J. 293 (294) : 19 I C 949 : 9 Nag L R 68, *Sheikh Moti v. Emperor*.
- ('23) AIR 1923 All 88 (88) : 24 Cr. L. J. 155, *Ganeshi Lal v. Emperor*.
- [See also ('26) AIR 1926 Bom 195 (198) : 50 Bom 344 : 27 Cr. L. J. 503, *Emperor v. Abasbhai Abdul Hussain*.]

Note 15

1. ('05) 2 Cr. L. J. 578 (580, 581) : 30 Bom 49 : 7 Bom L R 633, *Emperor v. Datto Hanmant*.
- [See however ('39) AIR 1939 Bom 129 (140) : 40 Cri L Jour 579, *Ramchandra Rango v. Emperor*.]

Note 16

1. ('13) 14 Cri L Jour 124 (125) : 18 Ind Cas 684 (All), *Baiju v. Emperor*.
- ('19) AIR 1919 Cal 249 (250) : 46 Cal 741 : 20 Cr. L. J. 394, *Ohl Dhusan Adikari v. Emperor*. (Proceeds of stolen property received at different times by different persons—Persons cannot be tried together.)
- ('05) 2 Cal L Jour 78n (78n), *Abdul Hakim v. Emperor*.
- (1900) 1900 Pun Re No. 5 Cr, p. 13 (14) : 1900 P L R p. 61, *Jang v. Emperor*.
- ('05) 29 Bom 449 (454, 465, 467) : 7 Bom L R 527 : 2 Cri L Jour 480, *Emperor v. Jethalal*. (But see Aston, J., *contra*, whose view now comes under clause (e).)
- (1900) 28 Cal 10 (11), *Karu Kulal v. Ram Charan*.
- ('96) 1 Cal W N 35 (36), *Bishnu Banwar v. Empress*.
- ('23) A I R 1923 Lah 394 (394) : 25 Cri L Jour 274, *Sohan Singh v. Emperor*.
- ('16) AIR 1916 Mad 571 (571, 572) : 16 Cr.L.J. 298 (300), *In re Mekalakati Subbadu*.
- ('14) AIR 1914 Mad 121 (121) : 15 Cri L Jour 471, *In re Nalli Veera Thevan*.
- ('14) AIR 1914 Mad 637 (637) : 15 Cri L Jour 256, *In re Govindaraju Mudali*.
- ('16) AIR 1916 All 321 (322) : 17 Cri L Jour 159 (161) : 38 All 311, *Emperor v. Bhima*. (Thief taking stolen property to person receiving it — Act of receipt has necessary connection with theft—Joint trial not illegal.)
- ('22) AIR 1922 All 208 (208) : 44 All 276 : 23 Cri L Jour 414, *Anwar v. Emperor*.
- ('23) AIR 1923 All 126 (126, 127) : 45 All 223 : 24 Cr.L.J. 149, *Durga Prasad v. Emperor*.
- ('10) 11 Cri L Jour 244 (245) : 5 Ind Cas 769 (Cal), *Janki v. Emperor*. (Accused charged for dacoity—Three of these charged under Ss. 411 and 412, Penal Code, on the strength of an incident forming part of the evidence against them on the charge under S. 395, Penal Code—Joint trial is not bad.)
- ('05) 2 Cri L Jour 37 (38) : 1905 Pun Re No. 3 Cr, *Emperor v. Sunder Singh*.
- ('03) 2 Low Bur Rul 19 (21, 22), *Nga Ta Pu v. King-Emperor*.
- ('07) 5 Cri L Jour 417 (418, 419) : 3 Low Bur Rul 280, *Paw Tha v. Emperor*.
- ('07) 6 Cr. L. J. 28(30) : 1907 Upp Bur Rul 5 : 14 Bur L R 38, *Nga Nyo Gyi v. Emperor*.
- ('12) 13 Cr. L. J. 59 (60) : 13 Ind Cas 395 (Upp Bur), *Nga Po Shat v. Emperor*.
- [See ('18) AIR 1918 Cal 494 (494) : 19 Cri L Jour 17, *Ram Ratan v. Emperor*.]
2. ('35) 62 Cal 946 (951) : 37 Cr. L. J. 728 : 162 I. C. 943, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Raghulal Brahman*. (Persons charged under S. 380, Penal Code, can be tried along with persons charged under S. 411.)

Section 239
Notes 17-18

the property at *different times*. Before the introduction of clause(f), it had been held in several decisions that a joint trial in such cases was illegal.³ Clause (f) was intended to meet such cases and a joint trial would now be permissible.⁴ The phrase, "possession of which has been transferred by one offence," refers to the original theft of stolen property and not to the transfer of possession from the thief to the person receiving stolen property.⁵

The provisions of this clause cannot, however, be extended by analogy to a trial of persons accused of offences other than those specifically mentioned therein. Therefore, the joint trial of the accused both charged under S. 412, Penal Code,⁶ or the joint trial of a person under S. 411, Penal Code, and another who has purchased the same from one of the accused,⁷ is illegal.

18. Clause (g). — In order that persons accused of an offence under chapter XII of the Penal Code relating to counterfeit coin can be tried under this clause with persons accused of any other offence under the same chapter, or of abetment of or attempting to commit any such offence, all the offences must *relate to the same coin*. So, where two persons are charged, one with uttering a counterfeit coin and the other with being in possession of *different* counterfeit coins, they cannot be jointly tried together under this clause.¹

3. ('16) AIR 1916 All 102 (102) : 17 Cri L Jour 477 (477), *Emperor v. Balgovind*. (Acts of receiving stolen property by different persons on different occasions at different places are different transactions.)
- ('21) AIR 1921 All 206 (206) : 23 Cri L Jour 409, *Jiwan v. Emperor*. (Articles stolen in same burglary found in separate possession of different accused — Joint trial is illegal.)
- ('22) AIR 1922 All 459 (459), *Moosan v. Emperor*. (Retaining property stolen from same complainant—No connexion between accused—Joint trial is illegal.)
- ('21) 63 Ind Cas 620 (621) : 22 Cr. L. J. 684 (All), *Ram Sarup v. Emperor*. (Stolen property recovered from two persons on different occasions — Accused cannot be tried together.)
- ('06) 3 Cri L Jour 391 (394, 399) : 33 Cal 1256 : 3 C. L. J. 412 : 10 C W N 912, *Abdul Majid v. Emperor*. (Separate retainers by separate persons at different places—Joint trial is not legal though the articles are proceeds of one dacoity.)
- ('19) AIR 1919 Cal 249 (250) : 46 Cal 741 : 20 Cr. L. J. 394, *Ohl Bhusan v. Emperor*. ('07) 5 Cri L Jour 479 (480) : 17 M L J 219, *In re Kupan Ambalam*.
- ('15) AIR 1915 Oudh 4 (4) : 16 Cr. L. J. 270 (270) : 18 O C 92, *Jagan Nath v. Emperor*.
- ('20) AIR 1920 Pat 190 (192) : 21 Cri L Jour 757, *Musai Kamat v. Emperor*. (Where possession of different properties is under joint control and is due to concert among the accused, the joint trial is not illegal.)
- ('21) AIR 1921 Pat 291 (291, 292) : 21 Cri L Jour 619, *Padma Nabh v. Emperor*. [See also ('16) AIR 1916 Pat 250 (250) : 1 P L J 64 : 17 Cr. L. J. 234, *Jadunandan Prasad v. Emperor*. (Portions of stolen property found in possession of two accused acting in concert—Joint trial is proper.)
- ('01) 28 Cal 104 (106), *Kumudini Kanta v. Queen-Empress*. (Joint trial for receiving stolen property and under S. 414 for assisting in concealing or disposing of it—Transactions held distinct and separate against each.)]
4. ('28) AIR 1928 Pat 38 (39) : 6 Pat 583 : 28 Cr. L. J. 962, *Mt. Guljania v. Emperor*.
- ('32) AIR 1932 Bom 201 (202) : 33 Cri L Jour 394, *Emperor v. Lakha Amra*.
- ('35) AIR 1935 Oudh 475 (476) : 36 Cri L Jour 1206, *Shakur v. Emperor*.
5. ('32) AIR 1932 Bom 201 (202) : 33 Cri L Jour 394, *Emperor v. Lakha Amra*.
6. ('25) AIR 1925 Oudh 452 (452) : 26 Cri L Jour 1291, *Behari v. Emperor*.
7. ('25) AIR 1925 Cal 248 (248) : 25 Cri L Jour 807, *Dalsuk Roy v. Emperor*. [See ('08) 8 Cri L Jour 11 (14) : 4 Nag L R 71, *Emperor v. Balwant Singh*.]

Note 18

1. ('33) AIR 1933 Lah 228 (229) : 34 Cri L Jour 1253, *Abdul Hamid v. Emperor*.

19. Simultaneous trials. — Simultaneous but separate trials of different accused persons for offences committed by them and not forming part of the same transaction are not bad unless the accused are prejudiced by the course adopted.¹

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Notes 19-22

20. Criminal breach of trust and receiving stolen property. — A person committing a criminal breach of trust and another who receives the stolen property can be tried together.¹

21. Effect of illegal trial. — See Note 10 under S. 537 and Note 5 under section 233.

22. Objection as to joinder. — An objection as to joinder can be taken in a Court of revision or appeal though it was never taken in the Court of first instance.¹

When an objection as to joint trial is made and it appears likely that the objecting parties will be prejudiced by such joint trial, it is advisable for the Court to accept the objection, even if the joint trial would in fact be legal.²

240.* When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the

Section 240

Withdrawal of remaining charges on conviction on one of several charges.

* **Code of 1882** — The section began : “When more charges than one are made against the same person”; in other respects it was the same as that of 1898 Code.

Code of 1872 : S. 459.

459. In trials before a Court of Session or High Court, when more charges than one are preferred against the same person, and when a conviction has been had on one or more of them the Government Pleader or other officer conducting the prosecution may, with the consent of the Court, withdraw, or the Court of its own accord may suspend, the inquiry into the remaining charge or charges.

Code of 1861 — Nil.

Note 19

1. ('25) AIR 1925 Pat 152 (153) : 25 Cri L Jour 1018, *Shafayet Khan v. Emperor*. (Trials of cross-cases.)
 - ('20) AIR 1920 Pat 177 (179) : 21 Cr.L.J. 739, *Dhakosingh v. Emperor*. (Simultaneous trials in counter-cases are not barred—Such trial is not joint trial and if prejudice is caused, trial can be set aside.)
 - ('04) 1 Cri L Jour 199 (204) : 8 C W N 344, *Sahadeo Ahir v. Emperor*. (Cross-cases of rioting—Simultaneous trials not bad.)
- [See however ('83) 13 Cal L R 275 (278, 279), *Chakowri Lall v. Moti Kurmi*. (Such a trial is however open to serious objections.)]
- See also S. 233 Note 6.

Note 20

1. ('04) 1 Cri L Jour 584 (585) : 6 Bom L R 516, *Emperor v. Balabhai*. (1 Cal W N 35, dissented from.)

Note 22

1. ('37) 41 Cal W N 251 (254), *C. S. Joseph v. Emperor*.
2. ('37) AIR 1937 Cal 22 (22) : 38 Cr. L. J. 750, *Bhola Sardar v. Emperor*.

Section 240
Note 1

remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Synopsis

- | | |
|---|--|
| 1. Scope and applicability of the section.
2. "Conviction has been had."
3. "On one or more of them." | 4. "With the consent of the Court."
5. Effect of withdrawal or stay of trial. |
|---|--|

Other Topics (miscellaneous)

Charges in same case and not in different cases. See Note 1. No withdrawal after verdict. See Note 3. Powers of appellate Court or Court of revision. See Notes 1 and 4.	Safest course is to convict for all offences and pass concurrent sentences. See Note 3. Withdrawal when available. See Note 3.
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1. Scope and applicability of the section. — Where a person is committed to the Court of Session on a number of charges, the Sessions Judge must record some order in respect of them and should not dispose of some of the charges alone without recording any order in regard to the others.¹ Under this section, he can stay the trial on some of the charges or allow them to be withdrawn on conviction being had on another charge.²

It has been held that this section applies only to a case where a person is accused of several distinct offences. Thus, it applies to a case where there are charges of several distinct offences constituted by separate acts or series of acts, like those which fall under ss. 234 and 235, sub-section (1), but not where there are several charges founded on the same act as those which fall under s. 235, sub-sections (2) and (3), and section 236.³

This section applies, again, only to charges framed in the *same case* and not to separate charges for distinct offences in different cases. Thus, the prosecution cannot, on conviction of the accused in *one* case, withdraw a charge against him in *another* case.⁴ Nor can the Court, pending an appeal against the conviction in one case, *stay* the trial of charges in respect of other cases.⁵ As to withdrawal of charges by the Court, see Notes to S. 227.

Section 240 — Note 1

1. ('39) AIR 1939 Pat 35(36):39 Cr.L.J. 997:18 Pat 82, *Emperor v. Sadasibo Majhi*.
2. ('39) AIR 1939 Pat 35(36):39 Cr.L.J. 997:18 Pat 82, *Emperor v. Sadasibo Majhi*.
3. ('89) 1889 Pun Re No. 24 Cr, p. 79 (80), *Amir Chand v. Queen-Empress*.
 [See also ('81) 1881 All W N 68 (68), *Empress v. Faiz Ilahi*.]
 [But see ('29) AIR 1929 All 899 (900) : 51 All 977 : 30 Cr. L. J. 1089, *Ghamandi Nath v. Babu Lal*.]
4. ('88) 1888 Rat 362 (362), *Queen-Empress v. Sadia*.
 ('97) 10 C P L R Cr 1 (6), *Empress v. Bansidhur Deoria*.
5. ('09) 9 Cri L Jour 495 (496) : 2 I. C. 128 (Mad), *In re Mantri Kamaraju*.
 ('98) 1898 Rat 977 (978), *Queen-Empress v. Govinda*.

2. "Conviction has been had." — The section contemplates a withdrawal or stay of trial of charges only when a conviction *has been had* on one or more of them. So, where a person is charged with murder under s. 302 of the Penal Code and with causing disappearance of the evidence of murder under s. 201, Penal Code, but before the trial begins in the Court of Session, the Public Prosecutor withdraws the charge for the offence under s. 201, Penal Code, this section has no application to such a case. A trial on the charge under s. 201, Penal Code, could not therefore be proceeded with under this section, when the conviction of the charge under s. 302, Penal Code, is set aside on appeal.¹

3. "On one or more of them." — Where a person is convicted on one or more of the charges against him, it is only before the other charges are tried that they could be withdrawn. But when all the charges have been tried and the accused found guilty, no withdrawal can be made of any charge. In such cases, if the Court considers a certain term of imprisonment adequate to meet the offence under each head, the practice is not to convict on one head and drop the others, but to convict on each head and pass concurrent sentences.¹ See also S. 35 Note 10 and S. 397 Note 3.

4. "With the consent of the Court." — The word "Court" in the section is not restricted merely to the trial Court, but includes every grade of Court including the High Court in revision and in appeal. Thus, when a charge containing more heads than one is framed against the same person and he had been convicted on one or more of them, and the complainant applies in revision praying for infliction of sentence on the others but subsequently withdraws the application, the withdrawal amounts to the withdrawal of the complaint, with regard to such charges, with the consent of the Court.¹ Again, where an accused is charged with an offence under s. 408, Penal Code, in respect of ten receipts, and is tried and convicted in respect of three of them, the High Court's direction in the appeal that no further proceedings be taken in respect of the other receipts amounts to a stay of the trial with regard to those charges within the meaning of this section.²

5. Effect of withdrawal or stay of trial. — A withdrawal of charges¹ or a stay of enquiry or trial thereof² under this section has

Note 2

1. ('05) 2 Cal L Jour 18n (18n), *Afiluddi v. Emperor*.

Note 3

1. ('69) 1869 Rat 19 (20), *Reg. v. Ramchandra*.
('86) 1886 Rat 288 (288), *Queen-Empress v. Nadharya*.
('86) 1886 Rat 286 (286, 287), *Queen-Empress v. Lingo*.

Note 4

1. ('29) AIR 1929 All 899 (900):51 All 977:30 Cr.L.J. 1089, *Ghamandi v. Babu Lal*.
2. ('09) 10 Cri L Jour 482 (483): 4 I. C. 48 (Cal), *Basiruddin v. Emperor*.

Note 5

1. ('29) AIR 1929 All 899 (900):51 All 977:30 Cr.L.J. 1089, *Ghamandi v. Babu Lal*.
2. ('25) AIR 1925 Pat 623 (624):4 Pat 503 : 27 Cr. L. J. 359, *Jeobaran Singh v. Ramkishun Lal*.

Section 240
Note 5

the effect of an acquittal on such charge or charges unless the conviction be set aside.³ If the conviction is set aside, the Court (subject to the order of the Court setting aside the conviction) may proceed with the trial or inquiry in respect of the other charges.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

Section 241

Procedure in summons-cases. **241.*** The following procedure shall be observed by Magistrates in the trial of summons-cases.

Synopsis

- | | |
|---|---|
| <p>1. "Summons-case," meaning of. See S. 4 (1) (v) and (w).</p> <p>2. Joint trial of summons and warrant cases.</p> <p>3. Applicability of Chapter XIX of the Code to the trial of summons-cases.</p> | <p>4. Trial of summons-case as warrant case — Effect.</p> <p>5. Commitment to sessions. See Notes to S. 347.</p> <p>6. Change of procedure at what stage permissible.</p> |
|---|---|

Other Topics (miscellaneous)

Absence of complainant—Discharge and not acquittal. See Note 2.

Counsel and admission — Conviction illegal. See S. 243 Note 3; S. 205 Note 7.

Joint trial of summons and warrant cases — Charges should be framed for both. See Note 2.

Procedure different from warrant and sessions cases. See S. 242 Note 1.

1. "Summons-case," meaning of. — See section 4 (1) (v) and (w).

2. Joint trial of summons and warrant-cases. — Where there is a joint trial of two offences, one of which is triable as a summons-case and the other as a warrant-case, the Magistrate must follow the procedure of warrant-cases with regard to both the offences,¹

* Code of 1882 : S. 241 and Code of 1872 : S. 203 para. 1

Same as that of 1898 Code.

Code of 1861 — Nil.

3. ('25) AIR 1925 Pat 623 (624) : 4 Pat 503 : 27 Cri L Jour 359, *Jeobaran Singh v. Ramkishun Lal*.

[But see ('89) 1889 All W N 8 (9), *Empress v. Raghunandan Lal*. (Magistrate expressly refraining from dealing with and disposing of the charge under S. 204, Penal Code, and not acquitting in terms the accused upon such charge — *Held*, the action of the Magistrate might be taken as a stay of the trial of such charge under S. 240 and the subsequent trial was not barred.)]

Section 241 — Note 2

1. ('18) AIR 1918 Mad 371 (372) : 41 Mad 727 : 19 Cri L Jour 613, *Raghavalu Nair v. Singaram*. (Absence of complainant — Discharge under S. 259 and not acquittal under S. 247 is proper procedure.)

('06) 3 Cri L Jour 350 (350) : 3 Low Bur Rul 113, *Emperor v. Maung Gale*. (Formal charges should be framed for both.)

('15) AIR 1915 Mad 1200 (1200) : 16 Cri L Jour 540 (540) : 39 Mad 503, *In re Sobhanadri*. (Right to recall prosecution witnesses for cross-examination should be allowed even in summons-case offences, if the charge of warrant-case is dismissed.)

Section 242

242.* When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.

Substance of accusation to be stated.

Synopsis

- | | |
|--------------------------------|--|
| 1. Scope of the section. | 6. Joinder of charges. |
| 2. "When the accused appears." | 7. Joint trial of a summons-case and a warrant-case. See Notes under S. 241. |
| 3. Particulars of the offence. | 8. Effect of non-compliance with the section. |
| 4. No formal charge necessary. | |
| 5. Plea of accused. | |

Other Topics (miscellaneous)

"Shall be stated to him." See Note 8.

Summons-case trial with the warrant case — Charges for both needed. See S. 241 Note 2.

Trial of European British subject. See S. 445, sub-section (5).

1. Scope of the section. — This section which relates to the commencement of the trial of a summons-case may be compared with the corresponding provisions relating to the trial of warrant-cases and sessions trials. In the trial of a summons-case, the particulars of the offence are stated to the accused and his plea is recorded at the very commencement of the trial, whereas in warrant-cases, the trial commences with the taking of the evidence for the prosecution, and the framing of the charge and recording of the accused's plea are postponed till after the prosecution evidence has been recorded. In this respect the commencement of a sessions trial resembles that of a summons-case, rather than that of a warrant-case, because in sessions trial also (S. 271) the charge is read and explained to the accused and his plea is recorded at the very commencement of the trial.

2. "When the accused appears." — As to the right of the accused to appear by pleader, see S. 205 and Notes thereunder.

3. Particulars of the offence. — The section requires that the particulars of the offence charged must be stated to the accused. A general reference to the terms of the marginal note of a section is not sufficient.¹ It is not necessary that the Magistrate should make a record of what he has stated to the accused in explaining the offence.² But there must be some indication in the record to show that the provisions

* 1882 : S. 242; 1872 : S. 203, para. 2, S. 206; 1861 : S. 265.

Section 242 — Note 3

1. ('03) 28 Bom 129 (142) : 5 Bom L R 805, *Emperor v. Alloomiya*. (S. 4 of the Bombay Prevention of Gambling Act, 1881.)
- (72-92) 1872-92 Low Bur Rul 594 (594), *Queen-Empress v. Sein Kaing*.
2. ('36) AIR 1936 Pat 501 (502) : 38 Cr. L. J. 22, *Bhubneshwar v. Emperor*.
- ('34) AIR 1934 Nag 258 (258) : 36 Cr. L. J. 361 : 31 N L R 139, *Jagannath Singh v. Emperor*. (It is sufficient if the proceedings show that he had orally explained to the accused what the offence was and asked him to show cause.)

of this section were complied with.³ However, the omission to make a note to the effect that the particulars of the offence were explained to the accused is only an irregularity.⁴ In the undermentioned case,⁵ the accused was sent up by the police on certain allegations. It was held that on such allegations being found not to amount to *any* offence, it was not open to the Magistrate to proceed against the accused on some other footing which would inculcate him. Where the accused is prosecuted for an offence of which he is not proved to be guilty, he cannot be convicted for another offence without being called upon to show cause why he should not be convicted of such other offence.⁶

4. No formal charge necessary. — Under this section it is not incumbent upon a Magistrate to frame a formal charge in a summons-case. It has, however, been held in the undermentioned case¹ that when a prosecution is for an offence under an Act of very recent date, with the provisions of which the litigants as well as the lawyers are not quite familiar, it would be proper for a Magistrate to frame a formal charge.

As to cases where the Magistrate frames a charge in a summons case and the accused is misled into believing that he will be given an opportunity to further cross-examine the prosecution witnesses, see Notes under section 256.

5. Plea of accused. — In summons-cases the Magistrate must record the accused's plea at the commencement of the trial.¹ See S. 243.

6. Joinder of charges. — Though this section provides that in summons-cases it is not necessary to frame a formal charge, the provisions of the Code relating to the joinder of charges and the joint trial of accused persons apply to the trial of summons cases also.¹

7. Joint trial of a summons-case and a warrant-case. — See Notes under Section 241.

3. ('38) AIR 1938 Pat 55 (57) : 16 Pat 97 : 39 Cr. L. J. 321, *Sukhdeo Prasad v. Emperor*. (The record on its face must establish that the provisions of the section have been complied with.)

4. ('36) AIR 1936 Pat 501 (502) : 38 Cr. L. J. 22, *Bhubneshwar Prashad v. Emperor*.

4. ('32) AIR 1932 Nag 127 (127) : 28 Nag L R 163 : 33 Cr. L. J. 938, *Mt. Lahni v. Khushal*. (Omission to make such note would be a mere irregularity.)

5. (1900) 1 Low Bur Rul 43 (44), *Queen-Empress v. Tun E*.

6. ('40) AIR 1940 Cal 328 (329) : 41 Cr. L. J. 736, *Daragali Miah v. Emperor*.

Note 4

1. ('38) AIR 1938 Pat 440 (442) : 39 Cr. L. J. 610, *Behari Ram v. Emperor*. (Prosecution under the Sugar Excise Duty Act of 1934.)

Note 5

1. ('12) 15 Ind Cas 488 (489) : 40 Cal 71 : 13 Cri L Jour 488, *Anath Nath Dey v. Mohendra Nath*. (It is not clear how an offence under S. 506, Penal Code, can be tried as a summons-case.)

1. ('30) AIR 1930 Sind 64 (65) : 30 Cri L Jour 1077, *Mahomed Jamal v. Emperor*. (Offence under the Motor Vehicles Act.)

Note 6

1. ('05) 2 Cr. L. J. 739 (744) : 3 Low Bur Rul 52 (FB), *Emperor v. San Dun*. ('14) AIR 1914 Cal 603 (606) : 41 Cal 694 : 15 Cr. L. J. 73, *Biswas v. Emperor*. (2 Cri L Jour 739 (FB), followed.)

[See also ('72-92) 1872-92 Low Bur Rul 398 (398), *Queen v. Nga Than Ton*.]
See also S. 233 Note 1 and S. 241 Note 3.

Section 242
Note 8

8. Effect of non-compliance with the section. — Does the omission to state the particulars of the offence to the accused as required by this section amount to an illegality or to a mere irregularity curable under S. 537? On this question there is a conflict of decisions. On the one hand, it has been held by the Calcutta High Court¹ that such an omission is an illegality and not a mere irregularity covered by S. 537. On the other hand, it has been held by the High Court of Madras² and the Judicial Commissioner's Court of Nagpur³ that such an omission is only an irregularity which under S. 537 does not vitiate the trial unless it has occasioned a failure of justice. In the undermentioned Patna case,⁴ the view of the Calcutta High Court was adopted but a more recent case⁵ of the Patna High Court has followed the opposite view.

Section 243

243.* If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly.

Synopsis

- | | |
|---|--|
| 1. Legislative changes. | plea of accused. See S. 252 and Notes thereunder. |
| 2. Conviction on admission of truth of accusation. | 7. Whether order for security for keeping the peace may be based on consent of person sought to be bound. See S. 117 Note 3. |
| 3. Admission by pleader. See S. 205 Note 7. | 8. "If he shows no sufficient cause why he should not be convicted." |
| 4. Record of admission. | |
| 5. One admission for several accused. | |
| 6. Warrant-case tried as a summons-case — Conviction on | |

Other Topics (miscellaneous)

Comparison between sessions and warrant cases. See S. 242 Note 1.
Conviction on confession is discretionary. See Note 2.
Record of actual words. See Note 4.

* 1882 : S. 243 ; 1872 : S. 206, para 1 ; 1861 : S. 265.

Note 8

1. ('27) AIR 1927 Cal 196 (196, 197) : 54 Cal 359 : 28 Cr. L. J. 155, *Gopalkrishna v. Matilal Singh*. (25 Mad 61 (PC), followed.)
2. ('19) AIR 1919 Mad 52 (52) : 42 Mad 787 : 20 Cr. L. J. 395, *Public Prosecutor v. Sankaralinga Moppan*.
3. ('32) AIR 1932 Nag 127 (128) : 28 Nag L R 163 : 33 Cr. L. J. 938, *Mt. Lahani v. Khushal*. (A I R 1927 P C 44, relied on.)
4. ('36) AIR 1936 Pat 501 (502) : 38 Cr. L. J. 22, *Bhubneshwar Prasad v. Emperor*.
5. ('38) AIR 1938 Pat 55 (57) : 16 Pat 97 : 39 Cr. L. J. 321, *Sukhdeo v. Emperor*.

1. Legislative changes.—The word “may” has been substituted for the word “shall” by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923, thereby restoring the language of the Codes of 1872 and 1861.

2. Conviction on admission of truth of accusation.—This section empowers a Magistrate to convict an accused person when he admits that he has committed the offence of which he is accused and does not show any sufficient cause why he should not be convicted.¹ But a mere admission of the truth of all or any of the facts alleged against him does not amount to an admission of guilt unless such facts constitute an offence in the eye of the law; and in case such facts do not constitute an offence the accused cannot be convicted on such an admission.² Further, the admission referred to in the section is the admission made *before* the trying Magistrate by an accused in pursuance of the questions put to him under S. 242. Therefore, where there has been no plea of “guilty” before the trying Magistrate, he cannot rely upon an admission alleged to have been made by the accused in some other case and at some other time.³

Under the Code as it stood prior to the amendments of 1923, a Magistrate was *bound* to convict an accused person if he pleaded guilty.⁴ The section in its present form, however, leaves it to the

Section 243 — Note 2

1. ('24) AIR 1924 All 188 (188): 46 All 41: 25 Cri L Jour 655, *Angnoo v. Emperor*. (U. P. Municipalities Act, S. 85 (1).)
- ('28) AIR 1928 Oudh 402 (403): 3 Luck 680: 29 Cri L Jour 893, *Emperor v. Shiwa Datta*. (Offence under S. 290, Penal Code—AIR 1925 Oudh 305, distinguished.)
[See also ('33) AIR 1933 Cal 186 (187): 60 Cal 351: 34 Cri L Jour 345, *Proboodh Chandra v. Emperor*. (Plea of guilty involves admission of truth of all facts essential for guilt.)]
2. ('32) AIR 1932 Lah 363 (364): 33 Cri L Jour 646, *Bahadur Singh v. Emperor*. (S. 16, Motor Vehicles Act, 1914.)
- ('26) AIR 1926 Lah 406 (406): 7 Lah 359: 27 Cr. L. J. 907, *Basant Singh v. Emperor*.
- ('15) AIR 1915 Cal 153 (153): 15 Cri L Jour 703 (703), *Gaya Roy v. Emperor*. (S. 13B, Calcutta Police Act, 1866—Mere admission of possessing four annas in contravention of S. 13 is not sufficient if off duty is pleaded.)
- ('20) AIR 1920 All 203 (204): 21 Cri L Jour 665, *Banwari Lal v. Emperor*. (Accused admitting that he travelled without ticket does not necessarily admit that he did so with fraudulent intention.)
- ('25) AIR 1925 Lah 153 (155): 25 Cri L Jour 707, *Emperor v. Ghulam Raza*.
- ('31) AIR 1931 Nag 100 (101): 32 Cri L Jour 1132, *Kanhaya Lal v. Emperor*. (Offence under S. 157, Penal Code—A I R 1925 Lah 153, followed.)
- ('88) 1 C P L R Cr 25 (26), *Empress v. Mt. Adhika*.
- ('28) AIR 1928 Lah 827 (828): 29 Cri L Jour 645, *Mt. Darkan v. Emperor*.
- ('08) 7 Cr. L. J. 208 (209): 1907 Upp Bur Rul 9:14 Bur L R 216, *Nga Pyo v. Emperor*.
[See also ('34) AIR 1934 Nag 65 (65): 35 Cri L Jour 696: 30 Nag L R 317, *Emperor v. Homnarain*. (Even if accused says “guilty” Court must see what he really means—If he merely means to say that he caused the alleged injury but that it was purely accidental, he cannot be convicted.)]
See also S. 271 Note 12.
3. ('05) 2 Cri L Jour 532 (534): 29 Cal 595: 9 C W N 816, *Emperor v. Mohunt Ram Das*. (In this case Magistrate relied on admission made and recorded by a police-officer in another case.)
4. ('14) AIR 1914 Sind 158 (159): 8 Sind L R 213: 16 Cri L Jour 238, *Emperor v. Aslum Gul Mahomed*.
- ('23) AIR 1923 Mad 364 (365): 46 Mad 476: 24 Cr. L. J. 358, *Crown Prosecutor v. Duraiswami*.

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discretion of the Magistrate whether to accept the accused's plea of guilty or not. If he exercises his discretion by not accepting the plea of guilty and proceeds to hear the evidence, he must satisfy himself that the evidence justifies a conviction. If the evidence does not prove the charge, he is bound to acquit the accused. It is not open to him to go back to the plea of guilty and convict the accused on that plea.⁵ Nor is it open to him to take from the accused a further plea of guilty and relieve himself of the duty of examining the remaining witnesses cited on behalf of the prosecution.⁶

A Magistrate may call for evidence even after he has accepted the plea of guilty made by the accused, with the object of acquainting himself with the facts of the case in order to pass an adequate sentence.⁷ A plea of "guilty" can be allowed to be withdrawn if the accused was, at the time of making it, enfeebled by illness and undefended.⁸

3. Admission by pleader. — See Section 205 Note 7.

4. Record of admission. — This section requires that an admission of an accused should be recorded as nearly as possible *in the words* used by him.¹ Further, an admission should be recorded *immediately* it is made and not afterwards from rough notes or memory.²

5. One admission for several accused. — The law requires that each accused should be questioned separately and that the answers given should be taken as nearly as possible in the words used by each accused. Therefore, where a Magistrate records *one* admission for a number of accused persons, the admission is bad.¹

6. Warrant-case tried as a summons-case — Conviction on plea of accused. — See Section 252 and Notes thereunder.

7. Whether order for security for keeping the peace may be based on consent of person sought to be bound. — See Section 117 Note 3.

8. "If he shows no sufficient cause why he should not be convicted." — These words are to be read along with the earlier part of the section and not as a distinct and separate part. Where an accused

5. ('31) AIR 1931 Bom 195 (196):32 Cri L Jour 719 (FB), *Emperor v. Janardhan*.

6. ('28) AIR 1928 Cal 243 (244), *Lalji Ram v. Corporation of Calcutta*.
See also S. 244 Note 3.

7. ('31) AIR 1931 Bom 195 (196): 32 Cr L. J. 719 (FB), *Emperor v. Janardhan*.

8. ('15) AIR 1915 Lah 487 (493): 16 Cr L.J. 257 (263) (FB), *Emperor v. L. C. E. Shuldham*.

Note 4

1. ('72-92) 1872-92 Low Bur Rul 594 (594), *Queen-Empress v. Sein Kaing*.

(199) 1899 All WN 81 (82), *Queen-Empress v. Muhammad Haniff*. (But failure to record statement in accused's own words was held mere irregularity.)

(1907) 6 Cr L. J. 332 (333): 17 M L J 438, *In re Subba Naicken*. (Statement made by a person against whom proceedings are taken under chapter VIII.)

(1928) AIR 1928 Cal 243 (244), *Lalji Ram v. Corporation of Calcutta*.

(1933) AIR 1933 Cal 117 (118): 34 Cri L Jour 250, *Ganesh Chandra Khan v. Corporation of Calcutta*.

[See ('73) 20 Suth W R Cr 55 (56), *In the matter of Mohesh Chunder*.

2. ('92) 15 Mad 83 (87): 2 Weir 326, *Empress v. Erugadu*.

Note 5

1. ('32) AIR 1932 Sind 211 (212): 26 Sind L R 345: 34 Cri L Jour 67, *Tejmal Hassomal v. Emperor*.

does not admit his guilt, he cannot be convicted merely because he does not show sufficient cause against his conviction.¹

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Note 8

244.* (1) If the Magistrate does not convict the accused under the preceding section or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence:

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Procedure when no such admission is made.

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

Synopsis

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| 1. Legislative changes. | 6. Extra-judicial information. |
| 2. "Shall proceed to hear the complainant." | 7. Evidence of the accused. |
| 3. Evidence in support of the prosecution. | 8. "May issue summons . . ." |
| 4. Duty of prosecution. | 9. Re-issue of summons. |
| 5. Cross-examination. | 10. Adjournment for procuring attendance of witnesses. |
| | 11. Process-fees. See Notes to S.544. |

Other Topics (miscellaneous)

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| Closing of the case by a party. See Note 3. | Duty to take evidence for accused. See Note 7. |
| Compulsion of attendance of witnesses. See Note 9. | Evidence in presence of accused. See Note 2. |
| Connected cases — Copies—Depositions not to be used. See Note 3. | Evidence of co-accused-witness. See Note 3. |
| Conviction of complainant. See Note 2. | Examination of accused. See Note 7. |
| Conviction on evidence recorded in another case. See Note 2. | Exhibiting documents. See Note 3. |
| Costs of adjournment by accused. See Note 2. | Non-examination of complainant. See Note 2. |
| Discretion to summon witnesses. See Note 8. | Subsequent plea of guilt. See Note 3. |
| Documents filed by accused. See Note 7. | Supplementary witnesses. See Note 10. |
| Duty to take all evidence of prosecution. See Notes 2 and 3. | Witnesses residing in foreign territory. See Note 8. |

* 1882 : S. 244 ; 1872 : Ss. 207, 361 ; 1861 : Ss. 262, 266.

Note 8

1. ('01) 1 Low Bur Rul 95 (96), *Vadivalooswamy v. Crown*.

Section 244
Notes 1-2

1. Legislative changes.

Changes made by Act XVIII of 1923 —

- (1) The words "If the Magistrate does not convict the accused under the preceding section or" which have been added at the commencement of sub-s.(1), are in keeping with the amendment of S. 243 whereby the Magistrate is no longer obliged to convict on a plea of guilty but *may*, notwithstanding such plea, record evidence before convicting the accused.
- (2) The proviso to sub-s.(1) is new and provides for a case where a complaint is made by a Court.
- (3) In sub-s.(2) for the words "issue process to compel the attendance of any witness or the production of," the words "issue a summons to any witness directing him to attend or to produce" have been substituted.¹

2. "Shall proceed to hear the complainant." — When an accused person denies the truth of the complaint made against him, the Magistrate ought to hear the complainant and his witnesses in support of the prosecution, and also the accused and his witnesses.¹ He is bound to hear the complainant and take all evidence that he produces in support of the prosecution before he can acquit the accused.² An order of acquittal passed without this being done is illegal,³ and the High Court may set it aside in revision.⁴

The accused cannot be convicted except upon the evidence that he did commit the offence; the latter part of S. 243 must not be read

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1. ('26) AIR 1926 Mad 361 (361) : 27 Cri L Jour 76, *Selvamuthu v. Chinnappan Chettiar*. (Magistrate is not bound to re-issue the summons if the witness summoned by him does not care to attend.)

Note 2

1. ('66) 6 Suth W R Cr 75 (75), *In re Ahlad Monce Dossec*.
(70) 14 Suth W R Cr 25 (26), *Queen v. Chooramoni*.
(71) 15 Suth W R Cr 6 (6) : 6 Beng L R App 83, *In re C. G. D. Betts*. (Conviction on evidence recorded in another case.)
(21) AIR 1921 Oudh 147 (147) : 24 Oudh Cas 267 : 22 Cri L Jour 765, *Emperor v. Kanhaiya Lal*. (Magistrate passing orders on the result of his inspection without giving parties opportunity of producing evidence—Order set aside.)
(07) 6 Cri L Jour 424 (425) : 9 Bom LR 1346, *Emperor v. Somabhai Nathabhai*. (The Magistrate is equally bound even where the accused admits all the facts alleged by the prosecution but pleads not guilty.)
 2. ('91) 1891 Rat 539 (539), *Queen-Empress v. Toulman*.
(95) 2 Weir 305 (305), *Naranapier v. Ramaswami Aiyar*. (Magistrate cannot dispense with any witness whom complainant wishes to examine.)
(97) 20 Mad 388 (389) : 2 Weir 251, *Queen-Empress v. Sinnai Goundan*. (The case was not disposed of under S. 203 and summonses were issued to the complainant's witnesses.)
(67) 7 Suth W R Cr 45 (45), *Queen v. Sreenath Mookopadhia*.
(68) 10 Suth W R Cr 61 (61) : 2 Beng L R (SN) 15, *Bilash v. Makroo*.
(71) 16 Suth W R Cr 48 (49), *Kishore Sahai v. Mungeri Sahai*. (Witnesses named by the complainant not examined but other witnesses were examined—Acquittal was set aside.)
(74) 21 Suth W R Cr 21 (21, 22), *Queen v. Hatoo Khan*. (But in this case the High Court refused to set aside order of acquittal on the ground of want of jurisdiction.)
 3. ('96) 18 All 221 (223) : 1896 A W N 35, *Kesri v. Muhammad Bakhsh*.
 4. ('13) 14 Cr. L. J. 177 (178) : 19 I. C. 177 : 1912 Upp Bur Rul 148, *Emperor v. Nga San Wein*.
- See also S. 245 Note 2.

as distinct and separable from the first part.⁵ A conviction is illegal which is arrived at without the recording of the prosecution evidence.⁶ Similarly, where the accused was convicted upon a statement of the complainant not made on oath before a Magistrate, the conviction was held to be illegal.⁷

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This section does not make the examination of the *complainant himself* absolutely necessary, so as to vitiate a conviction if such examination does not take place.⁸ But when a complainant's evidence is taken it should be in the presence of the accused. The common practice of not examining the complainant at the trial but only under S. 200 of the Code is contrary to law.⁹

A Magistrate while enquiring into the complaint cannot, in the same case, convict the complainant himself because the evidence discloses that he too was a party to an affray. If the complainant is to be convicted it can only be in separate proceedings taken against him.¹⁰

Criminal Courts have no authority to order the accused to pay the complainant costs of an adjournment on the failure of the accused to appear on the day fixed for hearing of the complaint.¹¹

3. Evidence in support of the prosecution. — The language of the section is compulsory and the Magistrate is bound to take all such evidence as may be produced in support of the prosecution.¹ Even when the complainant declines to be examined, it is the duty of the Magistrate to proceed to take the evidence of his other witnesses before dismissing the complaint, although in any event a strong preliminary presumption against the truth of the complainant's case would arise from his contumacious refusal to be examined.² In summons-cases, the parties have an undoubted right to examine their witnesses and their right could only be curtailed by the Court upon the ground that the examination of these witnesses will delay and possibly defeat the ends of justice.³ But where a complainant after examining some of the witnesses named by him, did not apply to the Magistrate to issue

5. ('01) 1 Low Bur Rul 95 (96), *Vadivelooswamy v. Crown*.

6. ('66) 6 Suth W R Cr 92 (92), *In re Samcerooddeen*.

('05) 2 Cr. L. J. 532 (534) : 9 C W N 816, *Emperor v. Mohunt Ram Das*. (Magistrate convicting merely on admission made to a police-officer—Police-officer ought to have at least been examined.)

('29) AIR 1929 Pat 406 (406) : 30 Cr.L.J. 517, *Munshi Mian v. Emperor*. (Magistrate convicting accused merely on report of another Magistrate—Conviction was set aside.)

7. ('73) 20 Suth W R Cr 55 (55), *In the matter of Mohesh Chunder*. (Conviction merely based on first information report.)

See also S. 200 Note 23.

8. ('20) AIR 1920 Cal 68 (69) : 21 Cri L Jour 252, *Amir Miya v. Sarafdi Hazi*. (Section only requires that the complainant shall be heard.)

9. ('97-01) 1 Upp Bur Rul 67, *Empress v. Nga Ngwe Nyun*.

10. ('88) 1888 Rat 403 (404), *Queen-Empress v. Kissan Malhari*.

11. ('22) AIR 1922 All 184 (184) : 23 Cri L Jour 243, *Beecha v. Emperor*.

Note 3

1. ('32) AIR 1932 All 188 (188) : 54 All 416 : 34 Cri L Jour 18, *Ali Husain v. Lachmi Narain*.

2. ('27) AIR 1927 Nag 210 (211) : 28 Cri L Jour 511, *Damdoo v. Harba*.

3. ('21) AIR 1921 Pat 308 (310) : 22 Cri L Jour 430, *Biswanath Mahapatra v. Shivanand Saraswathi*.

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Note 3

summons to other witnesses, it was held that the Magistrate was not wrong in deciding the case on evidence before him.⁴ A Magistrate has no jurisdiction to refuse to examine a witness who is deaf but who is able to speak and write. Such refusal is materially prejudicial and vitiates the trial.⁵

A Magistrate should always be chary of taking upon himself the duty of deciding on behalf of the parties which witnesses should be examined.⁶ Generally it is not the province of the Court to examine the witnesses, and as a rule, the Court should leave the witnesses to the pleaders to be dealt with as provided for in S. 138 of the Evidence Act. Section 495, sub-s.(9) also tends in the same direction.⁷

It is no doubt ordinarily the duty of the prosecution if they rely on documents, to tender them in evidence together with such formal proof as may be necessary. But where documents actually on the file of the proceedings are not formally exhibited and put on record as evidence, the Magistrate should in the exercise of a wise discretion, before the close of the prosecution case, draw the attention of the prosecution to the fact that the documents have not been exhibited, or ascertain whether they are to be regarded as having been produced as evidence for the prosecution under S. 214.⁸

But a Magistrate cannot after the trial is closed and while writing judgment, admit in evidence a document without giving the accused an opportunity of raising objection to its relevancy and admissibility.⁹

The closing of the case for the prosecution is no mere form, but, with certain exceptions, closes the door to any further evidence against the accused. The prosecution cannot re-open the case and make additions to it except such voluntary addition as the accused can himself make.¹⁰ A statement by a party that he has closed his case, should bear the signature of the party. In the absence of such signature, it is not recorded in accordance with law and there is no presumption of its correctness.¹¹

Statements made by a defence witness against accused persons other than the one who called him as a witness cannot be considered as if it were evidence led on behalf of the complainant.¹²

Where a Magistrate adopts the procedure prescribed by this section on the footing that there was no admission of guilt on the part

4. ('71) 15 Suth W R Cr 87 (87), *In re Notobur Bera*.

5. ('24) AIR 1924 Cal 541 (541); 21 Cr.L.J. 688, *Ganoda Dassya v. Srimanta Ghosh*.

6. ('15) AIR 1915 Mad 825 (825); 16 Cri L Jour 156 (157), *Venkatappaya v. Venkataramanayya*.

7. ('24) AIR 1924 Oudh 371 (372); 27 Oudh Cas 246; 25 Cri L Jour 1226, *Janaki v. Shco Narain Singh*.

8. ('09) 10 Cr.L.J. 408 (409); 3 S.L.R. 84; 3 I.C. 895, *Emperor v. Ghulam Hussein*.

9. ('16) AIR 1916 Mad 1084 (1085); 16 Cr.L.J. 458 (459), *In re Kelappan Nair*.

10. ('23) AIR 1923 All 322 (323); 45 All 323; 25 Cr.L.J. 305, *Mahadeo v. Emperor*. See also S. 256 Note 10 and S. 289 Note 2.

11. ('26) AIR 1926 Lah 656 (656); 27 Cri L Jour 1071, *Mt. Bholan v. Matu*.

12. ('40) 42 Pun L R 378 (379), *Amar Nath v. Emperor*. (It is not permissible to use against accused defence evidence of his co-accused.)

('31) AIR 1931 Lah 57 (58); 12 Lah 385; 32 Cr.L.J. 672, *Chatur Bhuj v. Emperor*.

of the accused person, he is not competent to take a further plea of guilty from the accused and relieve himself of the duty of examining other prosecution witnesses.¹³

In connected cases it is not proper to take the depositions in one case and have them copied and used in the other.¹⁴

4. Duty of prosecution. — The duty of the prosecution is to prove all the relevant facts essential to establish the guilt of the accused.¹ Irrelevant evidence should be excluded and the prosecution must be confined to simple and true evidence and no attempt should be made to hide essential facts or to embroider the case.²

The prosecution cannot be permitted at the last moment to change its ground.³ See also S. 286 Note 18.

5. Cross-examination. — The section does not contain any express provision for cross-examination, but a cross-examination must certainly be allowed at some stage and hence the right is exercisable under this section.¹ In the procedure laid down for the trial of summons cases the accused has no right to postpone the cross-examination of any prosecution witnesses as in the trial of warrant cases. But if the cross-examination is postponed in accordance with the direction of the Magistrate, he is bound to give the accused a further opportunity to cross-examine the witnesses. Without such examination the evidence will not be legally admissible and the irregularity will vitiate the trial.²

6. Extra-judicial information. — It is extremely improper for a Magistrate in disposing of a case to rely in any way on statements made to him out of Court.¹

7. Evidence of the accused. — The evidence of the accused should be taken after that of the complainant.¹ But where no prejudice was caused, it was held that the fact of a Deputy Magistrate having recorded some evidence of the defence before the close of the case for the prosecution, would be no ground for reversing his decision.²

13. ('28) AIR 1928 Cal 243 (244), *Lalji Ram v. Corporation of Calcutta*.

See also S. 243 Note 2.

14. ('23) AIR 1923 Cal 196(197): 50 Cal 223: 24 Cr.L.J. 198, *Mozahur v. Emperor*.

See also S. 252 Note 5.

Note 4

1. ('23) AIR 1923 All 322(324): 45 All 323: 25 Cr.L.J. 305, *Mahadeo v. Emperor*. (If prosecution relies on confession of co-accused it must be formally proved.)

2. ('36) AIR 1936 Lah 341 (344): 16 Lah 345: 37 Cri L Jour 504, *Hans Raj v. Emperor*.

3. ('28) AIR 1928 All 696 (697): 51 All 463: 29 Cr.L.J. 1084, *Bhan Deb v. Emperor*.

Note 5

1. ('31) AIR 1931 All 621 (623): 54 All 212: 33 Cr. L. J. 310, *Lachmi Narain v. Emperor*.

2. ('22) AIR 1922 Pat 296 (298): 23 Cr. L. J. 440, *Parmeshwar Lal v. Emperor*.

Note 6

1. ('90) 14 Bom 572 (573), *Queen-Empress v. Sahadeo Tukaram*.

Note 7

1. ('25) AIR 1925 All 614 (614): 47 All 341: 26 Cr.L.J. 905, *Bechan Teli v. Emperor*.

2. ('82) 8 Cal 154 (156): 10 C L R 51, *Empress v. Kalicharan*. (Defence witnesses examined before cross-examination of some of the prosecution witnesses who were not in attendance.)

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The section makes it obligatory on the Magistrate to hear the accused and record the evidence which he adduces in his defence after the prosecution evidence is recorded.³ When the section says that the Magistrate shall hear the accused, it certainly means that he should ask the accused what he has to say in his own defence against the charge which has been brought against him, and in explanation of the evidence which has been led to support the charge.⁴ But the examination need not be recorded with the same formality as in warrant-cases or preliminary enquiries.⁵ As to the applicability of S. 342 to summons-cases, see Note 3 to S. 342.

No Criminal Court can shut its eyes to the statement of an accused person when that statement refers to certain documents to which the accused is a party. The Court may not be satisfied with the statement or may require further proof but it cannot brush aside the documents to which the accused are parties when the accused themselves file those documents in Court along with their statements. As the accused cannot be examined on oath, they can only file a statement or refer to some documents to which they have been parties.⁶

Where, after closing hours, the Magistrate insisted on going on with the case and the accused's counsel wanted an adjournment to examine the witnesses who were in attendance and the adjournment was refused, one ground being that no defence list had been filed, it was held that the ground for refusal was wrong and the convictions were set aside.⁷

It is the duty of Magistrates when dealing with ignorant individuals accused of technical offences to go very thoroughly into the evidence, and where they are not defended by advocates, to give them some assistance in putting up obvious defensive pleas.⁸

As to the effect of refusal by a Magistrate to examine a witness, on the conviction of the accused, see S. 537 Note 27.

8. "May issue summons . . ." — Under the Code of 1861, S. 263, it was in the discretion of the Magistrate to summon the witnesses "if he considered the evidence essential to the just decision of the case," and incumbent on him to summon them only if it appeared to him that they were likely to give material evidence and that they would not voluntarily appear for the purpose of being examined.¹

3. ('21) AIR 1921 Bom 374 (375, 377) : 45 Bom 672 : 22 Cr. L. J. 17, *Fernandez v. Emperor*. (S. 342, Cr. P. C., is applicable to summons-cases.)

(('68) 9 Suth W R Cr 62 (63), *Queen v. Bissessur Sein*.

(('70) 13 Suth W R Cr 63 (64), *In re Ameerchand Nohatta*. (Point decided against the accused in another proceeding — This was held to be no reason for refusing to examine accused's witnesses.)

4. ('22) AIR 1922 Bom 290 (291) : 46 Bom 441 : 23 Cr. L. J. 45, *Gulabjap v. Emperor*.

5. ('70) 14 Suth W R Cr 76 (76), *In re Chedee Koonjra*.

6. ('28) AIR 1928 Mad 1135 (1136) : 29 Cr. L. J. 1041, *Muhammed Salia v. Emperor*. See also S. 256 Note 12.

7. ('02-03) 7 Cal W N 714 (716), *Emperor v. Keso Singh*.

8. ('30) AIR 1930 Rang 349 (350) : 32 Cri L Jour 206, *Ali Hossein v. Emperor*. See also S. 340 Note 4.

Note 8

1. ('70) 2 N W P H C R 393 (393, 394), *Queen v. Mohuree*.

(('68) 10 Suth W R Cr 42 (42), *Akbar v. Punchoo Biswas*.

Under the present section also, the Magistrate is under no obligation to issue process to compel the attendance of any witness either on the application of the complainant or the accused. He has a discretion in the matter.² However, he must consider the application. He cannot ignore it completely,^{2a} nor can he exercise the discretion to the detriment of the applicant in an arbitrary manner.³ The arbitrary exercise of discretion does not necessarily amount to acting without jurisdiction so as to justify the High Court's interference in all cases; but where the refusal to issue process amounts to a denial of justice, the High Court would interfere.⁴ Thus, when the accused was a police constable and it was not improbable that the witnesses for the prosecution would not voluntarily appear, it was held that it was just such a case in which the Magistrate should have exercised his discretion and issued summons.⁵ Where, on the other hand, no prejudice is caused, the High Court will not interfere with the order of the Magistrate.⁶

Though there is no provision for securing the attendance of witnesses residing in a foreign territory, the Magistrate is bound to make all reasonable efforts to procure their attendance.⁷

Where an accused who was called upon to let in evidence applied for, and obtained the summoning of his witnesses on his behalf, it was held that he had exhausted the power of summoning witnesses for the defence and all that he could do was to move the Magistrate to summon any other witnesses whom he might deem necessary under S. 540.⁸

An application for summoning witnesses cannot be granted by a Magistrate not seised of the case.⁹

9. Re-issue of summons. — It was held by the Calcutta Court in cases decided prior to the amendment of sub-s.(2) that there was no discretionary power given by S. 244 to a Magistrate to refuse to compel the attendance of witnesses upon whom processes had already been issued.¹ This view has also been adopted by the Patna High Court subsequent to the amendment.² But the Madras view is that

(70) 13 Suth W R Cr 63 (64), *In re Amcerchand Nohatta*. (Per Bayley, J.)

(71) 15 Suth W R Cr 87 (87), *In re Notobur Bera*.

2. ('20) AIR 1920 All 209 (210) : 21 Cri L Jour 385, *Jhabboo v. Emperor*.

2a. ('40) AIR 1940 Lah 58 (59) : 41 Cri L Jour 340, *Vidya Parkash v. Emperor*. (Failure to consider the application is incorrect though not illegal.)

3. ('03) 30 Cal 508 (514) : 7 Cal W N 404, *Surya Kanta v. Hem Chunder*.

4. ('03) 30 Cal 508 (515) : 7 Cal W N 404, *Surya Kanta v. Hem Chunder*.

(71) 15 Suth W R Cr 87 (88), *In re Jehan Buksh*. (Evidence already before the Magistrate was contradictory — Magistrate ought to have summoned witnesses whom accused wanted to call.)

(05) 2 Cri L Jour 679 (683, 686) : 32 Cal 1093 : 2 C L J 280, *Tara Pada Biswas v. Nurul Huque*. (Obiter — Case under S. 145, Cr. P. C.)

(11) 12 Cr. L. J. 566 (567) : 12 L. C. 654 (Mad), *Lunmo of Mahalanuma v. Emperor*.

5. ('68) 9 Suth W R Cr 3 (3), *Boiddonath Bania v. Bheedu Dass*.

6. ('08) 7 Cr. L. J. 344 (345) : 7 C L J 377 : 12 C W N 461, *Gosto Behari v. Emperor*. (Ordinarily accused are bound to bring their own witnesses in summons-cases.)

7. ('73) 1873 Pun Re No. 4 Cr, p. 5 (5), *Crown v. Ruttun Singh*.

8. ('14) AIR 1914 All 197 (198) : 36 All 13 : 15 Cr. L. J. 164, *Mangal v. Emperor*.

9. ('14) AIR 1914 All 197 (198) : 36 All 13 : 15 Cr. L. J. 164, *Mangal v. Emperor*.

Note 9

1. ('03) 30 Cal 121 (122), *Daulat Singh v. Brinda Belder*.

(01-02) 6 Cal W N 548 (550), *Bhomar Munshi v. Digambar Das*.

2. ('33) AIR 1933 Pat 494 (495) : 34 Cr. L. J. 1203, *Ajab Lal Rai v. Bhagawan Sahu*.

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the change in the new Code by the substitution of the words "may issue *summons* to any witness" for the words "may issue process to *compel the attendance* of any witness," renders it no longer obligatory on a Magistrate to compel the attendance of a witness who has received the summons.³

But every endeavour should be made to secure attendance of witnesses who have been summoned,⁴ and a Court should see that its summons and warrants are duly executed.⁵

When a Magistrate is unable to record the evidence of witnesses in attendance on the date fixed and the case is adjourned, the witnesses should be told to appear on the adjourned date; a party should not be required to repeatedly summon his witnesses on payment of fresh process-fees merely because the Magistrate is unable to record their evidence on the date originally fixed.⁶

10. Adjournment for procuring attendance of witnesses. —

The terms of the section apparently suppose that the defence witnesses attend voluntarily and accompany the accused.¹ The law intends that as a general rule the prisoner should have his witnesses present on the day of trial.² If a summons is necessary to procure the attendance of any witness, it should be applied for before the date fixed for hearing. When no such application is made a Magistrate does not exercise his discretion wrongly in refusing an adjournment asked for at the trial.³ On the other hand, however, it is not an irregularity to adjourn a trial for the purpose of enabling accused to procure the attendance of his witnesses.⁴

The section no doubt imposes an obligation on parties of procuring their evidence in summons-cases, but the Court should, before convicting an accused in such a case, take the precaution of ascertaining from the accused whether he has any witnesses, and if he has but they are not present, should consider whether he should not be allowed a further opportunity of bringing or summoning his witnesses through Court; where this was not done, a conviction was set aside.⁵ But a Court is not bound to do this and although the Magistrate may not have exercised a wise discretion in not sending for the defence witnesses, the High Court held in a case that it was unable to say that there was any illegality requiring it to quash the conviction.⁶

11. Process-fees. — See Notes to section 544.

3. ('26) AIR 1926 Mad 361 (361) : 27 Cri L Jour 76, *Selvamuthu v. Chinnappan*.

4. ('82) 4 All 53 (54) : 1881 A W N 102, *Empress v. Ruknuddin*.

5. ('21) AIR 1921 All 142 (142) : 23 Cri L Jour 124, *Bissay v. Emperor*.

6. ('12) 13 Cr. L. J. 176 (176) : 13 I. C. 928 (Lah), *Balmokand v. Nanak Chand*.

Note 10

1. ('68) 10 Suth W R Cr 36 (36), *Bhikha Roy v. Dhotun Roy*.

2. ('71) 16 Suth W R Cr 21 (22), *In re Dinoo Roy*.

('08) 7 Cr. L. J. 344 (345) : 7 C L J 377 : 12 C W N 461, *Gosto Behari v. Emperor*.

3. ('87) 1887 Rat 355 (355, 356), *Empress v. Mulchand*.

('70) 14 Suth W R Cr 76 (76), *In re Chedee Konjra*.

('71) 16 Suth W R Cr 28 (29) : 7 Beng L R 564, *Queen v. Bholanath Mukerjee*.

4. ('71) 16 Suth W R Cr 21 (22), *In re Dinoo Roy*.

5. ('84) 1884 Pun Re No. 7 Cr, p. 9 (9, 10), *Empress v. Jewan Singh*.

6. ('68-69) 4 Mad H C R App xxix (xxix).

245.* (1) If the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

Section 245:

(2) Where the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Sub-section (2) has been substituted for original sub-s. (2) by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

1. Legislative changes.
2. When to acquit.
3. "If he thinks fit."
4. Effect of dismissal of complaint or discharge.
5. Trial of warrant-case as summons-case and acquittal—Effect.
6. Sentence.
7. Whether Magistrate can find accused guilty while acting under S. 349. See S. 349 and Notes thereunder.
8. Committal to sessions.

1. Legislative changes. — Sub-section (2) has been amended by adding the words "where the Magistrate does not proceed in accordance with the provisions of S. 349 or S. 562": see Note 6.

Similar amendments are effected in Ss. 258 and 306.

2. When to acquit. — A Magistrate is not empowered to record an order of acquittal until he has heard all the prosecution and defence evidence. An order of acquittal passed before the evidence on both sides is over is not in accordance with law and is liable to be set aside.¹ Where a Magistrate refuses to proceed with a complaint on a legal objection raised by the defence, as for instance, the want of sanction of a particular authority, his order is not one of acquittal.²

3. "If he thinks fit." — As to whether these words make the examination of the accused prescribed by S. 342 optional in summons cases, see Note 3 to S. 342.

* 1882 : S. 245 ; 1872 : S. 211, paras 1 and 2 ; 1861 : S. 272.

Section 245 — Note 2

1. ('91) 1891 Rat 539 (539), *Queen v. Toulman*. (No evidence for prosecution taken.) ('67) 7 Suth W R Cr 45 (45), *Queen v. Sreenath Mookopadhia*. ('96) 18 All 221 (222, 223) : 1896 A W N 35, *Kesri v. Muhammad Baksh*. ('13) 14 Cri L Jour 177 (178) : 19 I C 177 : 1912 Upp Bur Rul 148, *Emperor v. Nga San Wein*. ('13) 14 Cri L Jour 559 (561) : 21 I. C. 159 : 36 Mad 315, *In re Mulhia Moopan*. ('32) AIR 1932 Mad 25 (26) : 33 Cr. L. J. 274, *Emperor v. Varadaraajulu Naidu*. See also S. 244 Note 2.
2. ('24) AIR 1924 Mad 487 (487) : 25 Cr. L. J. 442, *Sesha Ayyar v. Venkatasubba*.

Section 245
Notes 4-8

4. Effect of dismissal of complaint or discharge.—In the trial of a summons-case the law contemplates no other order except an order of acquittal or of conviction. When the Magistrate does not find the accused guilty, he is bound to record an order of acquittal.¹ Therefore, when the Magistrate finds that no case is made out against the accused, he *acquits* the accused *in law*, although he may style his order as an order of discharge² or of dismissal of complaint.³ See also Note 3 to S. 247 and Note 4 to S. 241.

5. Trial of warrant-case as summons-case and acquittal—Effect.—It has been held that when a warrant-case is tried as a summons-case and the accused is acquitted under this section, the acquittal amounts only to a discharge under S. 253 and can be dealt with under S. 436.¹

6. Sentence.—When a Court convicts an accused person of any offence, it is *bound* to pass some sentence, however light it may be, unless it acts under S. 349 or S. 562.¹ It is illegal to adjourn the passing of sentence for an *indefinite* period.² Section 349 deals with the procedure to be followed when the trying Magistrate cannot pass a sufficiently severe sentence.

Section 562 deals with the power of the Court to release first offenders under 21 years of age on probation of good conduct.

7. Whether Magistrate can find accused guilty while acting under section 349.—See S. 349 and Notes thereunder.

8. Committal to sessions.—As to the legality of committing to sessions offence triable as summons cases, see Note 4 to S. 347.

Note 4

1. ('71) 3 N W P H C R 273 (275), *Queen v. Tiloke Chund*. (1900) 1900 Pun Re N^o. 19 Cr, p. 43 (44); 1900 P L R Cr, p. 50, *Amir Khan v. Empress*. (Offence under S. 25, Indian Forest Act, 1878.)
2. ('10) 11 Cr. L. J. 350 (350) : 6 Ind Cas 385 (Mad), *Sessions Judge of Tinnevely v. Venkatram Aiyer*.
3. ('71) 3 N W P H C R 273 (275), *Queen v. Tiloke Chund*. ('76) 25 Suth W R Cr 63 (63), *Irfan Biswas v. Jimmut Bibee*.

Note 5

1. ('86) 1886 All W N 260 (260), *Empress v. Jadu*. ('88) 1888 All W N 96 (97), *Empress v. Lajja Ram*. ('05) 2 Cri L Jour 382 (382, 383) : 15 M L J 225, *Sabapathi Mudali v. Kuppusami Mudali*.
- See also S. 251 Note 3 and S. 403 Note 14.

Note 6

1. ('72-92) 1872-1892 Low Bur Rul 409 (409), *Queen-Empress v. Mi Bauk*. ('86) 1886 Rat 291 (292), *Queen-Empress v. Jakin*. (Offence under Bombay Abkari Act, 1878.) (1900) 2 Bom L R 611 (612), *Empress v. Hanmantdas*. (Offence under S. 74, Bombay District Municipal Act, 1873.) ('69) 2 Weir 305 (306) : 4 M H C R App lxvi. (Offence not stated.) ('34) AIR 1934 Rang 338 (339) : 12 Rang 419 : 36 Cr. L. J. 460, *Emperor v. Mi Hlwa*. ('95) 22 Cal 805 (809), *Dewan Singh v. Queen-Empress*. ('34) AIR 1934 Nag 117 (117) : 35 Cri L Jour 760, *Emperor v. Kalla*. (Sentence not inadequate merely because imprisonment is not awarded.) See also S. 258 Note 6, S. 309 Note 15 and S. 367 Note 10.
2. ('12) 13 Cr. L. J. 288 (288) : 14 Ind Cas 672 (Bom), *Emperor v. Keshavlal Girdhar*.

246.* A Magistrate may, under section 243

Section 246

Finding not limited by or section 245, convict the accused
complaint or summons. of any offence triable under this
Chapter which from the facts admitted or proved he
appears to have committed, whatever may be the
nature of the complaint or summons.

1. Scope of the section. — This section is analogous to S. 227 and enables the Magistrate to convict the accused of any offence which, from the facts proved or admitted, he appears to have committed, though it is different in its nature from the offence originally charged. But it is necessary that both the original offence and the offence of which the accused is sought to be convicted are triable as *summons-cases*.¹ The fact that the offence originally charged was one under a local or special law and that the offence of which the accused is sought to be convicted is under the Penal Code, does not affect the applicability of the section provided that both are triable as *summons-cases*.²

When convicting an accused person under this section for a different offence from that originally charged, it is not necessary to re-open the trial and to follow again the procedure prescribed by Ss. 243 and 244.³ But this does not mean that a Magistrate can convict an accused person of an offence in respect of which he has had no opportunity of defending himself.⁴ Further, the section refers to the *nature* of the offence and not to the date on which the offence was committed. Hence, the section does not empower a Magistrate in a *summons-case* to convict an accused person of an offence alleged to

* 1882 : S. 246; 1872 : S. 203, para. 2; 1861—Nil.

Section 246 — Note 1

1. ('36) AIR 1936 Mad 341 (341) : 59 Mad 442 : 37 Cr. L. J. 501, *Rajaratnam Pillai v. Emperor*. (Original charge under S. 121, Railways Act — Conviction under S. 323, Penal Code, is illegal.)
- ('84) 7 Mad 454 (456) : 2 Weir 551, *Queen-Empress v. Papadu*.
- ('94) 1894 Rat 708 (709), *Queen-Empress v. Viswanath*. (Original charge under S. 68 of the Bombay District Police Act IV of 1890—Conviction under S. 71 legal.)
- ('31) AIR 1931 Mad 228 (231) : 32 Cri L Jour 432, *Chairman Municipal Council, Mangalore v. Vasudewa Kamath*.
2. ('04) 1 All L Jour 206n (206n), *Mahabir Sahai v. Emperor*. (Original charge under S. 100, Railways Act—Conviction under S. 352, Penal Code, legal.)
- ('26) AIR 1926 Bom 255 (255) : 27 Cri L Jour 496, *Framji Bomanji v. Emperor*. (Original charge under S. 122, City of Bombay Police Act — Magistrate can convict under S. 352, Penal Code.)
3. ('40) AIR 1940 Rang 109 (109, 110) : 1940 R L R 219 : 41 Cr. L. J. 541, *The King v. Mi Nge Soe*.
- ('09) 10 Cr. L. J. 557 (559, 560) : 4 I.C. 352 : 36 Cal 869, *Dasarath Rai v. Emperor*.
4. ('90) 1890 Rat 529 (530), *Queen Empress v. Nathoo Lalji*. (Offence under S. 394, Bombay Municipal Act, 1888.)
- ('01) 5 C.W.N. 567 (568), *In the matter of Chinibas Pal*. (Ss. 447, 290 Penal Code.)
- ('69) 12 Suth W R Cr 40 (41) : 5 Beng L R App lxxxii, *Kalidas Bhattacharjee v. Mohendronath*. (Case under Code of 1861 — Order under S. 62 (present S. 144, Cr. P. C.) substituted for that under S. 308 (present S. 133, Cr. P. C.) without giving any opportunity to accused to meet it.)
- ('82) 8 Cal 195 (197), *Empress v. Radoinath Shaha*. (Offences under Ss. 53, 59 and 64, Bengal Excise Act, 1878.)

Section 246
Note 1

have been committed on a date different from that of the offence originally charged.⁵

Compare sections 237 and 238.

Section 247

247.* If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day:

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope, object and applicability of the section. 3. Applicability of section to cases consisting both of offences triable as summons-cases and offences triable as warrant-cases. 4. "Upon the day . . . adjourned." 5. "The complainant does not appear." 6. Death of complainant. | <ol style="list-style-type: none"> 7. "The Magistrate shall . . . some other day." 8. Whether acquittal under this section bars fresh trial under S. 403. See Notes to S. 403. 9. Complaints by public servants — Proviso. 10. Review. See S. 369 and Notes thereunder. 11. Power to restore a case in which accused has been acquitted under this section. See Notes under S. 369. 12. Revision. |
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Other Topics (miscellaneous)

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| <p>Absence of accused immaterial. See Note 4.</p> <p>Acquittal mandatory unless hearing is adjourned. See Notes 2 and 7.</p> <p>Adjournment not legally made. See Notes 5 and 7.</p> <p>Complainant absent but his vakil present. See Note 5.</p> <p>Date for arguments. See Note 4.</p> <p>Date for judgment. See Note 4.</p> <p>Discretion as to acquittal. See Note 7.</p> <p>Discretion as to adjournment. See Note 7.</p> | <p>Issue of summons on complaint. See Note 2.</p> <p>Non-applicability to Workman's Breach of Contract Act. See Note 2.</p> <p>Non-payment of process-fees. See Note 5.</p> <p>Non-service of summons on accused. See Note 4.</p> <p>Order of striking off or dismissal. See Note 7.</p> <p>Transfer without knowledge of complainant. See Note 7.</p> <p>Warrant-cases. See Notes 2 and 3.</p> |
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1. Legislative changes. — In the Code of 1861 (Ss. 259 and 269) the procedure was to *dismiss* the complaint¹ on the failure of the complainant to appear on the day of hearing. In the Code of 1872 it

* 1882 : S. 247 ; 1872 : S. 205, S. 208 para. 3, S. 212 ; 1861 : Ss. 259, 269.

5. ('21) 62 I.C. 575 (576) : 22 Cr.L.J. 559 (Cal), *Sarkar v. Howrah Municipality*.

Section 247 — Note 1

1. ('68) 4 Mad H C R App viii (ix).

was provided that on default of appearance of the complainant on the date of hearing the complaint might be dismissed and that the effect of such a dismissal was the same as an acquittal.² In the later Codes, it was provided that in such circumstances the accused shall be acquitted.

The proviso to the section was added for the first time in the 1893 Code.

2. Scope, object and applicability of the section. — This section provides that if on the day of hearing the complainant does not appear, the accused shall be *acquitted* unless the Magistrate thinks fit to adjourn the case. The object of the section is to prevent the complainant from being dilatory in the prosecution of the case.¹ The section applies only to *summons-cases*. In warrant-cases, the Magistrate has no jurisdiction to *acquit* an accused on the ground of the absence of the complainant.² As to the procedure to be followed in such cases if the complainant absents himself on the date of hearing, see S. 259. But where the Magistrate treats a case throughout as a summons-case and follows the procedure prescribed for such cases, he is at liberty to acquit the accused under this section although the *complaint* mentioned offences triable as warrant-cases.³ As the opening words of the section show, the section does not apply unless the proceedings have been instituted on a complaint.⁴

Inquiries under S. 1 of the Workman's Breach of Contract Act, 1859, are not criminal proceedings and the section does not apply to them.⁵

3. Applicability of section to cases consisting both of offences triable as summons-cases and offences triable as warrant-cases. — As seen in Note 2 to S. 241, where a case consists of two charges, one of which is a summons-case and the other a warrant-case, the procedure prescribed for the trial of the graver offence should be followed and the case ought to be tried as a warrant-case. Hence, in such a case, if the complainant absents himself on

2. ('73) 19 Suth W R Cr 52 (52), *In re J. G. Bagram*.

('75) 23 Suth W R Cr 63 (64), *E. B. Rly. Co. v. Kali Dass*.

('82) 1882 All W N 229 (229), *In the petition of Bansidhar*.

Note 2

1. ('26) AIR 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cr. L. J. 988, *Nagarambilli Tonkya v. Jagannath*.

2. ('34) AIR 1934 All 340 (341) : 56 All 750 : 36 Cr.L.J. 65, *Suraj Bali v. Emperor*. (1900) 4 Cal W N 26 (27), *Ram Coomar v. Ramjee*.

('23) AIR 1923 Mad 439 (439, 440) : 24 Cri L Jour 469, *Venkatarama Aiyer v. Sundaram Pillai*. (But the right of acquittal is not denied to the accused simply because the Magistrate follows a warrant-case procedure in a case where the accused is charged with a summons-case offence.)

[See ('69) 1869 Rat 16 (16), *Reg. v. Goolab Chand*.]

3. ('74) 22 Suth W R Cr 40 (41), *Madhoosoodun v. Haridass*.

4. ('24) AIR 1924 All 528 (528) : 26 Cr.L.J. 170, *Mt. Basanti v. Magsud Ali Khan*.

5. ('13) 14 Cri L Jour 404 (404) : 20 Ind Cas 228 : 9 Low Bur Rul 35, *Krishna Perdan v. Pasand*.

('23) AIR 1923 Mad 719 (720) : 46 Mad 723 : 24 Cri L Jour 465, *Ramamma v. Gurunathan*.

Section 247
Notes 3-4

the date of hearing, the Magistrate cannot acquit the accused under this section but can only discharge him under section 259.¹

Where, however, a case is begun as a warrant-case but a charge is framed only for an offence triable as a summons-case, it has been held by the Madras High Court that the accused is entitled to acquittal under this section on the complainant's absence on the day of hearing. This view proceeds on the ground that this section confers a substantive right on the accused of which he cannot be deprived merely by reason of the adoption of a particular procedure by the Magistrate.² See also Note 4 to S. 241.

4. "Upon the day adjourned." — The section refers to the absence of the complainant on the date fixed for the appearance of the accused or to which the *hearing* has been adjourned. If the Magistrate under a mistake takes up the case on a day to which it was not posted and dismisses the complaint, this section does not apply.¹ The section applies though the case has been posted only for arguments, because in such a case the hearing of the case cannot be said to be finished.^{1a} But where the hearing of the case is finished and the case is only posted for judgment, the section does not apply and the accused cannot be acquitted merely because the complainant is absent on such a day.² Similarly, if a case is only nominally fixed for hearing and it cannot be reasonably expected to be reached and is not in fact reached during the day, this section has no application and the accused cannot be acquitted on the ground of the complainant's absence.^{2a} The power of the Court to acquit an accused under this section on the ground of the complainant's absence at the hearing is not affected by the fact that the *accused* is not present³ or even by the fact that the process.

Note 3

1. ('85) 11 Cal 91 (92), *Rajnarain Koonwar v. Lala Tamoli Raut*.
(18) AIR 1918 Mad 371 (373) : 41 Mad 727 : 19 Cri L Jour 613, *Raghavalu Naicker v. Singaram*. (Order does not operate as acquittal even in cases of summons-case offence.)
2. ('23) AIR 1923 Mad 439 (439, 440) : 24 Cri L Jour 469, *Venkatarama Aiyar v. Sundaram Pillai*.

Note 4

1. ('34) AIR 1934 All 1025 (1026) : 36 Cri L Jour 328, *Mahadeo v. Emperor*.
- 1a. ('14) AIR 1914 Cal 768 (769) : 15 Cr.L.J. 163, *Ramjiwan Rai v. Abilakh Barai*.
2. ('40) AIR 1940 Nag 357 (359) : 1940 N.L.J. 399 (401), *Emperor v. Laxmi Prasad*.
(38) AIR 1938 Lah 121 (121) : 39 Cri L Jour 293, *Md. Hayat v. Daulat Khan*.
(19) AIR 1919 Cal 201 (201) : 46 Cal 867 : 20 Cri L Jour 492, *Girish Chandra v. Bhusan Das*.
- (23) AIR 1923 Nag 158 (158) : 19 Nag L R 48 : 24 Cri L Jour 205, *Emperor v. Jangu Singh*.
- 2a. ('34) AIR 1934 Bom 130 (132) : 35 Cri L Jour 1139, *In re Jamnabai Meghji*.
3. ('24) AIR 1924 Pat 140 (141) : 24 Cri L Jour 815, *Kiran Sarkar v. Emperor*.
- (29) AIR 1929 Bom 408 (409) : 53 Bom 693 : 31 Cri L Jour 1000, *Shankar v. Dattatraya*.
- (11) 12 Cri L Jour 41 (42) : 9 I C 253 : 34 Mad 253, *In re Guggilapu Peddaya*.
- (32) AIR 1932 Mad 563 (563, 564) : 33 Cr.L.J. 579, *Sriramulu v. Viraragavalu*.
[See (1865) 3 Suth W R Cr 36 (36), *Queen v. Chundrai Sikdar*. (Magistrate was held to be justified in dismissing the complaint when complainant was not present, though there was no question till then of the appearance of the accused.)]
[See also (1900) 4 Cal W N 346 (347), *Panchu Singh v. Umar Mahomed*. (Dismissal of case and acquittal of one of two accused (who alone was present) on the ground of complainant's absence—Dismissal operates also against the other accused whose attendance could not be procured.)]

was not served on him.⁴

Section 247
Notes 4-5

5. "The complainant does not appear." — The appearance of the complainant must be *in person*. The presence of the complainant's pleader is not enough to avoid the consequences specified in the section.¹ The complainant must be present when the *case is called*; it is not enough if he appears afterwards though it may be in the course of the same working day.² But it has been held in the undermentioned decision³ of the Madras High Court that if a case is posted for 11 A. M. on a certain day and the complainant appears at that time but the Court does not sit till 2 P. M. and the complainant does not wait till then, he cannot be said to have failed to appear within the meaning of the section.

Where, on the day to which a case is posted, the case is not taken up at all, the complainant cannot be said to have failed to "appear" within the meaning of the section though he does not attend Court on such date as the time at which appearance is contemplated is when the case is *called on for hearing*.⁴

It has been held by the Madras High Court that where the date of hearing has not been communicated to the complainant at all, his absence cannot be regarded as a failure to appear for the purposes of this section.⁵

The accused can be acquitted under the section only on the failure of the complainant to *appear*. His failure to *pay process-fees* is no ground for acquitting the accused under this section.⁶

In a joint charge for three offences under S. 234, where there are three complainants in respect of the three offences, the absence of one of the complainants can be ground only for acquitting the accused of

4. ('24) AIR 1924 Pat 140 (141) : 24 Cri L Jour 815, *Kiran Sirkar v. Emperor*. ('29) AIR 1929 Bom 408 (409) : 53 Bom 693 : 31 Cri L Jour 1000, *Shankar v. Dattatraya*.

[See also ('40) AIR 1940 Nag 357 (359) : 1940 Nag L Jour 399 (402), *Emperor v. Laxmi Prasad*. (Where on the day to which the case was adjourned no investigation of the controversy could begin as the summons of one of the accused was awaited and no witnesses were summoned for that day and the Magistrate acquitted the accused as the complainant remained absent it was held that the case was fixed for hearing on the adjourned date and the acquittal was proper.)]

[But see ('92) 2 Weir 307 (307), *In re Kandappa Chetty*.]

Note 5

1. ('36) AIR 1936 All 658 (658, 659) : 37 Cr.L.J. 1028, *Pirag Lal v. Rustam Singh*. ('26) AIR 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cri L Jour 988, *Nagarambilla v. Tonkya v. Jagannatha*.

2. ('84) 7 Mad 356 (357) : 2 Weir 309, *Syed Ambadhathi Kuttiyali v. Pari Mukri*. ('26) AIR 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cri L Jour 988, *Nagarambilla v. Tonkya v. Jagannatha*.

(('27) AIR 1927 Mad 172 (173) : 28 Cri L Jour 118, *Pullamma v. Sanjivi Reddi*.

3. ('27) AIR 1927 Mad 393 (394) : 28 Cr.L.J. 208, *Ahmed Meera Sahib v. Meeran Sahib*.

4. ('26) AIR 1926 Cal 102 (103) : 26 Cr.L.J. 1050, *Rashbehari Karury v. Corporation of Calcutta*.

5. ('28) AIR 1928 Mad 1158 (1162, 1164) : 30 Cri L Jour 191 : 52 Mad 695, *Nune Panakalu v. Ravelu Subba Rao*.

(('75) 2 Weir 307 (308).

6. ('25) AIR 1925 All 392 (393) : 26 Cri L Jour 963, *Bhimmi v. Pershadi*. ('82) 5 Mad 160 (160) : 2 Weir 305, *Korapalu v. Monappa*.

Section 247
Notes 5-6

the offence against the *particular* complainant who was absent and does not affect the charge as regards the others.⁷

6. Death of complainant.—The maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) or S. 306 of the Succession Act, 1925, does not apply to criminal prosecutions.¹ Hence the death of a complainant does not *ipso facto* terminate a criminal prosecution. The contrary view taken in the undermentioned cases² is, it is submitted, not correct.

There is a difference of opinion on the question whether this section applies to cases where the absence of the complainant on the day of hearing is due to his death. It has been held by the High Courts of Calcutta,³ Madras⁴ and Lahore⁵ that the section applies while the High Courts of Bombay⁶ and Patna⁷ and the Judicial Commissioner's Court of Nagpur⁸ have *doubted* whether the section applies. If it be held that the section applies to such cases, it is open to the Magistrate either to acquit the accused⁹ or to adjourn the case to

7. ('15) AIR 1915 Cal 366 (368) : 16 Cr.L.J. 332:43 Cal 13, *Subedar v. Emperor*.

Note 6

1. ('26) AIR 1926 Bom 178 (179) : 27 Cri L Jour 491, *Mahomed Azam v. Emperor*. (In proper cases Magistrate has discretion to allow the complaint to continue by a proper and fit complainant if he is willing.)
- (('22) AIR 1922 Lah 227 (229) : 2 Lah 27 : 22 Cr.L.J. 166, *Hazara Sing v. Emperor*. (S. 89 of the Probate and Administration Act, equivalent to S. 306, Succession Act.)
- (('24) AIR 1924 Lah 72 (73) : 4 Lah 7 : 24 Cri L Jour 29, *Emperor v. Mauj Din*. (Charge of abduction does not abate by the death of the husband (complainant).)
- (('24) AIR 1924 All 666 (667) : 25 Cri L Jour 1007, *Musa v. Emperor*. (Prosecution under S. 323 does not abate.)
- (('16) AIR 1916 Mad 1034 (1034) : 16 Cri L Jour 713, *In re Ramasamier*. (68-69) 4 Mad H C R App lv (lv):2 Weir 235. (But it is desirable that prosecution for adultery should be withdrawn on the death of complainant.)
- (('21) AIR 1921 Mad 278 (278, 279) : 44 Mad 417 : 23 Cri L Jour 117, *Muhammad Ibrahim v. Shaik Dawood*. (Charge under S. 323, Penal Code, does not abate.)
- (('31) AIR 1931 Mad 772 (772) : 54 Mad 768 : 33 Cr. L. J. 14, *Narayana Naick v. Emperor*.
- (('08) 8 Cr. L. J. 190 (190) : 1 Sind L R 72, *Imperator v. Nur Mahommed*. (Complaint under S. 498, Penal Code, does not abate by the death of the husband (complainant).)
- [See also ('29) AIR 1929 Rang 14 (15) : 6 Rang 664 : 30 Cri L Jour 345, *U Mo Gaung v. Po Sin*. (Complainant dying before hearing—Offence not compoundable and non-cognizable—Magistrate can still proceed with the case.)]
2. ('17) AIR 1917 Lah 403 (404) : 18 Cr. L. J. 688 (688) : 1917 Pun Re No. 26 Cr. *Rama Nand v. Emperor*. (Prosecution under S. 323, Penal Code, is a personal action—Hence, on death of complainant right to prosecution does not survive to legal representatives.)
- (('19) AIR 1919 Lah 409 (409) : 1919 Pun Re No. 25 Cr : 20 Cri L Jour 717, *Labhu v. Emperor*. (On death of complainant trials under offences compoundable without reference to Court abate—In other cases proceedings do not abate.)
- [See also ('08) 1908 Pun Re No. 10 Cr, p. 30 (30) : 7 Cri L Jour 290 (291) : 1908 Pun L R No. 112, *Ishar Das v. Emperor*. (Death of complainant terminates a prosecution for defamation which is essentially a personal action.)]
3. ('15) AIR 1915 Cal 708 (708) : 16 Cri L Jour 322, *Puran v. Dengar Chandra*. [But see ('15) AIR 1915 Cal 263 (263) : 15 Cr. L. J. 726, *Madho v. Turab Mian*.]
4. ('28) AIR 1928 Mad 167 (168) : 51 Mad 339 : 29 Cr.L.J. 257, *Appala v. Emperor*.
5. ('22) AIR 1922 Lah 227 (229) : 2 Lah 27 : 22 Cr L J 166, *Hazara v. Emperor*.
6. ('26) AIR 1926 Bom 178 (179) : 27 Cr. L. J. 491, *Mahomed Azam v. Emperor*.
7. ('16) AIR 1916 Pat 152 (153) : 37 I. C. 519 (521) : 1 Pat L J 264 : 18 Cri L Jour 151, *Jitan Dusadh v. Domoo Sahoo*.
8. ('32) AIR 1932 Nag 72 (73) : 28 Nag L R 49 : 33 Cr.L.J. 407, *Anand Rao v. Gadi*.
9. ('15) AIR 1915 Cal 708 (708) : 16 Cri L Jour 322, *Puran v. Dengar*.

enable another person to continue the prosecution.¹⁰ If it be held that the section does not apply, it is conceived that the Magistrate has no power to acquit the accused but must go on with the case.¹¹

Section 247
Notes 6-7

7. "The Magistrate shall . . . some other day." — If the complainant does not appear on the day of hearing, the accused is entitled to be acquitted¹ unless the Magistrate for some reason thinks it proper to adjourn the case.^{1a} The Magistrate has no power to dispense with the appearance of the complainant² or *compel* him to appear and go on with the case.³ But unless an order of acquittal is actually passed by the Magistrate, the mere absence of the complainant on the day of hearing does not *ipso facto* result in the acquittal of the accused.⁴ The exercise of discretion in favour of the complainant once by adjourning the hearing does not deprive the Magistrate of the power of acquitting the accused on the non-appearance of the complainant at a subsequent hearing.⁵

The following cases are illustrative of the circumstances under which a Magistrate would be exercising his discretion under the section properly by adjourning the case and giving the complainant a further opportunity instead of acquitting the accused —

- (1) when the complainant is not definitely informed of the place of trial;⁶
- (2) when the complainant is prevented by heavy floods from appearing;⁷
- (3) when the case is transferred from the file of one Magistrate to another without notice to the complainant and he is present in the original Court in ignorance of the transfer.⁸

10. ('16) AIR 1916 Pat 152(154): 1 Pat L J 264: 18 Cr. L. J. 151, *Jitan v. Domoo Sahoo*. [But see ('28) AIR 1928 Mad 167 (168): 29 Cri L Jour 257: 51 Mad 339, *In re Appala Naidu*. (Magistrate cannot adjourn case.)]

11. ('32) AIR 1932 Nag 72 (73): 28 Nag L R 49: 33 Cr. L. J. 407, *Anand Rao v. Gadi*. [See ('16) AIR 1916 Pat 152 (154): 18 Cri L Jour 151: 1 Pat L J 264, *Jitan Dusadh v. Domoo Sahoo*.]

Note 7

1. ('40) AIR 1940 Nag 357 (359): 1940 Nag L J 399, *Emperor v. Laxmi Prasad*. ('03) 2 Low Bur Rul 165 (165), *King-Emperor v. Nga Aing Nyan*. ('08) 8 Cri L Jour 139 (140): 10 Bom L R 628, *In re S. E. Dubash*.
- 1a. ('40) AIR 1940 Nag 357 (359): 1940 Nag L J 399 (401), *Emperor v. Laxmi Prasad*.
- ('36) AIR 1936 All 658 (659): 37 Cri L Jour 1028, *Pirag Lal v. Rustam Singh*. (Ordinary course is to acquit the accused.)
2. ('26) AIR 1926 Lah 628 (628): 27 Cr. L. J. 1022, *Maula Baksh v. Marshall*.
3. ('75) 24 Suth W R Cr 32 (33), *In re Dukhun Pahan*.
4. ('23) AIR 1923 Cal 725 (727): 25 Cr. L. J. 492, *Shermull v. Corporation of Calcutta*.
5. ('90) 2 Weir 308 (308), *In re Latchmana Patraiko*.
6. ('82) 1882 All W N 229 (229), *In the petition of Bansidhar*.
7. ('75) 24 Suth W R Cr 64 (65), *Tazoonissa v. Wassil*.
8. ('19) AIR 1919 Cal 1 (2): 47 Cal 147: 20 Cr. L. J. 782, *Ganpat Rai v. W. G. Good*.
- ('17) AIR 1917 Cal 314 (315): 18 Cri L Jour 104 (105), *Etim Haji v. Hamid*.
- ('83) 13 Cal L R 303 (305), *Romanath Bal v. Behari Bag*. (Complainant and his witnesses though not in attendance in the Court to which the case was transferred were present in another Court in the same Court house, being under the impression that their case had been transferred to such other Court.)

Section 247
Notes 7-8

- (4) after repeated unnecessary adjournments and after the accused is put on his defence on a day to which no legal adjournment is made;⁹
 - (5) when the adjournment is not made in the presence and hearing of the parties;¹⁰
 - (6) when all the evidence for the complainant is taken and he is not specially directed to appear;¹¹
 - (7) when the case is adjourned several times to suit the convenience of the Court and the complainant is only temporarily absent for a short time on the day the accused is acquitted;¹²
 - (8) when the complainant is prevented by illness from appearing.¹³
- See also the undermentioned case.^{13a}

The following cases show under what circumstances the Magistrate would be exercising his discretion under the section properly if he acquits the accused instead of adjourning the case —

- (1) where the complainant has gone abroad and will not be available for some considerable time;¹⁴
- (2) where the accused is charged for repairing a public road without permission when the repair is admittedly for the public good.¹⁵

The section only contemplates an order of *acquittal* or of adjournment. An order striking off a case or dismissing a complaint is not within the terms of the section. But such an order if passed in the circumstances mentioned in the section will amount to an order of *acquittal*.¹⁶

Where a case is *adjourned* the fact that the Magistrate examined some witnesses on that day does not vitiate the proceedings.¹⁷

8. Whether acquittal under this section bars fresh trial under section 403. — See Notes to Section 403.

9. ('71) 16 Suth W R Cr 58 (58), *Mahomed Alum v. Sheikh Akil*.

10. ('75) 8 Mad H C R App v (vi).

11. ('74) 2 Weir 306 (306), *H. C. Proceedings No. 1706 dated 5th Nov. 1874*.

('88) 2 Weir 306 (306), *In re Nagayya*.

[See also ('69) 12 Suth W R Cr 27 (27), *Queen v. Birdur Ghose*. (Where evidence for the prosecution is taken in the presence of the accused and the case is postponed for evidence of defence witnesses, the case ought not to be dismissed if on the day to which case is postponed the prosecutor is absent, but should be decided on merits.)]

12. ('72) 18 Suth W R Cr 59 (60), *Guruchurn v. Meer Saman Ali*.

13. ('67) 8 Suth W R Cr 5 (6), *Queen v. Ram Narain Ghose*.

('91) 1891 All W N 120 (121), *Empress v. Hardeo Singh*.

13a. ('27) AIR 1927 Mad 139 (140) : 27 Cr. L. J. 1391, *Subbiah v. Obiah*. (Case posted at 7 A. M., and taken up at 8 A. M., complainant being absent, case dismissed—Shortly after complainant appearing—*Held* Magistrate would have exercised better discretion if he had given short adjournment.)

14. ('26) AIR 1926 Lah 628 (628) : 27 Cr. L. J. 1022, *Maula Baksh v. Marshall*.

15. ('67) 7 Suth W R Cr 31 (32), *Queen v. Bholanath Banerjee*.

16. ('84) 1884 All W N 115 (115), *In the matter of Musahib Khan*.

('85) 1885 All W N 43 (43), *Empress v. Bhawani Prasad*.

('17) AIR 1917 Lah 143 (143) : 18 Cr. L. J. 324 (325), *Saifuddin v. Emperor*.

('25) AIR 1925 Oudh 44 (45) : 25 Cr. L. J. 359, *Bindra v. Mt. Bhagawanta*.

[But see ('08) 8 Cri L Jour 139 (140) : 10 Bom L R 628, *In re S. E. Dubash*. (Upon failure of complainant to appear Magistrate recording order, "Struck off, S. 247"—*Held* that words "struck off" were not same as "acquitted"—Hence there was no order of acquittal.)]

17. ('20) AIR 1920 Cal 68 (69) : 21 Cr. L. J. 252, *Amir Mia v. Sarafdi Hazi*.

9. Complaints by public servants—Proviso. — The section does not, by virtue of the proviso, apply to cases where the complainant is a public servant and the Court deems it fit to dispense with his personal attendance.¹

Section 247
Notes 9-12

10. Review. — See S. 369 and Notes thereunder.

11. Power to restore a case in which accused has been acquitted under this section. — See Notes under S. 369.

12. Revision. — The High Court can interfere in revision with an order of acquittal under this section.¹ But it cannot convert the order of acquittal into one of conviction; it can only direct the case to proceed according to law.² It will, however, very rarely interfere and set aside an acquittal especially when there is no error of law on the face of the record.³ See also Note 12 to S. 439.

As to the power to order further enquiry into a case, disposed of under this section, see Notes under S. 436.

248.* If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

Section 248

* 1882 : S. 248; 1872 : S. 210; 1861 : S. 271.

Note 9

1. ('36) AIR 1936 All 658 (659) : 37 Cr. L. J. 1028, *Pirag Lal v. Rustam Singh*.
(30) AIR 1930 Nag 33 (34) : 25 Nag L R 194 : 31 Cri L Jour 382, *Nanhe v. Municipal Committee, Jabulpore*.
[See also ('78) 1878 Rat 137 (138), *Queen-Empress v. Ramchandra*. (Provisions of S. 247 are not applicable to cases under Chapter XXXV of the Code—Sanction given by Court to prosecute person for resisting authority of bailiff — Non-appearance of bailiff does not justify Magistrate in dismissing complaint.)]

Note 12

1. ('39) AIR 1939 Sind 75 (75, 76) : ILR (1939) Kar 385 : 40 Cr. L. J. 524, *Mt. Soni v. Kishnomal*.
(38) AIR 1938 Lah 121 (122) : 39 Cri L Jour 293, *Md. Hayat v. Daulat Khan*.
(36) AIR 1936 All 658 (659) : 37 Cr. L. J. 1028, *Pirag Lal v. Rustam Singh*.
(82) 1882 All W N 229 (229), *In the petition of Bansidhar*.
(24) AIR 1924 Oudh 64 (64) : 26 Oudh Cas 282 : 25 Cri L Jour 794, *Ram Nidhi v. Ram Saran*.
(27) AIR 1927 Mad 172 (173) : 28 Cri L Jour 118, *Pullamma v. Sanjivi Reddi*.
(30) 1930 Mad W N 190 (190), *Anjayya v. Subbamma*.
2. ('39) AIR 1939 Sind 75 (75, 76) : ILR (1939) Kar 385 : 40 Cr. L. J. 524, *Mt. Soni v. Kishnomal*.
- (36) AIR 1936 All 658 (658, 659) : 37 Cr. L. J. 1028, *Pirag Lal v. Rustam Singh*.
3. (40) AIR 1940 Nag 357 (360) : 1940 Nag L Jour 399 (403), *Emperor v. Lazmi Prasad*.
(39) AIR 1939 Pat 186 (186) : 40 Cr. L. J. 514, *Bankim Behari v. Yusuf Mian*.
(Original charge under S. 427, Penal Code—Local inquiry by Magistrate without notice to parties — Magistrate concluding that offence was under S. 426 and acquitting accused under this section — Acquittal set aside.)
(27) AIR 1927 Mad 473 (474) : 28 Cr. L. J. 270, *Lakshminarasimham v. Bapanna*.

Section 248
Notes 1-2

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of the section. 3. Withdrawal of complaint and compounding of offences — Difference between. 4. "Complaint." 5. "At any time before a final order is passed." 6. "In any case under this chapter." | <ol style="list-style-type: none"> 7. "Satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint." 8. "Shall thereupon acquit the accused." 9. Withdrawal of complaint against one of several accused—Effect. 10. Power to order further inquiry. 11. Re-trial of accused, whether barred. |
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Other Topics (miscellaneous)

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| <p>Applicability only to summons cases. See Note 6.</p> <p>Cases on complaint by Courts. See Note 7.</p> <p>Consent of accused. See Note 3.</p> <p>Consent of public servants. See Note 4.</p> <p>Inapplicability before issue of process against accused. See Note 5.</p> | <p>Magistrate and police. See Notes 4 and 7.</p> <p>Withdrawal operates as acquittal. See Notes 3 and 8.</p> <p>Withdrawal of warrant-cases. See Note 6.</p> <p>Withdrawal with Magistrate's permission. See Notes 3 and 7.</p> |
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1. Legislative changes. — The clause at the end of the section "and shall thereupon acquit the accused" was substituted in the Code of 1882 for the words "a complaint withdrawn under this section shall not again be entertained" which occurred in the corresponding sections of the Codes of 1861 and 1872.

2. Scope of the section. — This section provides that under the circumstances specified therein a complaint may be *withdrawn* with the permission of the Court and that upon such withdrawal the accused must be acquitted. The section, however, applies only to summons-cases. (See Note 6.) An analogous provision is made in S. 494 for the withdrawal of prosecution by the *Public Prosecutor* with the permission of the Court. That section applies to *all* offences and is not confined like the present one to summons-cases. Section 345 provides for the *compounding* of offences. As to differences between withdrawal of complaint under this section and compounding of an offence under S. 345, see Note 3.

Section 537 of the Calcutta Municipal Act, 1923, which authorises the Corporation of Calcutta to withdraw legal proceedings, must be read subject to the provisions of this section and unless the Magistrate is satisfied that there are sufficient grounds for permitting a complaint to be withdrawn, the Corporation cannot withdraw a criminal complaint.¹

As to *abandonment* of criminal proceedings, see the undermentioned cases.²

See also Notes to Ss. 494 and 333.

Section 248 — Note 2

1. ('26) AIR 1926 Cal 786 (788) : 53 Cal 631 : 27 Cri L Jour 984, *Sishir Kumar Mitter v. Corporation of Calcutta*.
2. ('20) AIR 1920 Cal 345 (346) : 21 Cri L Jour 558, *Nando Lal Guha v. Corporation of Calcutta*. (Calcutta Municipal Act, 1899, Ss. 299 and 575—Prosecution under S. 575 kept pending for nearly three years for negotiation with Corporation — Prosecution revived and daily fine for some period during pendency imposed — Fine held invalid.)

3. Withdrawal of complaint and compounding of offences — Difference between.

Section 248:
Notes 3-4.

1. "Compounding" implies the *consent of the accused*, whereas such consent is not necessary for the withdrawal of a complaint under this section.¹

2. The right to withdraw a complaint under this section applies only to offences triable as *summons-cases* (see Note 6). But the right to compound an offence under S. 345 applies both to summons as well as to warrant-cases provided they relate to the offence specified in that section.

3. Under this section a complaint can be withdrawn in respect of *all* offences which are triable as summons-cases. But under S. 345 the right to compound applies only to certain offences specified in that section.

4. In the case of withdrawal of complaint under the section, the *permission of the Court* is necessary in all cases. But under S. 345 there are several offences which are compoundable without the permission of the Court and such permission is necessary only with reference to *certain* offences.

5. The withdrawal of a complaint under this section does not by itself result in the acquittal of the accused, unless the Court passes an order acquitting the accused. But the compounding of an offence under S. 345 by itself results in the acquittal of the accused.

See also S. 345 Note 3.

4. "Complaint." — Under this section, a complaint can be withdrawn with the permission of the Court, by a *complainant*. Thus, where the sanction of a certain public servant is necessary for the criminal proceedings in question and a complaint is filed with the sanction of such public servant, the complaint can be withdrawn by the *person filing* it and the sanction of the public servant is not necessary for such withdrawal.¹

But, the power to withdraw is *confined* to the complainant. Thus, where a complaint with reference to an offence under the Municipal law is filed by the Municipal Secretary, the complaint cannot be withdrawn by the Municipal Council.² Moreover, the term "complainant" is used in the restricted sense of a person who files a "complaint"

(1923) AIR 1923 Cal 725 (727) : 25 Cri L Jour 492, *Shermull v. Corporation of Calcutta*. (Interval of three years between filing of complaint and trial—Procedure held defective, though not illegal—AIR 1920 Cal 345, distinguished.)

Note 3

1. ('88) 1888 Pun Re No. 19 Cr, p. 35 (36 to 38), *Empress v. Khushali Ram*.
- ('92-96) 1 Upp Bur Rul 219 (220), *Queen-Empress v. Nga Po Gaung*.
- ('94) 21 Cal 103 (112, 113), *Murray v. Queen-Empress*.
- ('16) AIR 1916 Pat 200 (201) : 18 Cri L Jour 107, *Bayan Ali v. Emperor*.
- ('24) AIR 1924 Lah 595 (598); 5 Lah 239; 25 Cri L Jour 629, *Anantia v. Emperor*.

Note 4

1. ('71) 1871 Rat 45 (45), *Reg. v. Jeejibhai Nathu*. (Offence under S. 188, I.P.C.) [But see (1878) 2 Bom 653 (653, 654), *In re Muse Ali Adam*. (Complaint can be withdrawn only by the public servant.)]
2. ('14) AIR 1914 Mad 387 (387) : 15 Cri L Jour 299, *Paramananda Nadar v. Karunakara Dass*.

Section 248
Notes 4-6

as defined by S. 4 (1) (h). Hence, the term does not apply to a person who sets the police in motion by making a complaint to them. Therefore, where a person makes a complaint to the police and the police make a report to the Magistrate who takes cognizance of the offence on such report, he cannot act under this section and acquit the accused on the application for 'withdrawal' by the person who made the complaint to the police.³

5. "At any time before a final order is passed." — A complaint can be withdrawn under this section at any time¹ before a final order is passed in the case. But this does not mean that a complaint can be withdrawn and the accused can be *acquitted*, so as to bar a re-trial of the accused under S. 403, even before any process is issued against the accused.²

6. "In any case under this chapter." — This section applies only to offences triable as summons-cases and does not apply to offences triable as warrant-cases. In warrant-cases there is no provision in the Code which provides for the termination of the proceedings on the complainant offering to withdraw his complaint.¹ An offence under

3. ('40) AIR 1940 Sind 112 (112) : I L R (1940) Kar 429 : 41 Cr L J 694, *Emperor v. Elias Arz Muhammad*. (Section applies only when Magistrate has taken cognizance of case upon complaint preferred by person seeking to withdraw complaint.)
(1900) 23 Mad 626 (627, 628) : 2 Weir 310, *Queen-Empress v. Chenchayya*. (Ss. 143, 504, Penal Code.)

Note 5

1. ('33) AIR 1933 Lah 884 (885) : 35 Cri L Jour 86, *Mehr Singh v. Emperor*.
2. ('13) 14 Cri L Jour 559 (561, 562) : 36 Mad 315 : 21 I C 159, *In re Muthia Moopan*.

Note 6

1. ('69) 1869 Rat 23 (24), *Reg. v. Jagjivan*. (S. 325, Penal Code.)
('27) AIR 1927 Rang 174 (174, 175) : 5 Rang 136 : 28 Cr. L. J. 649, *Maung Thu Daw v. U Po Nyun*.
('94) 21 Cal 103 (113), *Murray v. Queen-Empress*.
('13) 14 Cr. L. J. 77 (77, 78) : 37 Bom 369 : 18 IC 413, *Emperor v. Ranchod Bawla*.
('70) 2 N W P H C R 234 (235), *Queen v. Gambhur*.
('71) 3 N W P H C R 341 (341), *Queen v. Jugroop Ugrabee*.
('89) 13 Bom 600 (605), *In re Ganesk Narayan*.
('82) 5 Mad 378 (378), *Sambasivanna v. Bhogappa*.
('98) 22 Bom 711 (713), *In re Samsudin*.
('89) 1889 Rat 461 (461), *Queen-Empress v. Lilladhar*.
('69) 1869 Rat 17 (17), *Reg. v. Jcenka*.
('69) 12 Suth W R Cr 59 (59, 60).
('71) 1871 Pun Re No. 8 Cr p. 9 (10), *Mohun v. Gunsham*. (S. 498, Penal Code.)
('33) AIR 1933 Lah 323 (324) : 34 Cri L Jour 718, *Dogar Singh v. Budh Singh*. (Order allowing proceedings to be dropped though technically incorrect was not interfered with in revision in the particular circumstances of the case.)
('09) 10 Cr. L. J. 14 (15) : 1908 Upp Bur Rul Cr 15, *Nga Maung Gyi v. Nga Lu Gale*.
('29) AIR 1929 Mad 7 (8), *Narasimhalu Naidu v. Naina Pillai*. (Withdrawal cannot by itself end the case—The accused can only be discharged by the Magistrate for want of sufficient evidence.)
('88) 1888 Rat 391 (392), *Queen-Empress v. Moti Das*. (The order of a Magistrate in a warrant-case, permitting the withdrawal of a complaint of a non-compoundable offence is equivalent to an order of discharge under S. 253.)
[But see ('87) 1887 Rat 330 (330), *Queen-Empress v. Vithoba*. (Withdrawal from the prosecution may be allowed in a proper case.)]

s. 24 of the Cattle Trespass Act being triable as a summons-case, a complaint of such an offence can be withdrawn under this section.²

Section 248
Notes 6-9

7. "Satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint."—The withdrawal of a complaint under this section is permissible only if the *Magistrate* is satisfied that there are "sufficient grounds" for permitting such withdrawal.¹ But where a complaint of offences under ss. 183 and 185 of the Penal Code is made by a Court and such Court subsequently finds that it made a mistake in filing the complaint and wishes to withdraw it, the Magistrate will scarcely be justified in refusing to allow a withdrawal.²

The power to allow a complaint to be withdrawn under this section rests entirely with the Magistrate. The *police* have no power to entertain an application for withdrawal of a complaint.³

Under this section it is competent to a Magistrate in a proper case to treat an application to the effect that the offence has been compounded as an application for withdrawal of complaint.⁴

8. "Shall thereupon acquit the accused." — Upon the withdrawal of a complaint, the Magistrate has no power to dismiss the case or discharge the accused but must *acquit* the accused.¹

9. Withdrawal of complaint against one of several accused — Effect. — Where there are several accused persons in a case and the complaint is allowed to be withdrawn as against one of the accused, the withdrawal does not enure to the benefit of the other accused and they are not entitled to acquittal under this section.¹

(163) 5 Dom H C R Cr 27 (28), *Reg. v. Ramlo Jerio*. (Trial before Sessions Court for adultery—Sessions Judge discharging accused on husband of woman intimating that he was not willing to proceed further—High Court refused to interfere.) See also S. 258 Note 3.

2. (19) AIR 1919 All 31 (31) : 42 All 202 : 21 Cr. L. J. 305, *Emperor v. Julua*.

Note 7

1. (126) AIR 1926 Cal 786 (788) : 53 Cal 631 : 27 Cri L Jour 984, *Sishir Kumar v. Corporation of Calcutta*. (Section 537, Calcutta Municipal Act, 1923, is subject to the provisions of S. 248, Cr. P. C.)

2. (127) AIR 1927 Oudh 51 (51) : 2 Luck 395 : 27 Cri L Jour 1247, *King-Emperor v. Ram Nath Bux Singh*.

3. (175) 1875 Rat 91 (91), *Surat District Magistrate's Letter No. 306*. See also S. 169 Note 6 and S. 170 Note 4.

4. (19) AIR 1919 All 31 (31) : 42 All 202 : 21 Cr. L. J. 305, *Emperor v. Julua*.

Note 8

1. (124) AIR 1924 Lah 595 (596) : 5 Lah 239 : 25 Cri L Jour 629, *Anantia v. Emperor*. (Per Harrison, J.)

(101) 25 Bom 422 (428) : 2 Bom L R 1095, *Queen-Empress v. Hussein Haji*. (Offence under S. 4, Bombay Gambling Act, 1887 — Prosecution against two accused withdrawn under S. 494, Cr. P. C. — Mistaken order of discharge held to be one of acquittal and mistake held covered by S. 537, Cr. P. C.)

Note 9

1. (140) AIR 1940 Mad 623 (624) : 41 Cr. L. J. 454, *South Indian General Assurance Co., Ltd. v. Registrar of Life Insurance Companies, Madras*.

(122) AIR 1922 Oudh 145 (146) : 23 Cr. L. J. 271, *Rohiti Singh v. Makhdum Kalwar*. (A I R 1921 All 35, followed ; 7 C W N 176, distinguished.)

(124) AIR 1924 Lah 595 (599) : 5 Lah 239 : 25 Cr. L. J. 629, *Anantia v. Emperor*. (Per Le Rossignol, J. ; Harrison, J., *contra*.)

Section 248
Notes 10-11

10. Power to order further inquiry. — As to the power to order further inquiry into the case of an accused person acquitted under this section, see S. 436 and Notes thereunder.

11. Re-trial of accused, whether barred. — As to whether a fresh trial of an accused acquitted under this section is barred under S. 403, see Notes to that section.

Section 249

249.* In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or with the previous sanction of the District Magistrate, any other Magistrate, may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

1. "In any case instituted otherwise than upon a complaint." — This section applies only to cases instituted *otherwise* than upon a complaint.¹ Further, a Magistrate can proceed under this section only in summons-cases.² If he proceeds under this section in a warrant-case his order will be void and the case will be deemed to continue on the file of the Court.³

2. Revival. — On general principles, the Magistrate who passed an order of stay under this section may, for sufficient reasons, remove the stay and proceed further.¹ But an order stopping further proceedings under this section does not operate as an order of discharge and there is no power under S. 436 to order further inquiry into a case in which such an order has been passed.² At the same time, the order is expressly excluded by the explanation to S. 403 from being an acquittal and hence it does not act as a bar to fresh proceedings against the accused with reference to the same matter.³

* Code of 1882.

S. 249 was newly added in 1882 and was same as that of 1898 Code.

Section 249 — Note 1

1. ('20) AIR 1920 Pat 469 (469, 470): 21 Cr. L. J. 184, *Nathu Thakur v. Emperor*. (Case started on police-report—Section applies.)
- (12) 13 Cri L Jour 860 (861): 1913 Pun Re No. 9 Cr: 17 I C 796, *Achhru v. Emperor*.
2. ('26) AIR 1926 Pat 292 (293): 5 Pat 243: 27 Cr. L. J. 698, *Firangi v. Durga*.
3. ('26) AIR 1926 Pat 292 (294, 295): 5 Pat 243: 27 Cri L Jour 698, *Firangi Singh v. Durga Singh*.

Note 2

1. ('06) 29 Mad 126 (142, 146): 3 Cr. L. J. 274: 16 M L J 79 (FB), *In re Chinna Kaliappa Goundan*.
2. ('12) 13 Cr. L. J. 860 (861): 17 I. C. 796: 1913 Pun Re No. 9 Cr, *Achhru v. Emperor*. ('34) AIR 1934 All 17 (19): 35 Cr. L. Jour 564, *Emperor v. Sripal*. See also S. 436 Note 10.
3. ('12) 13 Cr. L. J. 860 (861): 17 I C 796: 1913 Pun Re No. 9 Cr, *Achhru v. Emperor*.

Section 250

250.* (1) If in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate,
False, frivolous or vexatious accusations.

* Code of 1898, original S. 250.

250. (1) If, in any case instituted by complaint as defined in this Code, or upon information given to a police-officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, by his order of discharge or acquittal, direct the person upon whose complaint or information the accusation was made to pay to the accused, or to each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit:

Provided that, before making any such direction, the Magistrate shall —

(a) record and consider any objection which the complainant or informant may urge against the making of the direction, and

(b) if the Magistrate directs any compensation to be paid, state in writing, in his order of discharge or acquittal, his reasons for awarding the compensation.

(2) Compensation of which a Magistrate has ordered payment under sub-s. (1) shall be recoverable as if it were a fine:

Provided that, if it cannot be recovered, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs.

(3) A complainant or informant who has been ordered under sub-s. (1) by a Magistrate of the second or third class to pay compensation to an accused person may appeal from the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) Where an order for payment of compensation to an accused person is made in a case which is a subject to appeal under sub-s. (3) the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any compensation paid or recovered under this section.

Code of 1882 : S. 250.

250. If, in any case instituted upon complaint, a Magistrate acquits the accused under S. 245 or S. 247, and is of opinion that the complaint was frivolous or vexatious, he may, in his discretion, by his order of acquittal, direct the complainant to pay to the accused, or to each of the accused where there are more than one, such compensation, not exceeding fifty rupees, as the Magistrate thinks fit.

The sum so awarded shall be recoverable as if it were a fine: provided that, if it cannot be realized, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs. At the time of awarding compensation in any subsequent civil suit relating to the same matter the Court shall take into account any sum paid or recovered as compensation under this section.

Code of 1872 : S. 209.

209. A Magistrate may dismiss the complaint as frivolous or vexatious, and may, in his discretion, by his order of dismissal, award that the complainant shall pay to the accused person such compensation, not exceeding fifty rupees, as to such Magistrate seems just and reasonable.

In such cases, if more persons than one are accused in the complaint, the Magistrate may, in like manner, award compensation not exceeding fifty rupees to each of them.

Section. 250

one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid.

(2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.

(2A) The Magistrate may, by the order directing payment of the compensation under sub-section (2), further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.

The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant which may be found within the jurisdiction of the Magistrate of the District ; and such order shall authorize the distress and sale of any moveable property belonging to the complainant without the jurisdiction of the Magistrate of the District, when the order has been endorsed by the Magistrate of the District in which such property is situated, and, if the sum awarded cannot be realized by means of such distress, by imprisonment of the complainant in the civil jail, for any time not exceeding thirty days, unless such sum is sooner paid.

Code of 1861 : S. 270.

270. In any case where the Magistrate shall dismiss the complaint as frivolous and vexatious, it shall be lawful for him in his discretion, by his order of dismissal, to award that the complainant shall pay to the accused person such amends, not exceeding fifty rupees, as to such Magistrate shall seem just and reasonable. The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant, which may be found within the jurisdiction of the Magistrate of the District and in default of such distress by imprisonment in the civil jail, for any time not exceeding thirty days unless such amends shall be sooner paid.

(2B) When any person is imprisoned under sub-section (2A), the provisions of sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply.

(2C) No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him :

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

(3) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal from the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

Sub-sections (1) to (2C) were substituted for the original sub-sections (1) and (2) by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

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|---|---|
| 1. Legislative changes. | 11. "Shall record and consider any cause"—Sub-section (2). |
| 2. Object and applicability of the section. | 12. "For reasons to be recorded." |
| 3. "Upon complaint or upon information given to a police-officer or to a Magistrate." | 13. Amount and nature of compensation. |
| 4. "Accused of an offence." | 14. Who can be ordered to pay compensation. |
| 5. "Triable by a Magistrate." | 15. To whom compensation can be awarded. |
| 6. Magistrate by whom the case is heard. | 16. Imprisonment in default of compensation—Sub-sections (2A) and (2B). |
| 7. "Discharges or acquits." | 17. No exemption from civil or criminal liability—Sub-section (2C). |
| 8. False and either frivolous or vexatious. | 18. Abatement. |
| 9. "By his order." | 19. Appeal—Sub-section (3). |
| 10. "Call upon him to show cause." | 20. Revision. |

Section 250

Note 1

Other Topics (miscellaneous)

- | | |
|--|---|
| <p>Absence of complainant — Procedure. See Note 10.</p> <p>Acquittal owing to absence of complainant. See Note 7.</p> <p>Appellate Court has no power to award compensation. See Note 6.</p> <p>Case heard by two Magistrates—Magistrate deciding is to act. See Note 6.</p> <p>Cases on police-report—Section inapplicable. See Note 3.</p> <p>Cattle Trespass Act—Complaint under. See Note 4.</p> <p>Charge framed—No bar. See Note 8.</p> <p>Compensation not fine, but recoverable as fine. See Note 13.</p> <p>Complainant—Servant or master. See Note 14.</p> <p>Composition. See Note 7.</p> <p>Co-accused convicted — Still compensation awarded. See Note 15.</p> <p>Death of party pending revision. See Note 18.</p> | <p>Dismissal of complaint—Section inapplicable. See Note 7.</p> <p>General, special or local Acts. See Note 4.</p> <p>Guardian of a minor complainant. See Note 14.</p> <p>Informant when liable and when not. See Notes 3 and 14.</p> <p>Magistrate without jurisdiction. See Note 5.</p> <p>Notice to accused — In appeal. See Note 19.</p> <p>Notice to accused — In revision. See Note 20.</p> <p>Petition under S. 488—Section inapplicable. See Note 4.</p> <p>Security proceedings. See Note 4.</p> <p>Several offences — Conviction only for some—Section inapplicable. See Note 7.</p> <p>Summary cases. See Notes 2 and 12.</p> <p>Summons and warrant cases. See Note 2.</p> <p>Village Magistrate. See Note 3.</p> <p>Withdrawal. See Note 7.</p> |
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1. Legislative changes.

Changes made in 1869 —

- (1) Under S. 270 of the Code of 1861, the compensation awarded could not exceed rupees fifty, whether there were one accused person or more.¹ Act VIII of 1869 amended the section and made rupees fifty awardable as compensation for each of the accused where there were more than one.²
- (2) The words “false and frivolous” were changed into “false or frivolous.”³

Changes made in 1872 —

The second part of S. 270 of the 1861 Code relating to the mode of recovery of compensation was omitted in S. 209 of the Code of 1872, provision having been made therefor in S. 307 of the latter Code.

Changes made in 1882 —

- (1) For the words “dismiss the complaint as frivolous or vexatious” and “by his order of dismissal,” the words “acquits the accused under S. 245 or S. 247” and “is of opinion that the complaint was frivolous or vexatious” and “by his order of acquittal” were substituted.
- (2) The provisions as to recovery of the sum awarded, as if it were a fine and imprisonment if the same is not realised were re-introduced as paragraph 2.
- (3) Paragraph 3 was added.

Changes made in 1891 —

Act IV of 1891 repealed S. 250 of the Code of 1882 and in its place

Section 250 — Note 1

1. ('67) 8 Suth W R Cr 54 (55), *Queen v. Lalloo Singh*.
- (’70) 2 N W P H C R 430 (431), *Queen v. Gopal*.
2. ('70) 14 Suth W R Cr 75 (75), *In re Bhyroo Lall*.
3. ('03) 30 Cal 123 (132) : 6 C W N 799 (FB), *Beni Madhub v. Kumud Kumar*.

substituted S.560 at the end of that Code. The chief changes made were in sub-section (1) —

- (1) After the word 'complaint' the words "or upon information given to, a police-officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate" were added.
- (2) After the word "Magistrate" the words "by whom the case is heard" were added.
- (3) For the words "acquits, etc.," the words "discharges or acquits" were substituted.
- (4) The provisos as to the recording and considering the objections of the complainant and the recording of reasons for the orders were added.
- (5) Paragraphs 3 and 4 regarding appeals were added.

Changes made in 1898 —

There was no change in the Code of 1898.

Changes made by Act XVIII of 1923 —

- (1) In sub-sections (1) and (2) :
 - (a) For the words "frivolous or vexatious," the words "false and either frivolous or vexatious" were substituted.
 - (b) The words beginning with "if the person upon whose complaint" to the end of sub-section (1) were new.
 - (c) The words "fifty rupees" were replaced by the words "one hundred rupees or if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees."
- (2) The proviso to old sub-s. (2) was incorporated in the newly added sub-section (2A) and the old sub-section (2) was omitted.
- (3) Sub-section (2B) is new.
- (4) Sub-section (2C) is new. The proviso is the same as sub-s. (5) (now repealed) of the Code of 1898.
- (5) In sub-s. (3) for the word and figure "sub-s. (1)" the word and figure "sub-s. (2)" were substituted and after the words "pay compensation" the words "or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees" were added.
- (6) In sub-section (4) the last sentence is new.

2. Object and applicability of the section. — The object of the section is twofold, *firstly*, to award by a summary order some compensation to the person against whom a frivolous or vexatious accusation is brought, leaving it to him to obtain further redress against the complainant, if he seeks for it by a regular civil suit or criminal prosecution,¹ and *secondly*, to deter persons from making vexatious and frivolous complaints.^{1a} The powers, however, should

Note 2

1. ('03) 30 Cal 123 (129) : 6 C W N 799 (FB), *Beni Madhub v. Kumud Kumar*.
[See ('40) AIR 1940 Sind 134 (136) : 41 Cr. L. J. 789 : ILR (1940) Kar 470 (FB),
Mad. Hashin v. Emperor.]

1a. ('02) 15 C P L R 194 (196), *Pannalal v. Amrit Rao*.

('98) 21 Mad 237 (239) : 2 Weir 312, *Adikkan v. Alagan*.

('04) 1 Cr.L.J. 433(434):26 All 512:1 ALJ 234:1904 A W N 116, *Bindesri v. Emperor*

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Notes 2-3

never be used as a punitive measure.^{1b}

Under the Code as it stood before it was amended in 1891, it was held that this section applied only to summons-cases and not to warrant-cases.² For the changes introduced in 1891, see Note 1. The present section is applicable to *any* case.³ It is applicable also to cases triable summarily whether tried summarily or not.⁴

3. "Upon complaint or upon information given to a police-officer or to a Magistrate." — Before the year 1891 the corresponding section of the old Code applied only where a case was instituted upon a *complaint* and not to cases instituted on any information.¹ After the amendment of that section in 1891 and also

- 1b. ('81) 1881 All W N 167 (168), *In re Sarnam*.
 2. ('81) 1881 All W N 154 (154), *Empress v. Anqu*.
 ('81) 1881 All W N 161 (161), *Empress v. Jokhan*.
 ('82) 1882 All W N 116 (116), *Jugmohan v. Shcobalak*.
 ('83) 1883 All W N 130 (130), *Niazullah v. Najju*.
 ('85) 1885 All W N 45 (45), *In the matter of Harbans*. (The mere fact that Magistrate chooses to treat a serious charge as a summons case does not bring it under the provisions of S. 250 and compensation therefore cannot be legally awarded.)
 ('85) 1885 All W N 258 (258), *Kalka v. Babu*. (Do.)
 ('68-69) 5 Bom H C R Cr 12 (12), *Reg. v. Ramji*.
 ('70) 7 Bom H C R Cr 58 (58, 59), *Reg. v. Gurlingapa*.
 (1864) 1 Suth W R Cr 1 (1, 2), *Chidi Chowbee v. Bhowany*.
 (1864) 1 Suth W R Cr 6 (7), *Assuruddee Khan v. Babu Khan*.
 (1865) 2 Suth W R Cr 57 (57, 58), *Queen v. Gogul Sein*.
 (1865) 3 Suth W R Cr 60 (60), *Queen v. Nijanund*.
 (1865) 3 Suth W R Cr 70 (70), *Juhooran v. Girdharee Ram*.
 ('66) 5 Suth W R Cr 1 (1), *Rateeah v. Phokondee*.
 ('66) 6 Suth W R Cr 55 (55), *Jalil Munshi v. Farnan Hossein*.
 ('67) 7 Suth W R Cr 11 (12), *Jharu v. Bahar Ali*.
 ('67) 7 Suth W R Cr 12 (12), *Dhurai Noshyo v. Hubei Nashyo*.
 ('67) 7 Suth W R Cr 40 (40), *Chootoo Dhoon, Bharbhoma v. Abdul Meah*.
 ('67) 8 Suth W R Cr 54 (54), *Queen v. Lalloo Singh*.
 ('72) 17 Suth W R Cr 1 (1, 2), *Azgur Howladar v. Asaruddin*.
 ('72) 18 Suth W R Cr 6 (7), *Gumamane v. Harce Dutta*.
 ('73) 20 Suth W R Cr 59 (59, 60), *Jitam Khan v. Durga Singh*.
 ('74) 22 Suth W R Cr 12 (13, 14), *Radhanath v. Wooma Churn*.
 ('66) 1866 Pun Re No. 14 Cr, p. 14, *Boota v. Buggoo*.
 ('66) 1866 Pun Re No. 27 Cr, p. 28, *Kaloo v. Emam Bux*.
 ('66) 1866 Pun Re No. 102 Cr, p. 101 (101), *Jumna Dass v. Ramla*.
 ('69) 1869 Pun Re No. 6 Cr, p. 5, *Ghulam Yaseen v. Khanan Khan*.
 ('70) 1870 Pun Re No. 28 Cr, p. 45 (46), *Ahmed v. Khoda Bux*.
 ('86) 1886 Pun Re No. 31 Cr, p. 74 (75), *Empress v. Samwan Singh*.
 ('87) 1887 Pun Re No. 17 Cr, p. 34 (35), *Empress v. Ghulam Hossain*.
 ('69-70) 5 Mad H C R App xl (xl).
 ('71) 6 Mad H C R App xlix (xlix).
 [See ('68) 10 Suth W R Cr 49 (49), *Hothoor Laloog v. Hindoo Singh*.]
 [See also ('83) 6 Mad 316 (318, 319), *Somu v. Queen*. (Complaint and proof in support thereof showing accused to be guilty of offences under S. 323, Penal Code — Magistrate issuing summons to answer charge under S. 352 — On examining witnesses discharging accused and awarding compensation — Held order awarding compensation was illegal.)]
 [But see ('70) 13 Suth W R Cr 39 (40), *Modhoosoodun v. Joyram*. (Three distinct charges two of which being offences triable as summons-cases and one as warrant-case—Magistrate can award compensation to accused if he considers the charges with reference to summons-cases to have been vexatious.)
 ('75) 23 Suth W R Cr 17 (18), *Kali Churn v. Shoshee Bhooshun*.]
 3. ('27) AIR 1927 Oudh 175 (175) : 28 Cri L Jour 450, *Paigambar v. Emperor*.
 4. ('81) 11 Mad 142 (143) : 2 Weir 314, *Queen-Empress v. Basava*.

Note 3

1. ('84) 6 All 96 (97) : 1883 A W N 224, *Ishri v. Bakhshi*.
 ('84) 7 Mad 563 (563, 564), *Queen-Empress v. Polavarapu*.

under the present section a case instituted "upon information given to a police-officer or to a Magistrate" is within the section.²

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Note 3

As has been seen already in section 4 (1) (h), a *police-report* is not a complaint and compensation cannot be awarded in a case instituted on such report.³ The words "information given to a police-officer" mean information given and entered in the register of cognizable cases under S. 154 of the Code,⁴ and the words "information given to a Magistrate" refer to such information as falls within S. 190 (1), clause (c) of the Code.^{4a} A *statement* by a person to a police-officer in the course of a police enquiry is not an "information" given to him and a case instituted on the basis of such statement is not within the section.⁵ But where a person points out two persons to the police as those who assaulted him and the police treats this as first information, the case is one that falls under this section.⁶

The report of a Civil Court Amin to the Civil Court that he has been obstructed in the execution of the process entrusted to him is neither a complaint nor information to a police-officer or to a Magistrate, and where the Civil Court directs a prosecution on the basis of such report, the Amin cannot be ordered to pay compensation under this section.⁷ Similarly, where A tells B and B tells C and C tells the

2. ('39) AIR 1939 Oudh 101 (102), *Gajadhar v. Emperor*.
- ('26) AIR 1926 All 165 (166) : 27 Cri L Jour 35, *Jairaj Singh v. Bansi*. (Making a report to the police-officer amounts to giving information to police-officer.)
- ('26) AIR 1926 All 295 (296) : 27 Cri L Jour 702, *Faridudin v. Emperor*.
- ('10) 11 Cr. L. J. 201 (201, 202) : 5 Ind Cas 693 (Cal), *Jogdani Pershad v. Mahadeo Kandoo*. (Case instituted ultimately upon police-report but originally upon information given to the police-officer falls within S. 250.)
- ('25) AIR 1925 Oudh 558 (558) : 26 Cri L Jour 527, *Hafiz Khan v. Emperor*.
3. ('40) AIR 1940 Sind 134 (135) : 41 Cr L J 789 : I L R (1940) Kar 470 (FB), *Md. Hashin v. Emperor*.
- ('83) 1883 All W N 257 (257), *Empress v. Durga*.
- ('01) 1901 All W N 142 (142), *King-Emperor v. Habib*.
- ('98) 22 Bom 934 (935), *Queen-Empress v. Sakar Jan Mahomed*. (Case instituted upon information given by police-officer.)
- ('94) 21 Cal 979 (984), *Ramjeevan Koormi v. Durga Charan*. (Do.)
- (1900) 5 Cal W N 370 (371, 372), *Sheobaran Ojha v. Nunmonia Doshad*. (Do.)
- ('03) 7 Cal W N 206 (208), *Syed Bahadur Ali v. Nur Mahomed*. (A police-officer acting under the Calcutta Police Act does not come within S. 250.)
- ('79) 1879 Pun Re No. 16 Cr, p. 48 (44, 45), *Karm Ilahi v. Morrison*.
- ('97.01) 1 Upp Bur Rul 68 (70), *Queen-Empress v. Sahawath Ali Khan*. (21 Cal 979, followed — Police-officer making report of the commission of an offence does not become a complainant.)
- ('32) AIR 1932 Sind 156 (156) : 26 Sind L R 299 : 33 Cri L Jour 644, *Salch v. Emperor*. (S. 250 does not apply to case instituted at the instance of the police.)
4. ('20) AIR 1920 Sind 73 (74) : 13 Sind L R 166 : 21 Cri L Jour 49, *Wali Mahomed v. Emperor*.
- 4a. ('40) AIR 1940 Sind 134 (135) : 41 Cr. L. J. 789 : I L R (1940) Kar 470 (FB), *Md. Hashin v. Emperor*.
5. ('20) AIR 1920 Sind 73 (73, 74) : 13 S L R 166 : 21 Cr. L. J. 49, *Wali Md. v. Emperor*.
- ('16) AIR 1916 Pat 211 (212) : 1 Pat L J 106 : 17 Cri L Jour 336 (336), *Sarjug Prasad Singh v. Emperor*.
6. ('20) AIR 1920 Sind 41 (42) : 14 Sind L R 168 : 22 Cri L Jour 120, *Faiz Muhammad v. Emperor*.
7. ('04) 26 All 183 (184) : 1903 A W N 216, *In the matter of Ram Padarath*.
- ('88) 1888 All W N 216 (216), *In the matter of Nain Sukhi*.
- ('75) 1 Bom 175 (176, 177), *In re Keshav Lakshman*.
- ('93) 20 Cal 481 (482, 483), *Bharut Chunder Nath v. Javed Ali Biswas*.
- ('10) 11 Cr. L. J. 634 (634) : 8 I. C. 382 : 1910 Pun Re No. 25 Cr, *Emperor v. Abdul*.

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Notes 3-4

police, A cannot be said to give any information to the police and no order can be made against him under this section.⁸ The High Court of Allahabad has, however, held in the undermentioned case⁹ that where A tells B about C with a view to securing the punishment of C and B informs the Magistrate, A can be ordered to pay compensation. It is submitted that this view is not correct. Where, however, the information is given by A to a person whose *duty* it is to report the same to the police or the Magistrate (as in cases coming under S. 45 of the Code), the latter only acts as a channel for conveying the information given by A who can therefore be ordered to pay compensation.¹⁰

4. "Accused of an offence." — The section by its terms applies only where in pursuance of a complaint or information a person is accused before a Magistrate of an *offence*. It does not, therefore, apply to the following cases where there is no accusation of any 'offence' as defined in S. 4 (1) (o) of the Code:—

1. Security proceedings under S. 107¹ and S. 110.²

- { '13 } 14 Cri L Jour 1 (1, 2) : 18 Ind Cas 145 (Bom), *In re Kisandas Hirachand*. (Deposition of decree-holders in the course of proceedings started on obstruction to attachment is not a complaint.)
8. { '29 } 1929 Mad W N 785 (785), *Velayuda Udayan v. Thandan Talayari*. [See also { '40 } AIR 1940 Sind 134 (136) : 41 Cr.L.J. 789 : I L R (1940) Kar 470 (FB), *Md. Hashin v. Emperor*. (This section provides a remedy which does not contemplate an inquiry into a chain of informants to ascertain who is real as against the formal complainant.)]
9. { '18 } AIR 1918 All 111 (111) : 40 All 79 : 19 Cr.L.J. 76, *Emperor v. Bahawal*.
10. { '24 } AIR 1924 Mad 91 (92) : 24 Cr. L. J. 717, *Kaliyaperumal Naidu v. Bavaji Shaib*.
- { '14 } AIR 1914 Mad 694 (695) : 39 Mad 1006 : 15 Cri L Jour 431, *Nachimulhu v. Muthusami*.
- { '17 } AIR 1917 Mad 660 (661) : 18 Cri L Jour 11 (12, 13), *Margasahaya Chetty v. G. Nadiabba*.
- { '17 } AIR 1917 Mad 967 (968) : 17 Cri L Jour 503 (503), *Thonokadavath Awalla v. Ammian Mannil Kuttiali*.
- { '15 } AIR 1915 Mad 1076 (1076) : 16 Cri L Jour 248 (248), *Marudai Veeran v. Pichan Ambalagaran*.
- { '12 } 13 Cr. L.J. 29 (29, 30) : 13 Ind Cas 221 (Mad), *In re Arulanantham Pillai*. (Information to village Magistrate cannot be regarded as information given to police within S. 250 though village Magistrate is bound to report offence to police.) [But see { '01 } 25 Mad 667 (668, 669) : 2 Weir 318, *King-Emperor v. Thammana Reddi*. (A made complaint to village Magistrate who sent a report to police who submitted charge sheet—Accused discharged and A ordered to pay compensation —Held village Magistrate not being Magistrate within S. 250, A could not be ordered to pay compensation.)]

Note 4

1. { '10 } 11 Cr.L.J. 446 (446) : 7 I. C. 290 (All), *Ram Sukh Rai v. Mahadeo Rai*. { '14 } AIR 1914 All 370 (370, 371) : 36 All 382 : 15 Cri L Jour 578, *Bindhachal Prasad Rai v. Lal Behari Rai*.
- { '22 } AIR 1922 All 321 (321) : 23 Cr. L. J. 474, *Mannu Khan v. Chandī Prasad*.
- { '23 } AIR 1923 All 332 (332) : 45 All 363 : 24 Cr.L.J. 228, *Ram Badan v. Janki*.
- { '27 } AIR 1927 All 531 (532) : 49 All 750 : 28 Cr.L.J. 604, *Baij Nath v. Kali Charan*.
- { '12 } 9 All L J 10n (10n), *In re Chattar Singh*.
- { 1900 } 25 Bom 48 (49) : 2 Bom L R 339, *In re Govind Hanmant*.
- { '84 } 1884 Pun Re No. 37 Cr, p. 72 (72), *Jay Singh v. Kanhya*.
- { '93 } 1893 Pun Re No. 16 Cr, p. 70 (71), *Hazarimal v. Memanmal*.
- { '96 } 1896 Pun Re No. 4 Cr, p. 13 (13), *Natha Singh v. Pala Singh*.
- { '02 } 1902 Pun Re No. 33 Cr, p. 86 (87), *Crown v. Kaura*.
- { '35 } AIR 1935 Lah 29 (30), *Rohel v. Kaura*.
- See also S. 107 Note 2.
2. { '93 } 15 All 365 (366, 367) : 1893 All W N 114, *Queen-Empress v. Lakhpat*.

2. Application for maintenance under S. 488.³
3. Complaints under S. 1 of the Workman's Breach of Contract Act, XIII of 1859.⁴
4. Complaint under S. 28 of the Bombay Police Conveyance Act.⁵
5. Complaint under S. 41 of the Bombay District Police Act.⁶

The section applies to a complaint under S. 20 of the Cattle Trespass Act, as it has specifically been introduced in the Code of 1898 as an offence under the Code. Therefore the undermentioned rulings,⁷ holding that compensation could not be awarded in such cases, are no longer law.

It was held in a decision under the Code of 1861 that the provisions of this section were inapplicable to a complaint under a special law⁸ and in another that it would be applicable.⁹ Under the present section it is applicable to a case of "any" offence, as for example, under the Railways Act, XVIII of 1854.¹⁰

5. "Triable by a Magistrate." — The offence must be one which is *triable by a Magistrate*,¹ that is, one which is shown as triable by a Magistrate in column 8 of Sch. II.² Thus, the section does not apply to cases where the offence is triable exclusively by the Court of Session but is enquired into by the Magistrate under Chapter XVIII of the Code³ or is even tried by him under the special powers under S. 30

(70) 2 N W P H C R 447 (448), *Queen v. Balkishan*.

See also S. 117 Note 5.

3. ('10) 11 Cri L Jour 156 (157) : 4 Ind Cas 1045 (Mad), *Amboo v. Baboo*.

See also S. 4 (1) (h) Note 11 and S. 488 Notes 5 and 27.

4. ('19) AIR 1919 All 395 (395, 396) : 41 All 322 : 20 Cr. L. J. 570, *Jamil Ahmad v. Muhammad Ishaq*.

(92) 1892 Rat 617 (618), *Queen-Empress v. Namdeo*.

(99-1900) 4 Cal W N 253 (254), *In the matter of Ram Sarup Bhakat*.

5. ('20) AIR 1920 Bom 350 (350) : 44 Bom 463 : 21 Cr. L. J. 380, *In re Valli Mitha*.

6. ('13) 14 Cri L Jour 320 (320) : 6 Sind L R 254 : 19 I. C. 1008, *Imperator v. Mt. Khairi*.

7. ('96) 18 All 353 (353) : 1896 All W N 98, *Meghai v. Shcobhik*.

(86) 13 Cal 304 (305), *Kalachand v. Gudhadhar Biswas*. (9 Mad 102, followed.)

(86) 9 Mad 102 (102) : 2 Weir 315, *Pitchi v. Ankappa*.

(86) 9 Mad 374 (375) : 2 Weir 315, *Kottalanada v. Muthaya*.

See also S. 4 (1) (h) Note 11 and S. 4 (1) (o) Note 5.

8. ('70) 14 Suth W R Cr 36 (39), *Queen v. Abdul Azeez Khan*. (Case under Act VII of 1864 B. C.)

9. ('72) 1872 Pun Re No. 1 Cr, p. 1(1), *Alla Ditta v. Shere Mahomed*. (Case under Cattle Trespass Act.)

10. ('72) 4 N W P H C R 94 (96, 97), *Queen v. Turner*.

Note 5

1. ('27) AIR 1927 Oudh 175 (175) : 28 Cri L Jour 450, *Paigambar v. Emperor*.

(27) AIR 1927 All 744 (744) : 28 Cr. L. J. 983, *Bansidhar v. Chummi Lal*. (Offence was triable by a Court of Session.)

(22) AIR 1922 All 188 (188) : 23 Cr. L. J. 319, *Sarup Sonar v. Ram Sundar* (Do.)

(16) AIR 1916 Bom 96 (96) : 18 Cr. L. J. 463, *Emperor v. Chhaba Dolsong* (Do.)

(86) 2 Weir 315 (316), *In re Poligadu*. (Do.)

[See ('10) 11 Cri L Jour 396 (396) : 6 I C 735 (Lah), *Ramjan v. Rajan*. (Magistrate empowered under S. 30 passing order under S. 250 in a case triable by a Court of Session, as an Additional Sessions Judge—Order held wrong.)]

2. ('30) AIR 1930 Lah 482(483) : 11 Lah 558 : 31 Cr. L. J. 1133, *Amin Lal v. Emperor*.

3. ('37) 1937 M W N 96 (96), *Shama Rao v. Emperor*. (Complaint under Ss. 395, 342 and 352, Penal Code — Accused discharged under S. 209 (2), Cr. P. C. — Order for compensation is illegal.)

(18) AIR 1918 All 126 (126) : 40 All 615 : 19 Cr. L. J. 706, *Hait Ram v. Ganga Sahai*.

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Note 5of the Code.⁴

Where a complaint is made of offences some of which are triable by the Magistrate and some by the Sessions Court, and the accused is discharged in respect of all the offences, an order for compensation can be passed under this section only in respect of the offences triable by the Magistrate⁵ and not in respect of the other offences also.⁶

In filing a complaint, the complainant must, for the purposes of this section, be deemed to make an accusation which includes not merely the offence charged therein but also any offence which the facts in the complaint disclose in the light of any enquiry or trial. The mere fact that the complaint charges the accused with an offence which is not triable by a Magistrate does not oust the jurisdiction of the Magistrate to pass an order under this section, if after enquiry the Magistrate finds that the accusation is really one in respect of an offence triable by him.⁷ But it is not incumbent upon a Magistrate to find whether a case is triable by a Court of Session or by himself and if he *tries* an accused for an offence *prima facie* triable by him, an order under this section is not illegal even if really the facts prove

(22) AIR 1922 All 188 (188) : 23 Cri L Jour 319, *Sarup Sonar v. Ram Sundar*.

(27) AIR 1927 All 744 (744) : 28 Cri L Jour 983, *Bansidhar v. Chunni Lal*.

(31) AIR 1931 All 355 (355) : 53 All 461:32 Cr.L.J. 670, *Shiam Lal v. Nand Ram*.

(98) 1898 Rat 961 (961), *Queen-Empress v. Bavabhai Kesarisingh*.

(16) AIR 1916 Bom 96 (96) : 18 Cri L Jour 463, *Emperor v. Chabba Dolsingh*.

(02) 1902 Pun Re No. 14 Cr, p. 39 (40), *Crown v. Hamirchand*.

(30) AIR 1930 Lah 482 (483):11 Lah 558:31 Cr. L. J. 1133, *Amin Lal v. Emperor*.

(86) 2 Weir 315 (316), *In re Poligadu*.

(09) 9 Cri L Jour 502 (502) : 2 I. C. 159 (Mad), *In re Kesava Panda*.

(93-1900) 1893-1900 Low Bur Rul 443 (443), *Ma Pwa Yon v. Maung Po Mya* (Offence under S. 366, Penal Code, not triable by a Magistrate — This section is not applicable.)

4. ('19) AIR 1919 Lah 192 (193) : 1919 Pun Re No. 1 Cr : 20 Cri L Jour 141, *Mahomed Hayat v. Bhola*.

(02) 1902 Pun Re No. 26 Cr, p. 74 (75) : 1902 P L R No. 139, *Crown v. Qadu*.

(19) AIR 1919 Lah 227 (228) : 1919 Pun Re No. 15 Cr : 20 Cri L Jour 495, *Shankar Sahai v. Emperor*.

(23) AIR 1923 Rang 15 (15) : 11 Low Bur Rul 151 : 23 Cri L Jour 289, *Ma E Dok v. Maung Po Than*.

(30) AIR 1930 Lah 482 (483):11 Lah 558:31 Cr.L.J. 1133, *Amin Lal v. Emperor*.

[But see ('36) AIR 1936 Rang 230 (231) : 37 Cri L Jour 773 : 14 Rang 378, *Ma Sin v. Maung Maung Lay*. (Trial by special power Magistrate of complaint under S. 376 of Penal Code—Order discharging accused passed—Magistrate is entitled to pass order directing payment of compensation under S. 250, although offence is exclusively triable by Sessions Court.)]

See also S. 30 Note 3.

5. ('30) AIR 1930 Lah 482 (483):11 Lah 558:31 Cr.L.J. 1133, *Amin Lal v. Emperor*.

(19) AIR 1919 Lah 227 (228) : 1919 Pun Re No. 15 Cr : 20 Cri L Jour 495, *Shankar Sahai v. Emperor*.

[See however ('26) AIR 1926 All 159 (160) : 48 All 166 : 27 Cri L Jour 6, *Harihar Dat v. Maksud Ali*. (Complaint for offences some of which triable by Magistrate and some triable exclusively by Court of Session—On accused being discharged as to all offences, order for compensation cannot be passed.)]

6. ('30) AIR 1930 Lah 482 (483):11 Lah 558:31 Cr.L.J. 1133, *Amin Lal v. Emperor*.

(18) AIR 1918 All 126 (126):40 All 615:19 Cr.L.J. 706, *Hait Ram v. Ganga Sahai*.

7. ('39) AIR 1939 Lah 122 (123) : I L R (1938) Lah 619 : 40 Cri L Jour 515, *Painda v. Mt. Gulab Khatun*.

(21) AIR 1921 Sind 105 (106) : 16 Sind L R 205 : 26 Cri L Jour 265, *Hamandas v. Ahmad Khan*.

(31) AIR 1931 All 355 (356) : 53 All 461 : 32 Cri L Jour 670, *Shiam Lal v. Nand Ram*.

the offence to be one triable by a Court of Session.^{7a} The question, therefore, whether an offence is triable by a Magistrate is not to be decided solely by the complaint. The proper criterion is the form of the proceeding, i. e., whether they were conducted under Chapter XVIII or Chapter XXI.⁸

Where a particular Magistrate, however, has *no power* to try a case even though it is triable by a Magistrate, he cannot award compensation as he has not the power to try the case itself.⁹

6. Magistrate by whom the case is heard. — It is only the Magistrate by whom the "*case is heard*" that can pass an order under this section.¹ It is not the intention of the Legislature that one Magistrate should deal with the case and call upon the complainant to show cause and that another Magistrate should pass an order for compensation.² Thus, an Appellate Court³ cannot, when reversing a conviction, act under this section. Even a High Court cannot in revision pass an order for compensation, although it is of opinion that such an order should be made.⁴ See also Note 99 to S. 423.

The words "the Magistrate by whom the case is heard" do not, however, mean that the *evidence* must have been heard by him but

7a. ('22) AIR 1922 Mad 223 (223, 224) : 45 Mad 29 : 23 Cr.L.J. 232, *Mahajaman Venkatarayar v. Venkatarayar*.

('30) AIR 1930 All 280 (280) : 31 Cri L Jour 563, *Balkishen v. Emperor*.

8. ('31) AIR 1931 All 355 (356) : 53 All 461 : 32 Cri L Jour 670, *Shiam Lal v. Nand Ram*.

9. ('09) 9 Cri L Jour 502 (502) : 2 Ind Cas 159 (Mad), *In re Kesava Panda*.

Note 6

1. ('40) AIR 1940 Rang 278 (279) : 1940 Rang LR 502, *King v. Mg. Khin Maung*. ('39) AIR 1939 Sind 321 (321) : 41 Cr. L. J. 53 : 1 L R (1940) Kar 119, *Emperor v. Md. Alan*.

('06) 3 Cr. L. J. 441 (442) : 28 All 625 : 3 A L J 382 : 1906 A W N 145, *Emperor v. Chittan*.

('24) AIR 1924 All 224 (224) : 46 All 80 : 25 Cr.L.J. 967, *Chedi v. Ram Lal*.

('11) 12 Cr.L.J. 529 (531) : 12 I. C. 297 : 39 Cal 157 (FB), *Mehi Singh v. Mangal*.

('29) AIR 1929 Cal 762 (765) : 31 Cr.L.J. 828, *Rajaram Majhi v. Panchanan Ghosh*.

('26) AIR 1926 Lah 427 (427) : 7 Lah 152 : 27 Cr.L.J. 570, *Notified Area, Kharar v. Karta Ram*.

2. ('39) AIR 1939 Sind 321 (321) : 41 Cr.L.J. 53 : 1 L R (1940) Kar 119, *Emperor v. Md. Alan*.

('29) AIR 1929 Cal 762 (765) : 31 Cr.L.J. 828, *Rajaram Majhi v. Panchanan Ghosh*.

('92) 1892 All W N 58 (58), *In the matter of Mahadeo Tiwari*.

3. ('40) AIR 1940 Rang 278 (279) : 1940 Rang LR 502 (506), *The King v. Mg. Khin Maung*. (Such an order cannot be an order incidental to the order of acquittal under S. 423 (1) (d) of the Code.)

('06) 3 Cri L Jour 441 (442) : 28 All 625 : 3 A L J 382 : 1906 A W N 145, *Emperor v. Chittan*.

('24) AIR 1924 All 224 (224) : 46 All 80 : 25 Cri L Jour 967, *Chedi v. Ram Lal*.

('01) 3 Bom L R 841 (842), *Hari Chand v. Fakir Sadrudin*.

('11) 12 Cri L Jour 529 (531, 532) : 12 I C 297 : 39 Cal 157 (FB), *Mehi Singh v. Mangal Khanda*. (Overruling 11 Cri L Jour 46.)

('26) AIR 1926 Lah 427 (427) : 7 Lah 152 : 27 Cri L Jour 570, *Notified Area, Kharar v. Karta Ram*.

('74) 8 Mad H C R App vii (vii).

4. ('40) AIR 1940 Rang 278 (279) : 1940 Rang LR 502 (505, 506), *The King v. Mg. Khin Maung*.

('39) AIR 1939 Sind 321 (322) : 41 Cr. L. J. 53 : 1 L R (1940) Kar 119, *Emperor v. Md. Alan*.

('28) AIR 1928 All 95 (96) : 29 Cri L Jour 274, *Aminullah v. Emperor*.

See also S. 250 Note 6.

Section 250
Notes 6-7

mean "the Magistrate by whom the case is decided." So, where *part* of the evidence is heard by one Magistrate and the rest of the evidence is heard and the case is *decided* by another, the latter is competent to order compensation under this section.⁵ A Magistrate by whom a case is "heard" need not be the one before whom it was instituted.⁶

7. "Discharges or acquits." — Under the Codes of 1861 and 1872, compensation could be awarded only where the complaint was *dismissed* as being frivolous or vexatious. There was a divergence of opinions as to whether it could be awarded in cases of acquittal.¹

The Code of 1882 provided for the award of compensation only in cases where the accused was *acquitted* under S. 245 or S. 247.² An acquittal by reason of *withdrawal* of the complaint was not within the section.³

After the amendment in 1891 (see Note 1) the Magistrate can act under this section when he either *discharges or acquits* an accused person.⁴ The acquittal may be either one under S. 245 or S. 247 or may be one passed on the withdrawal of the complaint. But the acquittal must be one *made by the Magistrate himself*. The composition of an offence under S. 345 has by itself the *effect of an acquittal* but there is no order by the Magistrate himself recording an acquittal. The section is not applicable to such cases and no compensation can be awarded.⁵

Where the accused is neither *discharged* nor *acquitted*, this section does not apply and no compensation can be awarded to him.⁶

5. ('21) AIR 1921 All 122 (122) : 22 Cri L Jour 406, *Ram Devi v. Govind Sahai*.

6. ('39) AIR 1939 Lah 122 (123) : ILR (1938) Lah 619 : 40 Cr. L. J. 515, *Painda v. Mt. Gulab Khatun*.

Note 7

1. ('74) 1874 Rat 83 (83, 84), *Reg. v. Jekison*. (Section does not apply.)

('81) 6 Cal 581 (582), *Mona Seikh v. Ishan Bardhan*. (Section applies.)

('82) 5 Mad 381 (382) : 2 Weir 316, *Number v. Ambu*. (Section applies.)

('81) 1881 All W N 155 (155), *Debi Sahai v. Dalsingar Rai*. (Withdrawal of complaint—Section does not apply.)

('70) 1870 Pun Re No. 26 Cr, p. 43 (44), *Crown v. Gujiur*. (Do.)

[See ('71) 1871 Pun Re No. 16 Cr, p. 29 (30), *Crown v. Maiya*. (Do.)]

2. ('86) 10 Bom 199 (200), *Queen-Empress v. Pandu Gopala*.

('89) 1889 Rat 462 (463), *Moro Krishna v. Yeswantrao*.

3. ('88) 1888 Pun Re No. 19 Cr, p. 35 (36, 37) *Empress v. Khusali Ram*. (Dis-senting from 1883 Pun Re No. 24 Cr.)

('87) 1887 Pun Re No. 56 Cr, p. 151 (151), *Sital Das v. Anokha*.

('84) 1884 Pun Re No. 14 Cr, p. 19 (19), *Ali Ahmed v. Nathoo*.

('84) 1884 Pun Re No. 14 (n) Cr, p. 19 (20), *Gulab v. Santram*.

[But see ('83) 1883 Pun Re No. 24 Cr, p. 57 (57) : *Himmat Singh v. Bukhtawar*. Not approved in 1888 Pun Re No. 19 Cr.]

4. [See ('37) AIR 1937 Rang 398 (399) : 1937 R L R 159 : 39 Cri L Jour 29, *D. K. Nath v. P. K. Nath*. (But order of discharge or acquittal must be legal.) (1900) 1 L B R 44 (44), *Shwe Zin v. Mg. Tun Hla*. (Do.)]

5. ('10) 11 Cr. L. J. 638 (639) : 8 I. C. 387 : 1910 Pun Re No. 30 Cr, *Emperor v. Sunder*.

('98) 1898 Rat 957 (957), *Queen-Empress v. Sangappa*.

('08) 9 Cr. L. J. 186 (187) : 10 Bom L R 1056, *In re Harikisan Das Hari Das*.

('94) 1894 Rat 700 (700), *Queen-Empress v. Raoji*.

('92) 7 C P L R Cr 2 (3), *Alopi v. Bhura*.

('88) 1888 Pun Re No. 19 Cr p. 35 (36, 37), *Empress v. Khushali Ram*.

See also S. 345 Note 18.

6. ('29) AIR 1929 Lah 623 (624) : 30 Cr. L. J. 854, *Ram Lubhaya v. Jagan Nath*.

Thus, where a complaint is dismissed under S. 203, there is neither a discharge nor an acquittal of the accused as no process is at all issued to the accused; consequently no compensation can be awarded under this section.⁷

This section speaks of 'the case' as a whole and contemplates a trial or inquiry ending in an unqualified acquittal or discharge of the accused and the policy of the Legislature is to limit the jurisdiction of the Magistrate under this section to simple cases in which the complainant is found to be wholly in the wrong and the accused is discharged or acquitted altogether. So, where an accused is charged with two offences and convicted under one and acquitted under another, this section will not apply.⁸

8. False and either frivolous or vexatious. — Before the amendment of 1923, an order under this section could be passed if the case was either frivolous or vexatious.¹ It was not necessary that the charge should be false as well. But it was held in some cases that neither of the two words excluded the element of falsehood in the charge and that a charge which is false must also be vexatious and is not outside the scope of the section.^{1a}

7. ('06) 4 Cr.L.J. 451 (451):29 All 137: 1906 A W N 306, *Bhagwan v. Harmukh*. ('97) 1897 Pun Re No. 8 Cr, p. 19 (19, 20), *Basta Singh v. Kapuri Lal*. (It could be gathered from the orders of the Magistrate in this case that he intended to dismiss the complaint under S. 203 though there was no such clear order.) ('08) 7 Cr. L. J. 297 (299): 5 A L J 137: 1908 A W N 67, *Bhagwan Din v. Dibba*. ('97) 1897 Pun Re No. 14 Cr, p. 35 (35), *Azam v. Mir Abdulla*. ('06) 1906 Pun L R No. 84, p. 254 (255, 256): 4 Cr.L.J. 36:1906 Pun Re No 6 Cr, *Harphul v. Manku*.
8. ('97) 24 Cal 53 (55): 1 C W N 17, *Mukti Bewa v. Jhotu Santra*. ('18) AIR 1918 All 109 (109): 40 All 610: 19 Cri L Jour 670, *Mad. Ali Khan v. Raja Ram Singh*. ('18) AIR 1918 Sind 24 (24): 12 Sind L R 87: 20 Cr.L.J. 106, *Emperor v. Nadar*. (Order for compensation is not justified merely because the complaint is frivolous as regards one of the heads of charges.)

Note 8

1. ('83) 2 Weir 319 (320), *In re Munisami Mudali*.
1a. ('03) 30 Cal 123 (129): 6 C W N 799 (FB), *Beni Madhab Kurmi v. Kumud Kumar Biswas*. (Overruling 28 Cal 251.) ('04) 1 Cr.L.J. 433 (433, 434): 1 A L J 234: 1904 A W N 116: 26 All 512, *Emperor v. Bindeshri Prasad*. ('03) 5 Bom L R 128 (128, 129), *Emperor v. Bai Asha*. (Dissenting from 4 Bom L R 645.) ('13) 14 Cr.L.J. 75 (75): 37 Bom 376: 18 I. C. 411, *In re Gopala Bhan Chan Gula*. ('03) 1903 Pun Re No. 18 Cr, p. 47 (48, 49): 1903 Pun L R No. 156, *Crown v. Ismail*. ('81) 2 Weir 313 (314), *In re Ponnammal*. ('02) 15 C P L R 194 (195, 196), *Pannalal v. Amrit Rao*. ('20) AIR 1920 Nag 78 (78): 21 Cri L Jour 41, *Mt. Jaina v. Santuk Das*. ('18) AIR 1918 Low Bur 48(50): 19 Cr.L.J. 172, *Shaik Dawood v. Mohamed Ibrahim*. ('14) AIR 1914 Upp Bur 29 (30): 2 Upp Bur Rul 31: 16 Cr.L.J. 92, *Nga Myo v. Nga Kyan*. ('20) AIR 1920 Sind 41 (42): 14 Sind L R 168: 22 Cr. L. J. 120, *Faiz Mahomed v. Emperor*. [See ('69) 11 Suth W R Cr 10 (10), *In re Mothoor Ghose*. (Complainant laying claim to large jammās on chur without possessing documents to prove rights—Order under S. 250—Interference in revision with order refused on ground that complaint was false and vexatious.) ('02) 29 Cal 479 (480), *Kinakarmarkar v. Preo Nath Dutt*. (Where a case is found to be false and vexatious but is essentially one coming under S. 211, Penal Code, Magistrate would not be exercising proper discretion in passing an

Section 250
Note 8

Under the present Code the case must *be false* and either frivolous or vexatious² and there must be a definite finding to that effect before an order for compensation can be passed.³ The fact that a Magistrate has framed a charge, does not of itself prevent him from holding, after inquiry, that the charge is false and frivolous or vexatious.⁴

As qualifying an accusation the term "frivolous" indicates that the accusation is of a trivial nature⁵ or is 'trifling,' 'silly' or 'without due foundation.'⁶ The term vexatious implies that the accusation is one that ought not to have been made and is intended to 'harass'⁷ or 'annoy'⁸ the accused. For instance, where a criminal prosecution is

order for compensation under S. 250 instead of instituting proceedings under S. 211, Penal Code.)

('07) 9 Cri L Jour 268 (269) : 1 Sind L R 28 (FB), *Crown v. Noto*. (Overruling 9 Cri L Jour 255. Where a complaint is not only false but also vexatious, Magistrate has discretion to award compensation if in his opinion public policy does not necessitate sanctioning prosecution of complainant under S. 211, Penal Code.)

[See also ('17) AIR 1917 Pat 594 (595) : 18 Cr.L.J. 837, *Mangra Kharia v. Ram Dhari Singh*. (Serious charge cannot by itself be described as frivolous and order of compensation is not justified unless such charge is proved in fact to be false.)]

[But see ('12) 13 Cr.L.J. 247 (248) : 14 I. C. 599 : 34 All 354, *Ram Singh v. Mathura*.

('02) 4 Bom L R 645 (646, 647), *Emperor v. Asha*.

('95) 22 Cal 586 (588), *Shib Nath v. Sarat Chunder*. (If a case is wilfully and maliciously false and the Magistrate is of opinion that prosecution against the complainant under S. 211, Penal Code, should be sanctioned he ought not to order compensation under S. 250 of the Code.)

('99) 26 Cal 181 (183, 184), *Bachu Lal v. Jagdam Sahai*. (Do.)

('15) AIR 1915 Mad 940 (941) : 16 Cr. L. J. 128 (129) : 38 Mad 1091, *Venkatarama Iyer v. Krishna Iyer*. (To justify order under S. 250 it must be found not only that the complaint was false but that it was also frivolous or vexatious.)]

2. ('40) AIR 1940 Rang 110 (111) : 41 Cr. L. J. 506, *Ma Pu v. Mg. Tun Pe*.

('36) AIR 1936 All 363 (363) : 37 Cri L Jour 424, *Bechan Prasad v. Jhuri*. (The mere fact that the evidence produced by the complainant in support of his allegation was unreliable or inconclusive will not justify a finding that the allegation was false.)

('26) AIR 1926 Sind 19 (19) : 19 S. L. R. 66 : 26 Cr. L. J. 1295, *Assanmal v. Dilbar*.

('26) AIR 1926 All 141 (142) : 27 Cri L Jour 300, *Kashi Prasad v. Emperor*.

('20) AIR 1920 Nag 78 (78) : 21 Cri L Jour 41, *Mt. Jaina v. Santuk Das*.

3. ('40) AIR 1940 Rang 110 (111) : 41 Cri L Jour 506, *Ma Pu v. Mg. Tun Pe*. (Magistrate must find that case is frivolous or vexatious — Mere finding that it is false is insufficient.)

('38) AIR 1938 Rang 209 (209) : 39 Cri L Jour 704, *Mg. Pan v. Mg. Mya Din*. (Magistrate finding case to be false — He must also find whether it is frivolous or vexatious.)

('32) AIR 1932 Lah 554 (554, 555) : 34 Cri L Jour 80, *Ibrahim v. Anant Ram*.

('26) AIR 1926 Nag 31 (32, 33) : 26 Cri L Jour 1033, *Bhau v. Syed Chand*.

('33) AIR 1933 Sind 226 (226) : 27 Sind L R 78 : 34 Cri L Jour 767, *Emperor v. Sarup Singh*.

('29) AIR 1929 Sind 113 (113, 114) : 30 Cri L Jour 458, *Pir Mahomed v. Yacoob*.

('32) AIR 1932 Sind 156 (157) : 26 Sind L R 299 : 33 Cr. L. J. 644, *Salch v. Emperor*.

('34) AIR 1934 Sind 18 (19) : 35 Cri L Jour 1038, *Emperor v. Baloch Daryakhan*.

4. ('95) 1895 Rat 734 (735), *Queen-Empress v. Abdulla Rahiman*.

5. ('03) 30 Cal 123 (129) : 6 C W N 799 (FB), *Beni Madhub Kurmi v. Kumud Kumar Biswas*.

6. ('20) AIR 1920 Nag 78 (78) : 21 Cri L Jour 41, *Mt. Jaina v. Santuk Das*.

7. ('03) 30 Cal 123 (129) : 6 C W N 799 (FB), *Beni Madhub Kurmi v. Kumud Kumar Biswas*.

('20) AIR 1920 Nag 108 (109) : 21 Cri L Jour 226, *Bakaji v. Mukund Singh*.

8. ('26) AIR 1926 Lah 365 (365) : 27 Cr. L. J. 607, *Municipal Committee, Simla v. Mukund Singh*.

('21) AIR 1921 Lah 283 (284) : 23 Cri L Jour 1, *Chanan Singh v. Emperor*.

('17) AIR 1917 Sind 73 (73) : 18 Cri L Jour 1005 (1005, 1006) : 11 Sind L R 55, *Emperor v. Kouro Jumo*.

launched on mere suspicion⁹ or with a view to put pressure on an opponent in a civil suit,¹⁰ the Magistrate is justified in acting under this section.

Section 250
Notes 8-9

But where the complainant's case is not an improbable one¹¹ and he is merely unable to prove his case,^{11a} or there is nothing to show that it is wilfully false or that there is any perversion or exaggeration of evidence,¹² it is not proper to hold the complaint false and vexatious. Similarly, the fact that the complainant and the accused are on bad terms is not a sufficient ground for holding that the complaint is a false one.¹³

9. "By his order." — Before the amendment of 1923, the order to pay compensation was part of the order of discharge or acquittal, that is to say, the order of discharge or acquittal and the order directing compensation had to be made simultaneously. An order for compensation made after such discharge or acquittal, in a separate proceeding, was held to be illegal.¹ This is no longer law as after the amendment

9. ('32) AIR 1932 Bom 177 (178) : 33 Cri L Jour 392, *In re Dinshaji Hirjibhai*.

10. ('33) AIR 1933 Bom 233 (234) : 34 Cri L Jour 878, *Dahyabhai v. Tangania*.

('26) AIR 1926 Bom 163 (164) : 27 Cri L Jour 448, *Ravi Shankar v. Savai Lal*.
(In this case the complaint was filed in order to force the accused to give up his legal rights without defending them in a civil suit.)

11. ('06) 3 Cr. L. J. 123 (124) : 1905 Pun Re No. 57 Cr, *Emperor v. Narpal Rai*.

11a. ('21) AIR 1921 Oudh 247 (247, 248) : 24 Oudh Cas 261, *Emperor v. Chunni*.

('34) AIR 1934 Sind 18 (19) : 35 Cr. L. J. 1038, *Emperor v. Daloch Daryakhan*.

[See ('36) AIR 1936 All 363 (364) : 37 Cri L Jour 424, *Bechan Prasad v. Jhauri*.
(Unreliable or inconclusive evidence.)]

[See also ('26) 27 Cr. L. J. 633 (633) : 94 Ind Cas 409 (Lah), *Sanwalya v. Baru*.
(Some witnesses and zaildars report supporting the complaint without any rebuttal by the accused—Complaint cannot be said to be false and frivolous or vexatious.)]

12. ('29) AIR 1929 Rang 14 (14) : 30 Cri L Jour 539, *Ganguli v. Emperor*.

[See ('35) AIR 1935 Pesh 178 (179) : 37 Cr. L. J. 298, *Gul Din v. Abdul Khalik*.
(Prima facie case against accused—Mere discrepancy of two of complainant's witnesses does not justify conclusion that case is false.)]

[See also ('36) AIR 1936 Lah 702 (703) : 37 Cr. L. J. 935, *New Delhi, Municipal Committee v. Ram Bai*. (Prosecution lodged carelessly and on inadequate ground, but not grossly careless or vindictive—No case for compensation.)]

13. ('38) AIR 1938 Rang 209 (209) : 39 Cr. L. J. 704, *Mg. Pan v. Mg. Mya Din*.

Note 9

1. ('03) 25 All 315 (316) : 1903 A W N 57, *In the matter of Safdar Husain*.

('12) 13 Cri L Jour 247 (248) : 34 All 354 : 14 I. C. 599, *Ram Singh v. Mathura*.

('19) AIR 1919 All 398 (398) : 20 Cri L Jour 774, *Chauthi Ahir v. Emperor*.

('11) 12 Cri L Jour 6 (6, 7) : 38 Cal 302 : 9 I. C. 45, *Haru Tanti v. Satish Roy*.

('12) 16 Cal W N cxcix (ccc), *Sabarali v. Kali Proshonyo*.

('06) 3 Cri L Jour 123 (124) : 1905 Pun Re No. 57 Cr, *Emperor v. Narpal Rai*.

('06) 4 Cri L Jour 428 (429) (Lah), *Emperor v. Sundhi Khan*.

('13) 14 Cri L Jour 48 (48) : 18 I. C. 272 (Lah), *Imam Din v. Emperor*.

('21) 22 Cr. L. J. 527 (528) : 62 I. C. 415 (416) (Lah), *Karam Baksh v. Md. Said*.

(1900) 14 C P L R Cr 37 (38), *Kashi Nath Gopal v. Zincke*.

('14) AIR 1914 Nag 68 (68) : 10 Nag L R 8 : 15 Cr. L. J. 290, *Nanhey Lal v. Mt. Rani Bahu*.

('93-1900) 1893-1900 Low Bur Rul 528 (529), *Queen-Empress v. Abdul Karim*.

('92-1896) 1 Upp Bur Rul 35 (35, 36).

[See ('14) AIR 1914 Cal 548 (549) : 15 Cri L Jour 150, *Lalit Mohan v. Kunji Behari*. (Magistrate by his order of discharge declaring case to be false and vexatious and ordering complainant to pay compensation subject to any cause to be shown by him—On failure to show cause next day, order made absolute—Order held satisfied requirements of S. 250.)]

Section 250
Note 9

it is not necessary that the order for compensation should be embodied in the order of discharge. The two orders are made in separate proceedings. It is only the order calling upon the complainant to show cause which is to be contained in the order of discharge or acquittal.^{1a} The actual order for compensation is necessarily a subsequent order.² But, where the order of compensation is made along with the order of discharge or acquittal, the provision of law is complied with if the order calling upon the complainant to show cause is also made simultaneously with the order of discharge.³ The order calling upon the complainant to show cause cannot either precede⁴ or be made after⁵ the order of discharge or acquittal. Although, the order to show cause is not made part of the judgment of discharge or acquittal, if it is passed and signed immediately after the judgment, so that the order can be said to be a continuation of the original proceeding, or part of it, it is not illegal.⁶

[But see ('20) AIR 1920 Bom 314 (314, 315) : 21 Cri L Jour 371, *In re Nagindas Chanusa*. (Notice to show cause why order under S. 250 should not be made issued on the same day and practically in same proceedings as order of discharge — Final order for compensation made some days later, below the order of discharge—*Held* S. 250, cl. (b) was sufficiently complied with.)

('06) 4 Cr. L. J. 423 (424, 425): 8 Bom L R 847, *Emperor v. Punamchand*. (Do.)

('18) AIR 1918 Lah 58 (59) : 1917 Pun Re No. 31 Cr : 19 Cr. L. J. 444, *Emperor v. Saudagar Ram*. (Do.)

('14) AIR 1914 Sind 25 (26) : 7 Sind L R 123 : 15 Cri L Jour 508, *Ghanumal v. Emperor*. (Order for acquittal and compensation need not be pronounced in same breath but must be in same proceedings—Reserving order of compensation for hearing objections is not bad.)]

In the following cases it was held that it was a mere irregularity curable by S. 537 :

('05) 2 Cr.L.J. 523 (524) : 1905 All W N 214 (All), *Jogal Kishore v. Abdul Karim*. (*Held*, under the circumstances of the case that two orders might be regarded as passed in one continuous proceeding.)

('14) AIR 1914 All 86 (88) : 36 All 132 : 15 Cri L Jour 193, *Ghurbin v. Emperor*.

('18) AIR 1918 Cal 436 (436) : 18 Cr. L. J. 1014, *Ram Narayan v. Atul Chandra*.

('17) AIR 1917 Mad 628 (629) : 17 Cri L Jour 314, *Dhanu Kodi v. Muthusamy*.

1a. ('36) AIR 1936 Sind 240 (242) : 38 Cr.L.J. 121 : 30 S L R 359, *Talib Delawar v. Sajan Saleh*.

[*See also* ('37) AIR 1937 Rang 301 (302) : 38 Cri L Jour 999, *Chidambaram v. Chand Ali*. (No opinion expressed in order of discharge that case was false and frivolous or vexatious—No reasons recorded for ordering compensation—Order is bad.)]

2. ('26) AIR 1926 Lah 298 (299) : 7 Lah 121 : 27 Cr.L.J. 752, *Achhru Mal v. Emperor*.

('28) 29 Cr.L.J. 680 (680) : 110 Ind Cas 232 (Lah), *Saudagar Singh v. Aroor Singh*.

('29) AIR 1929 Bom 287 (288) : 30 Cri L Jour 1112, *In re Vali Mahomed*.

3. ('29) AIR 1929 Cal 332 (332, 333) : 31 Cr. L.J. 411, *Wahad Ali v. Sarajuddin*.

[*See also* ('36) AIR 1936 Sind 240 (242) : 38 Cr. L. J. 121 : 30 S L R 359, *Talib Delawar v. Sajan Saleh*. (Order to show cause containing the words that the Magistrate 'finds' the accusation to be false and frivolous is not illegal.)]

4. ('29) 1929 Mad W N 277 (278, 279), *Ramaswami v. Suryanarayana*.

5. ('33) AIR 1933 Nag 296 (296, 297) : 13 N L R 15 : 34 Cr. L. J. 1163, *Emperor v. Rangnath Koshti*. (No reference in the order of discharge that action is to be taken under S. 250 — Magistrate subsequently acting on suggestion of accused and issuing notice to complainant to show cause—Procedure *held* bad.)

6. ('36) AIR 1936 Rang 230 (232) : 37 Cr.L.J. 773 : 14 Rang 378, *Ma Sin v. Mg. Maung Lay*.

('26) AIR 1926 All 165 (166) : 27 Cri L Jour 35, *Jairaj Singh v. Bansî*.

('27) AIR 1927 Lah 515 (516) : 28 Cr.L.J. 592, *Ghulam Muhammad v. Vir Bhan*.

('30) AIR 1930 Pat 292 (293) : 9 Pat 100 : 31 Cri L Jour 875, *Mangal Chand v. Makhan Goala*.

Where there are two accused, and one of them is discharged on one day and the other acquitted on a later day, the Magistrate cannot call upon the complainant, in so far as the payment of compensation to the discharged accused is concerned, to show cause on the day of the acquittal of the other accused, as the case against that person is at an end on the date of his discharge and no order to show cause can be made subsequently.⁷ But where the same accused is charged with two offences, and he is discharged on one charge first, and acquitted of other charges at a later date, it is not illegal to pass an order to show cause on the later date.⁸

Section 250
Notes 9-10

10. "Call upon him to show cause." — When a Magistrate discharging or acquitting an accused intends to take action under this section, he has to call upon the complainant forthwith to show cause why he should not pay compensation to the accused or if he is not present direct the issue of a summons to him to appear and show cause.¹ An order for compensation made without giving the complainant an opportunity to show cause is illegal and must be set aside.^{1a} If the

7. ('25) AIR 1925 Cal 264 (265) : 26 Cri L Jour 449, *Suresh Chandra Gupta v. Abdul Jabbar*.

8. ('26) AIR 1926 Bom 163 (164, 165) : 27 Cr.L.J. 448, *Ravishankar v. Savai Lal*.

Note 10

1. ('38) AIR 1938 Rang 161 (164) : 39 Cr. L. J. 642, *The King v. Mg. Thoungh Shwe*. ('38) AIR 1938 Rang 247 (248) : 39 Cr. L. J. 743 : 1938 R L R 163, *Ma E Myaing v. The King*.

('29) AIR 1929 Bom 287 (288) : 30 Cri L Jour 1112, *In re Vali Mahomed*.

('33) AIR 1933 All 814 (816) : 35 Cr. L. J. 175, *M. H. Faruqi v. Municipal Board, Allahabad*.

('26) AIR 1926 All 241 (242) : 27 Cri L Jour 128, *Kalka v. Ranjit Singh*.

('29) AIR 1929 Cal 762 (764) : 31 Cri L Jour 828, *Rajaram Majhi v. Panchanan*.

('33) AIR 1933 Sind 226 (226) : 27 Sind L R 78 : 34 Cr L Jour 767, *Emperor v. Sarup Singh Phool Singh*.

The following cases, decided before the amendment of 1923, holding that the complainant need not be called upon to show cause, are no longer good law :

('23) AIR 1923 All 548 (548, 549) : 45 All 474 : 24 CrLJ 719, *Pancham v. Emperor*.

('14) AIR 1914 Cal 548 (549) : 15 Cri L Jour 150, *Lalit Mohan v. Kunja Behari*.

('84) 1884 All W N 115 (115), *In the matter of Musahib Khan*.

1a. ('38) AIR 1938 Rang 247 (248) : 39 Cr. L. J. 743 : 1938 R L R 163, *Ma E Myaing v. The King*.

('36) AIR 1936 Lah 702 (703) : 37 Cr. L. J. 935, *New Delhi Municipal Committee v. Ram Bai*.

('26) AIR 1926 All 241 (242) : 27 Cr. L. J. 128, *Kalka v. Ranjit Singh*.

('19) AIR 1919 All 398 (398) : 20 Cri L Jour 774, *Chauthi Ahir v. Emperor*.

('12) 13 Cr. L. J. 268 (269) : 14 Ind Cas 652 (All), *Gulzari Lal v. Ganga Ram*.

('22) AIR 1922 Bom 409 (410) : 23 Cri L Jour 574, *In re Mahadev Ramkrishna*.

('93) 1893 Rat 634 (634), *Govinda v. Keshav Rao*.

('94) 1894 Rat 725 (726), *Queen-Empress v. Manik*.

('15) AIR 1915 Cal 225 (225) : 15 Cr. L. J. 707, *Subans Singh v. Mahabir*.

('06-07) 11 Cal W N lxii (lxii, lxiii), *Sekh Jonab Ali v. Hiralal Pasban*.

('11) 12 Cri L Jour 6 (7) : 38 Cal 302 : 9 I. C. 45, *Haru Tanti v. Satish Roy*.

('23) AIR 1923 Lah 458 (458) : 25 Cri L Jour 1312, *Mughla v. Mahomed*.

('33) AIR 1933 Oudh 37 (38) : 34 Cr. L. J. 44, *Municipal Board, Lucknow v. Abdul*.

('20) AIR 1920 Pat 211 (211) : 21 Cri L Jour 751, *Akloo Mistri v. Nawbat Lal*.

('09) 10 Cri L Jour 220 (220) : 2 Sind L R 4, *Imperator v. Achar*.

('09) 10 Cri L Jour 229 (230) : 2 Sind L R 14, *Emperor v. Jettho*.

[See also ('21) AIR 1921 Mad 597 (597) : 44 Mad 51 : 22 Cri L Jour 161, *Appala Narasayya v. Emperor*. (Order for compensation made in spite of complainant's request to examine his remaining witnesses is not illegal—But such order should not be made except in exceptional cases.)]

See also Note 11.

Section 250
Notes 10-11

complainant is present, he is bound to show cause immediately. He cannot insist upon the grant of an adjournment for the purpose.²

It is only after the examination of all the evidence, which the complainant wants to adduce, that a Magistrate can come to the conclusion that the case is false and frivolous or vexatious and can award compensation to the accused. Though he can discharge the accused at any stage, he is not entitled to order compensation without examining all such witnesses,³ except in very exceptional circumstances.^{3a} As to the effect of irregularities in the original hearing on the proceedings for compensation, see the undermentioned case.⁴

11. "Shall record and consider any cause" — Sub-section (2). — Before making an order for compensation the Magistrate should record and consider any objection the complainant makes or any cause he may show. An order without doing so is illegal and is not cured by S. 537.¹ Cause may be shown with reference to the

2. ('29) AIR 1929 Bom 287 (288) : 30 Cri L Jour 1112, *In re Vali Mahomed*.
('26) AIR 1926 Bom 225 (225) : 27 Cri L Jour 430, *In re Ishwarlal Maneklal*.
('14) AIR 1914 All 86 (87) : 36 All 132: 15 Cri L Jour 193, *Ghurbin v. Emperor*.
('29) AIR 1929 Cal 762 (763): 31 Cri L Jour 828, *Rajaram Majhi v. Panchanan Ghose*.

3. ('28) AIR 1928 Mad 169 (169) : 51 Mad 337 : 29 Cr. L. J. 114, *Parthasarathi Naicker v. Krishnaswamy Aiyar*.

('24) AIR 1924 Rang 293 (293) : 25 Cri L Jour 1280, *Sya Kyaw v. Emperor*.

('72-92) 1872-92 Low Bur Rul 44 (44), *Queen-Empress v. Maung Tun Hla*.

('91) 1891 All W N 63 (63), *Abdul Ghafur v. Lattu*. (Complainant absent—Accused acquitted and order for compensation made without any further inquiry—Order held, was due to want of exercise of discretion required under S. 250.)

('82) 1882 All W N 116 (116), *Jugmohan v. Sheobalak*.

('72) 17 Suth W R Cr 6 (6), *Ram Churan Dey v. Sheikh Jannuc*. (Complaint dismissed for default—Case not heard—There being no judicial decision whether case is false or true compensation cannot be ordered.)

('68) 10 Suth W R Cr 61 (61) : 2 Beng L R (SN) 15, *Bilash v. Makroo*.

('35) AIR 1935 Pesh 178 (179) : 37 Cr. L. J. 298, *Gul Din v. Abdul Khalik*. (Order for compensation made without going through all the evidence of the complainant though not illegal is highly undesirable in the interest of justice.)

[See however ('37) AIR 1937 Rang 398 (399) : 1937 R L R 159 : 39 Cri L Jour 29, *D. K. Nath v. P. K. Nath*. (The sole criterion is whether the order of discharge is a legal one, although this question itself depends on whether the Magistrate has taken all the evidence produced on behalf of the prosecution — Order of discharge after refusing for proper reasons to issue commission for examination of a witness is legal.)]

3a. ('33) 1933 Mad W N 900 (902), *Maruthathal v. Ramaswami Chetty*.

('21) AIR 1921 Mad 597 (597) : 44 Mad 51 : 22 Cr. L. J. 161, *Appalanarasayya v. Emperor*.

('23) AIR 1923 Lah 194 (195) : 24 Cri L Jour 251, *Dewa Singh v. Emperor*.

4. ('34) AIR 1934 Bom 157 (158) : 58 Bom 298 : 35 Cr. L. J. 841, *In re Tippanna Koutya Mannavaddar*. (Held that failure to record evidence in summary trial did not affect the validity of the proceedings for compensation.)

Note 11

1. ('38) AIR 1938 Rang 161 (164, 165): 39 Cr. L. J. 642, *The King v. Mg. Thoun Shwe*. (Magistrate must record words used by complainant unless complainant chooses to put his reason into writing in which case the filing of written submission will do.)

('38) AIR 1938 Rang 247 (248) : 39 Cr. L. J. 743 : 1938 R L R 163, *Ma E Myaing v. The King*. (If complainant shows cause verbally, what he says should be written down in words used by him.)

('29) AIR 1929 Sind 113 (113) : 30 Cri L Jour 458, *Pir Mahomed v. Yacoob*. (This is so even in cases tried summarily.)

('01) 5 Cal W N 214 (215), *Suchandi Kolitani v. Dom Kolita*.

evidence already recorded, why complaint should not be held frivolous or vexatious.²

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Notes 11-12

12. "For reasons to be recorded." — The Magistrate is bound to record his reasons for making an order for compensation. The record of reasons is almost a condition precedent to the proper exercise of the power.¹ This is so even in summary cases.²

The reasons must go to show why it is that the Magistrate considers the accusation against the accused to be frivolous or vexatious and why, in his opinion, it is a fit case for awarding compensation.^{2a} While Magistrates should be on their guard against frivolous or vexatious complaints, they should also at the same time be careful not to deny the protection and redress provided by law against wrong-doers.^{2b} The policy of the Legislature in requiring

(1902) 2 Weir 310 (311), *Narayanasami v. Bukee Reddy*.

(1922) AIR 1922 Pat 157 (158): 23 Cr.L.J. 261, *Deo Narain Mahto v. Chhattoo Raut*.

(1907) 5 Cr.L.J. 298 (298, 299, 300): 1906 U.B.R. Cr PC 51, *Emperor v. Nga Pwe*.

(1914) AIR 1914 Sind 69 (69): 8 S.L.R. 25: 15 Cr.L.J. 666 *Minhomal v. Emperor*.

(Per Hayward, J. C. — It is imperative on Magistrate even when trying a case summarily to record and consider cause shown—Per Boyd, A. J. C., at p. 70—Failure to do so is merely a small irregularity.)

(1932) AIR 1932 Sind 156 (156, 157): 26 S.L.R. 299: 33 Cr.L.J. 644, *Saleh v. Emperor*.

[See (1901) 3 Bom L R 777 (778), *Pandurang Narayan v. Luxman Babaji*.

(Complainant was not called upon to show cause why order for compensation should not be made.)

(1909) 10 Cr. L. J. 229 (230): 2 S. L. R. 14, *Emperor v. Jetho*. (Do.)

(1933) AIR 1933 Sind 226 (226): 27 Sind L. R. 78: 34 Cri L Jour 767, *Emperor v. Surupsingh Phoolsingh*. (In this case notice to show cause was not issued to the complainant nor was he given opportunity of being heard.)]

[But see (1905) 2 Weir 711 (711), *Ramudu v. Ramayya*.]

See also Note 11.

2. (1908) 1898 All W N 198 (199), *Queen-Empress v. Chiragh Ali*.

(1914) AIR 1914 All 86 (87): 36 All 132: 15 Cri L Jour 193, *Ghurbin v. Emperor*.

(All evidence tendered by complainant in support of allegations in complaint already taken at trial itself—He cannot be given further opportunity of producing evidence in order to show cause against order of compensation.)

Note 12

1. (1938) AIR 1938 Oudh 99 (99): 39 Cr. L. J. 378, *Bhagvandin v. Jagdat*. (Order for compensation without recording reasons is illegal.)

(1937) AIR 1937 Oudh 269 (270): 38 Cr. L. J. 191, *Krishna Datt v. Brahma Datt*.

(1937) AIR 1937 Rang 301 (302): 38 Cri L Jour 999, *Chidambaram v. Chand Ali*. (Reasons not recorded before order directing compensation to be paid to accused—Order of compensation is bad.)

(1925) AIR 1925 Mad 1139 (1139, 1140): 26 Cri L Jour 1501, *Thadiappan v. Vceera Perumal Thevan*.

(1906) 3 Cri L Jour 390 (391): 10 C W N 544, *Amjad Ali v. Ashraf Ali*.

(1932) AIR 1932 Sind 156 (156, 157): 26 S.L.R. 299: 33 Cr. L. J. 644, *Saleh v. Emperor*.

(1933) AIR 1933 Sind 226 (226): 27 Sind L R 78: 34 Cri L Jour 767, *Emperor v. Sarupsing Phoolsing*.

(1934) AIR 1934 Sind 18 (19): 35 Cr. L. J. 1038, *Emperor v. Baloch Darya Khan*.

[See (1914) AIR 1914 All 86 (87), 36 All 132: 15 Cr. L. J. 193, *Ghurbin v. Emperor*.

(1906) 3 Cri L Jour 123 (124): 1905 Pun Re No. Cr 57, *Emperor v. Narpat Rai*.

(Reasons for awarding compensation for making frivolous complaint and the order awarding it must be contained in the order of discharge or acquittal.)

(1913) 14 Cri L Jour 48 (48): 18 Ind Cas 272 (Lah), *Imam Din v. Emperor*. (Do.)

(1900) 14 C P L R Cr 37 (38), *Kashinath Gopal v. Zincke*. (Do.)]

2. (1930) AIR 1930 Mad 929 (929): 32 Cr. L. J. 207, *Palani Goundan v. Krishnappa*.

2a. (1925) AIR 1925 Mad 1139 (1140): 26 Cri L Jour 1501, *Thadiappan v. Vceera Perumal*.

2b. (1892-96) 1 Upp Bur Rul 290 (292), *Queen-Empress v. Mi Te*.

**Section 250
Notes 12-13**

reasons to be recorded is to afford an opportunity to an appellate or revising tribunal to consider the sufficiency of the reasons.³ The mere statement in the order that "in his opinion, the evidence is highly unsatisfactory,"⁴ or that he "finds nothing in the explanation to justify that the complaint was not false and either frivolous or vexatious,"⁵ or "that no case is made out against the accused and some of the accused were added vexatiously,"⁶ is not a good reason for making an order under this section. The reasons must be in addition to and apart from the finding of the Magistrate that the accusation was either frivolous or vexatious,⁷ such as that the object of the complainant was to harass the accused.⁸ But it has been held in some decisions⁹ that the Magistrate is only bound to give reasons for ordering compensation and not for his finding that the accusation is false and frivolous or vexatious.

13. Amount and nature of compensation. — The compensation awarded to *each* accused should not exceed one hundred rupees. The section does not mean that if there are a number of accused, the total amount awarded to all must not exceed one hundred rupees.¹

Money ordered to be paid as compensation under this section is not a *fine*² though it is made recoverable under S. 547 *as if* it were a fine.³ The sum awarded as compensation is by way of amends or

3. ('38) AIR 1938 Oudh 99 (99,100) : 39 Cri L Jour 378, *Bhagwandin v. Jagdat*.
(37) AIR 1937 Oudh 269 (270) : 38 Cr. L. J. 191, *Krishna Datt v. Brahma Datt*.
(25) AIR 1925 Mad 1139 (1139,1140) : 26 Cri L Jour 1501, *Thadiappan v. Veera Perumal*.

[See ('06) 3 Cr.L.J. 390 (391) : 10 CWN 544, *Amjad Ali v. Ashraf Ali*. (In this case the judgment did not contain statement of the facts, nor any criticism of the incidents involved nor any reasons why the case was considered to be frivolous — Hence High Court set aside order for compensation.)]

4. ('06) 3 Cri L Jour 390 (391) : 10 CWN 544, *Amjad Ali v. Ashraf Ali*.
(29) AIR 1929 Sind 113 (113,114) : 30 Cri L Jour 458, *Pir Mahomed v. Yacoob*.
5. ('40) AIR 1940 Rang 110 (111) : 41 Cri L Jour 506, *Ma Pu v. Maung Tun Pe*.
(38) AIR 1938 Oudh 99 (100) : 39 Cri L Jour 378, *Bhagwandin v. Jagdat*.
(32) AIR 1932 Sind 156 (156,157) : 26 S L R 299 : 33 Cr. L. J. 644, *Saleh v. Emperor*.
[See ('37) AIR 1937 Rang 301 (301,302) : 38 Cri L Jour 999, *Chidambaram v. Chand Ali*.]

6. ('25) AIR 1925 Mad 1139 (1139,1140) : 26 Cr.L.J. 1501, *Thadiappan v. Veera Perumal*.

7. ('25) AIR 1925 Mad 1139 (1140) : 26 Cri L Jour 1501, *Thadiappan v. Veera Perumal*.

8. ('30) AIR 1930 Mad 929 (930) : 32 Cr.L.J. 207, *Palani Goundan v. Krishnappa*.

9. ('36) AIR 1936 Rang 230 (232) : 37 Cr. L. J. 773 : 14 Rang 378, *Ma Sin v. Mg. Maung Lay*.

(36) AIR 1936 Sind 240 (242) : 38 Cri L Jour 121 : 30 S L R 359, *Talib Delawar v. Sajan Saleh*.

Note 13

1. ('26) AIR 1926 All 295 (296) : 27 Cri L Jour 702, *Fariduddin v. Emperor*.

2. ('03) 26 Mad 127 (129, 130), *In the matter of Byravalu Naidu*.

(70) 2 N W P H C R 430 (431), *Queen v. Gopal*.

(94) 8 C P L R Cr 13 (14), *Empress v. Babia Koshti*.

[See however (1862-65) 1 Bom H C R Cr 181 (181), *Reg v. Vellappa Mudakappa*.

(69) 1869 Pun Re No. 26 Cr, p. 53 (53), *Prubhoo Dyal v. Mookha*.]

3. ('32) AIR 1932 Pat 301 (301) : 33 Cr. L. J. 958 (F B), *Ramchander v. Emperor*.

(94) 21 Cal 979 (984), *Ramjeevan v. Durgacharan*. (When the case was decided S. 250 itself provided that such compensation was recoverable as if it were a fine.)

(01) 28 Cal 164 (166), *Lal Mahomad Shaikh v. Satcowari Biswas*. (Do.)

compensation to the accused and should not be credited to the Government.⁴ As to the method of recovery of fines, see S. 336.

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Notes 13-14

The section should not be used as a punitive measure and in awarding compensation the Magistrate should be strictly guided by the loss or inconvenience which the accused has sustained.⁵ Any misconduct of the accused may also disentitle him to any compensation.⁶

The powers under this section are to be exercised only in fit and proper cases and not indiscriminately in every case in which the accused is discharged.⁷

14. Who can be ordered to pay compensation.—Compensation under this section can only be awarded against a person upon whose complaint or information the accusation was made, and not against a person who did not institute the proceedings but was only examined as a witness.¹ Where a judicial officer makes a complaint under S. 476 acting in his judicial capacity, it is not to be lightly presumed that his conduct is vexatious or frivolous and no compensation should be awarded against him under this section.^{1a}

Public officers are not exempted from liability under this section when they make a complaint.² A police-officer making a report in a *non-cognizable* case must be taken to be only making a complaint and is not exempt from liability under the section.³

The word 'person' includes also a 'juristic person' like a corporation. So a municipal committee may be ordered to pay compensation under this section.⁴ An *obiter dictum* has been expressed in the undermentioned case⁵ to the effect that there is nothing in the section to make it non-applicable to the case of even the Crown.

The question whether a servant is responsible under this section for an information lodged on behalf of his master is one of fact and

4. ('66) 1866 Pun Re No. 102 Cr, p. 101 (101), *Jumna Dass v. Ramla*.

('69) 1869 Pun Re No. 1 Cr, p. 1 (1), *Ghoola v. Ameer Singh*.

('69) 1869 Pun Re No. 26 Cr, p. 53 (53, 54), *Prubhoo Dyall v. Mookha*.

('33) AIR 1933 Nag 296 (296) : 30 Nag L R 15 : 34 Cri L Jour 1163, *Emperor v. Ranganath Koshli*.

5. ('81) 1881 All W N 167 (168), *In the matter of Sarnam*.

6. ('01) 1901 Pun L R No. 22, p. 65 (66), *Crown v. Ishar Singh*.

7. ('38) AIR 1938 Rang 200 (201) : 39 Cr. L. J. 587, *L. R. Abrol v. S. L. Sirpaul*.
(Awarding of compensation in frivolous or vexatious cases is discretionary.)

('32) AIR 1932 Sind 156 (157) : 26 Sind L R 299 : 33 Cr. L. J. 644, *Salch v. Emperor*.

Note 14

1. ('93-1900) 1893-1900 L B R 443 (443), *Ma Pwa Yon v. Maung Po Mya*.

1a. ('71) 15 Suth W R Civ 506 (507).

('75) 1 Bom 175 (176), *In re Keshav Lakshman*.

2. ('99) 2 Weir 317 (318), *Narasayya v. Ramadas Naidu*.

('27) AIR 1927 Cal 405 (406) : 54 Cal 371 : 28 Cr. L. J. 316, *Radhika Mohan Das v. Hamid Ali*.

3. ('40) AIR 1940 Sind 134 (135) : 41 Cr. L. J. 789 : 1 L R (1940) Kar 470 (FB), *Id. Hashin v. Emperor*.

('02) 26 Bom 150 (157, 158) : 3 Bom L R 586 (F B), *King-Emperor v. Sada*.

('12) 13 Cr. L. J. 752 (753) : 6 Sind L R 82 : 17 I. C. 64, *Imperator v. Khushal Das*. (Information laid by police-officer before Magistrate under S. 51, Bombay District Police Act, is complaint for the purposes of S. 250.)

4. ('23) AIR 1923 Lah 31 (31) : 24 Cr. L. J. 463, *Municipal Committee, Lahore v. Rattan Chand*.

5. ('30) AIR 1930 All 206 (209) : 52 All 263 : 31 Cri L Jour 485 (FB), *Emperor v. Kanver Sen*.

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Notes 14-16

depends on the question whether the servant is merely the mouth-piece of the master or whether he also joins the master in the accusation. In the latter case he is liable.⁶

A guardian or next friend of a minor complainant⁷ or a person who only instigates the giving of false information but who does not *himself* make the complaint or give the information⁸ cannot be ordered to pay compensation.

15. To whom compensation can be awarded.—A complaint may be well-founded as regards some of the accused and yet vexatious and frivolous as regards others. So, where a Magistrate discharges one of the accused, and convicts the other accused, he can award compensation to the accused who is discharged.¹

16. Imprisonment in default of compensation—Sub-sections (2A) and (2B).—Before the amendment in 1923, a Magistrate had no power to order imprisonment in default of payment of compensation *alternatively* in the order for payment of compensation itself. He could order imprisonment only *after the failure* to recover the compensation.¹ But now such an order can be made in the order itself.

6. ('10) 11 Cri L Jour 201 (201, 202) : 5 Ind Cas 693 (Cal), *Jagdami Pershad v. Mahadco Kandoo*.

('99) 2 Weir 318 (318), *Khashim Sahib v. Dasari Ramudu*. (Proceedings instituted by subordinate officer on information given by superior officer—Subordinate officer giving evidence as witness cannot be ordered to pay compensation.)

('11) 12 Cri L Jour 482 (482) : 12 Ind Cas 90 (Mad), *Subramania Pillai v. Pakia Nadatchi*. (Prosecution sanctioned by police-officer — Charge sheet laid before Magistrate by constable — Accused discharged — Award of compensation against constable held illegal.)

[See also ('86) 1886 Rat 309 (309), *Queen-Empress v. Bhima*. (Executive body cannot authorise a servant to prefer a wrongful complaint and so screen the complainant from legal penalty.)]

7. ('12) 13 Cri L Jour 136 (137) : 13 Ind Cas 824 (Lah), *Isa v. Ranon*.

8. ('40) AIR 1940 Sind 134 (136) : 41 Cr. L. J. 789 : 1 L R (1940) Kar 470 (FB), *Id. Hashin v. Emperor*. (Section does not apply to punish the real complainant as against the formal complainant.)

('18) AIR 1918 Sind 25 (25) : 12 Sind L R 76 : 20 Cr. L. J. 100, *Emperor v. Sumar*.

Note 15

1. ('82) 5 Mad 381 (382) : 2 Weir 316, *Number v. Ambu*.

('77) 1877 Pun Re No. 15 Cr, p. 31 (32), *Gohra Shaha v. Amira*.

Note 16

1. ('70) 2 N W P H C R 430 (431), *Queen v. Gopal*.

('96) 18 All 96 (97) : 1895 A W N 241, *Queen-Empress v. Punna*.

('97) 19 All 73 (74) : 1896 A W N 180, *Manjhli v. Manik Chand*. (Overruled on another point in 26 All 512.)

('92) 1892 Rat 611 (611), *Queen-Empress v. Hari*.

('75) 23 Suth W R Cr 64 (65), *Bisheshwar v. Bishwambar*. (Compensation awarded — Complainant admitting that he has no goods — Magistrate can proceed to imprison him in civil jail—But warrant of distress cannot be issued simultaneously with order of imprisonment.)

('94) 21 Cal 979 (985), *Ramjeevan Kurmi v. Durga Charan*.

('95) 22 Cal 586 (588), *Shib Nath Chong v. Sarat Chunder Sarkar*.

('01) 28 Cal 164 (166), *Lal Mahmud v. Satcowri*.

('01) 28 Cal 251 (252), *Parshi Hajra v. Bandhi Dhanuk*. (Overruled by 30 Cal 123 on another point.)

('01) 5 Cal W N 213 (214), *Priya Nath Bose v. Basanta Kumar Singh*.

('01) 5 Cal W N 214 (215), *Suchanchi Kolitani v. Dom Kolita*.

('14) AIR 1914 Cal 548 (548) : 15 Cri L Jour 150, *Lalit Mohan v. Kunja Behari*.

('18) AIR 1918 Cal 436 (437) : 18 Cr. L. J. 1014, *Ram Narayan v. Atul Chandra*.

('69) 1869 Pun Re No. 26 Cr, p. 53 (54), *Prubhoo Dyal v. Mookha*.

The Magistrate has no power to order that the sentence of imprisonment in default shall take effect after a term of civil detention which the complainant was undergoing at the time.² The term of thirty days' imprisonment can be imposed in respect of each of several accused in whose favour payment of compensation has been ordered though the aggregate term of imprisonment exceeds thirty days.³ Where a portion of the compensation is recovered, the person ordered to pay compensation is liable to imprisonment only for a proportionate part of the period of one month mentioned in this section.⁴ [Sub-s.(2B).]

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Notes 16-17

17. No exemption from civil or criminal liability — Sub-section (2C). — The compensation awarded under this section does not deprive the person compensated, of his right to further redress, either by a regular civil suit or a criminal prosecution against the person ordered to pay compensation under this section.¹

An order for payment of compensation does not debar the Magistrate from directing the prosecution of the complainant under S. 476 for an offence under S. 211 of the Penal Code.² Nor does the starting of the prosecution of the complainant bar an order for compensation under the section.³ The question whether a Magistrate is to act under

(196) 1896 Pun Re No. 13 Cr, p. 36 (36), *Queen-Empress v. Asa Nand*.

(192) 1902 Pun Re No. 14 Cr, p. 39 (40), *Crown v. Hamir Chand*.

(193) 26 Mad 127 (129, 130), *In the matter of Byravatu Naidu*.

(195) 2 Weir 320 (320, 321), *In re Venkatarayappa*.

(117) AIR 1917 Mad 628 (629) : 17 Cri L Jour 314 (315), *Dhanukodi Asari v. Muthuswami Aiyer*.

(104) 1 Cri L Jour 762 (762) : 17 C P L R 104, *Bhiva Kunbi v. Ramji*.

(120) AIR 1920 Nag 108 (109) : 21 Cri L Jour 226, *Bakaji v. Mukund Singh*.

(120) AIR 1920 Pat 211 (211) : 21 Cri L Jour 751, *Akloo Mistri v. Nawbat Lal*.

(197-01) 1 Upp Bur Rul 71 (71), *Queen-Empress v. Nga Myit*.

(105) 2 Cr. L. J. 724 (724, 725) : 3 Low Bur Rul 32, *King-Emperor v. Pan Aung*.

2. (125) AIR 1925 Rang 202 (203) : 3 Rang 93 : 26 Cr. L. J. 821, *Emperor v. Ma Kha Gyi*.

3. (140) AIR 1940 Rang 110 (110) : 41 Cri L Jour 506, *Ma Pu v. Mg. Tun Pe*.

(125) AIR 1925 Rang 202 (202, 203) : 3 Rang 93 : 26 Cri L Jour 821, *Emperor v. Ma Kha Gyi*.

4. (193-1900) 1893-1900 Low Bur Rul 320 (320), *Queen-Empress v. Ma Ka Ya*.

Note 17

1. (193) 30 Cal 123 (129) : 6 C W N 799 (FB), *Beni Madhub v. Kunud Kumar*.

(170) 2 N W P H C R 58 (58, 59), *Adram v. Harbullub*.

2. (125) AIR 1925 Oudh 558 (558) : 26 Cri L Jour 527, *Hafiz Khan v. Emperor*.

(198) 21 Mad 237 (239) : 2 Weir 312, *Adikhan v. Alagan*.

(167) 2 Weir 311 (311).

(175) Weir 3rd Edn. 908 (908).

(117) AIR 1917 Sind 19 (20) : 18 Cr. L. J. 414 (414, 415); 10 S.L.R. 162, *Alla Bux v. Emperor*.

[But see (195) 22 Cal 586 (588), *Shib Nath Chong v. Sarat Chunder*. (It was never intended that recourse should be had to the provision of S. 560, Code of 1882, (corresponding to S. 250 in the present Code) in a case in which the trying Magistrate is of opinion that the complainant should be prosecuted for an offence under S. 211, Penal Code.)]

See also S. 476 Note 1.

3. (171) 15 Suth W R Cr 9 (10) : 6 Beng L R 296, *Queen v. Rupan Rai*.

(101) 1901 Pun Re No. 18 Cr, p. 48 (48, 49); 1901 P L R 100, *Mathra Das v. Raja*.

(104) 1 Cr. L. J. 597 (598) : 1904 Pun Re No. 6 Cr, *Mulka v. Fattah Muhammad*.

[It is not illegal but only improper to order compensation under S. 250 and also sanction prosecution under S. 211, Penal Code.]

(108) 7 Cri L Jour 231 (232) (Lah), *Nanhe Khan v. Ghanhaya*.

(113) 14 Cri L Jour 437 (437) : 20 I. C. 597 : 7 Sind L R 10, *Achar v. Piru Shah*.

(Magistrate can proceed both under S. 250 and S. 476 at the same time.)

Section 250
Notes 17-19

this section, or prosecute the complainant under S. 211, Penal Code, or to do both, is in the discretion of the Magistrate himself and depends upon the facts of each particular case. If prosecution is necessary on grounds of public policy, it would be a wrong exercise of his discretion, if he were to act under this section instead of instituting a prosecution. If prosecution, on the other hand, is unnecessary on grounds of public policy, an order under this section, instead of a prosecution will not be wrong.⁴ The fact that the Magistrate did not desire to act under this section cannot also preclude him from directing the prosecution of the complainant.⁵

The compensation awarded, will of course, be considered in passing sentence in the event of a conviction as the result of the prosecution.⁶

18. Abatement. — Where the *accused* to whom compensation has been ordered, dies just after the complainant has filed his revision in the High Court, no order can be passed on the petition as no notice can be served and no proceedings can be taken against a dead person.¹ But where the complainant dies, after filing a revision against an order of compensation, the application does not abate but can be prosecuted by his legal representatives.²

19. Appeal — Sub-section (3). — Before the amendment of 1891, no appeal lay against the order for compensation.¹ Sub-s. (3) now provides for an appeal.

Before the amendment of 1923, no appeal lay against an order under this section passed by a first class Magistrate.² Sub-section(3) now provides for such an appeal if the amount awarded exceeds rupees fifty. No appeal lies against the order of a single judge of the High Court in revision from an order under this section.³ An appeal lies when the total amount ordered to be paid exceeds rupees fifty even though the amount to be paid to *each* of the accused, where there are more than one, does not exceed that sum.⁴ Where an order for

(‘98) 21 Mad 237 (239) : 2 Weir 312, *Adikkan v. Alagan*.

4. (‘03) 27 Mad 59 (60, 61):1 Cr.L.J. 280:2 Weir 313, *In the matter of Tami Reddi*.
[See (‘19) AIR 1919 Pat 81 (83) : 20 Cri L Jour 226, *Lalji Hari v. Emperor*.

(Order to pay compensation under S. 250 passed—Subsequent order calling upon complainant to show cause why prosecution under S. 211, Penal Code, should not be sanctioned, *held*, not justified under the particular circumstances of the case.)]

5. (‘11) 12 Cri L Jour 521 (522) : 12 Ind Cas 289 (U B), *Ma Ma v. Emperor*.

6. (‘04) 1 Cr. L. J. 597 (598):1904 Pun Re No. 6 Cr, *Mulk v. Fattch Muhammad*.

Note 18

1. (‘93) 1893 Rat 634 (634), *Govinda v. Keshava Rao*.

2. (‘08) 9 Cr. L. J. 103 (103,104): 1908 Pun Re No. 24 Cr, *Prem Singh v. Bhola*.
See also S. 431 Note 1 and S. 439 Note 43.

Note 19

1. (‘91) 1891 All W N 120 (120, 121), *Queen-Empress v. Hardeo Singh*.

(‘88) 1888 Rat 409 (410), *Queen-Empress v. Nagya*.

2. (‘99) 1 Bom L R 350 (351), *Queen-Empress v. Biru*.

(‘95) 8 C P L R Cr 13 (14), *Empress v. Babia Koshti*.

3. (‘18) AIR 1918 Mad 418 (418, 419): 19 Cr. L. J. 208, *In re Kandasami Pillai*.

4. (‘26) AIR 1926 All 247 (248) : 27 Cri L Jour 146, *Mt. Sumaria v. Emperor*.

(‘25) AIR 1925 Bom 129 (129) : 49 Bom 440 : 26 Cri L Jour 480, *Pereira v. Daming Pascot*.

(‘28) AIR 1928 Lah 638 (638) : 9 Lah 462 : 29 Cri L Jour 430, *Sarab Dial v. Bir Singh*.

compensation is appealed against, the accused should, on the principle of *audi alteram partem*, receive notice thereof and the Court hearing the appeal would be exercising a proper discretion to give notice to the accused in such cases.⁵ See also S. 422. An appellate Court can go into all the facts of the case, in order to determine whether the case is false and vexatious.⁶ But an appellate Court will not set aside an order for compensation except for very cogent reasons inasmuch as the power to award compensation is discretionary with the Magistrate.⁷ As to whether additional evidence can be recorded by the appellate Court in an appeal under this section, see Note 3 to S. 428.

20. Revision.—The High Court has ample jurisdiction to revise and examine an order under this section, in the exercise of its ordinary revisional powers and under S. 435,¹ though it will not interfere when no prejudice is caused.²

The High Court can also entertain a revision petition in the first instance, though ordinarily it is the practice not to entertain it without its being presented to the Sessions Judge or the District Magistrate.³

An accused person after his acquittal is not an accused within S. 439 (2), and hence has no right to be heard in a revision petition against an order for compensation under this section.⁴

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- (‘26) AIR 1926 Pat 70 (70, 71) : 26 Cri L Jour 1504, *Sobhit Mallah v. Emperor*.
 (‘26) AIR 1926 Sind 19 (20) : 19 Sind LR 66 : 26 Cr. L. J. 1295, *Assanmal v. Dilbar*.
 (‘29) AIR 1929 Sind 176 (177) : 30 Cr. L. J. 905, *Shafi Mahomed v. Kamruddin*.
 5. (‘24) AIR 1924 Lah 675 (675, 676) : 25 Cr. L. J. 209, *Ramchand v. Jesa Ram*.
 (‘33) AIR 1933 Lah 545 (546) : 34 Cri L Jour 533, *Lachhman v. Babu*. (Order by appellate Court passed without notice to accused is not bad in law — But very often notice in such case is desirable.)
 (‘05) 3 Cri L Jour 459 (459) : 29 Mad 187, *Emperor v. Palaniappa Velan*.
 (‘09) 9 Cri L Jour 150 (150, 151) : 1 I. C. 79 : 33 Mad 89, *Nagi Reddi v. Bassappa*. (Notice legally not necessary — High Court will not interfere on the ground of want of notice unless there is some irregularity of the order of lower Court.)
 (‘15) AIR 1915 Mad 940 (940, 942) : 16 Cri L Jour 128 (128, 129, 130) : 38 Mad 1091, *Venkatarama Aiyar v. Krishna Aiyar*.
 (‘21) AIR 1921 Mad 281 (281) : 22 Cri L Jour 583, *Krishna Kone v. Narayana Dass*. (9 Cri L Jour 150, followed.)
 (‘26) AIR 1926 Sind 143 (144) : 20 Sind LR 41 : 27 Cr. L. J. 248, *Momoon v. Ibrahim*. [See (‘26) AIR 1926 Cal 1054 (1055) : 53 Cal 969 : 27 Cri L Jour 1086, *Bharasa Now v. Sukdeo*. (Costs and compensation awarded to complainant under S. 545 — Appeal by accused — Complainant held should have been served with notice.)]
 [But see (‘27) AIR 1927 Lah 357 (357) : 8 Lah 568 : 28 Cri L Jour 416, *Rashid Muhammad Khan v. Emperor*. (In such cases Crown being the real respondent notice to accused is not necessary.)]
 6. (‘32) AIR 1932 Cal 120 (121) : 58 Cal 1436 : 33 Cri L Jour 269, *Surendra Nath v. Basanta Chandra*.
 7. (‘38) AIR 1938 Rang 200 (201) : 39 Cr. L. J. 587, *L. R. Abrol v. S. L. Sirpaul*.

Note 20

- (‘37) AIR 1937 Oudh 269 (270) : 38 Cr. L. J. 191, *Krishna Datt v. Brahma Datt*. (Order for compensation without recording reasons is irregular and can be set aside in revision.)
- (‘20) AIR 1920 All 351 (351) : 21 Cri L Jour 767, *Harris v. Peal*.
- (‘24) AIR 1924 All 674 (675), *Debi Prasad v. Emperor*.
- (‘12) 13 Cri L Jour 268 (269) : 14 I. C. 652 (All), *Gulzari Lal v. Gunga Ram*.
- (‘88) 1888 Pun Re No. 14 Cr, p. 24 (26), *Empress v. Lal*. (Cf. Note 18, Pt. (1) above. However notice may very properly be given to the accused to enable him to support the award in his favour.)

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

Section 251

Procedure in warrant-cases. **251.*** The following procedure shall be observed by Magistrates in the trial of warrant-cases.

Synopsis

1. "Trial," meaning of. See Notes on S. 4 (1) (k).
2. "Warrant-case."
3. Effect of non-compliance with provisions.
4. Change of procedure subsequent to commencement of trial.
5. Joint trial of offences triable as summons and warrant-cases.
See Notes under S. 241.
6. Presidency Magistrates, procedure of.

Other Topics (miscellaneous)

Issue of summons instead of warrant. See Note 2.
 Procedure for summons-cases, warrant-cases and Sessions cases compared and contrasted. See S. 254 Notes 2 and 3; Ss. 241, 206.
 Splitting of warrant-case into summons-cases. See Note 2.
 Trial — Commencement. See S. 252 Note 2; S. 256 Note 3.
 Trial of warrant-case as a summons-case. See Note 3.

1. "Trial," meaning of. — See Notes on section 4 (1) (k).
2. "Warrant-case." — For definition of warrant-case, see section 4 (1) (w).

Where the offence is one triable as a warrant-case, the fact that a summons instead of a warrant was issued under S. 204, does not affect the character of the offence and it cannot be tried as a summons-case.¹ Similarly, where an offence is triable as a warrant-case, the Magistrate cannot split it up into its component parts which constitute minor offences so as to be able to try the case as a summons-case.²

3. Effect of non-compliance with provisions. — It has been held in the undermentioned cases¹ that where a Magistrate tries a warrant-case as a summons-case and acquits the accused, the order of acquittal operates only as an order of discharge under S. 253 and not as an order of acquittal. See also Note 19 to S. 537.

4. Change of procedure subsequent to commencement of trial. — Where the offence charged at the commencement of proceedings against the accused is triable as a warrant-case and the trial is commenced as a warrant-case, it is not open to the Magistrate thereafter to abandon the procedure prescribed for the trial of warrant-cases and adopt that of summons-cases on the ground that the accused appears

* 1882 : S. 251; 1872 : S. 213; 1861 : Nil.

Section 251 — Note 2

1. ('68) 10 Suth W R Cr 31 (31), *Nund Lall v. Bhagiratty*.
2. ('21) AIR 1921 All 282 (284) : 22 Cri L Jour 146, *Ganga Saran v. Emperor*.

Note 3

1. ('88) 1888 All W N 96 (97), *Empress v. Lajja Ram*.
 ('86) 1886 All W N 260 (260), *Empress v. Jadu*.
 ('66) 5 Suth W R Cr 58 (58), *In re Shoodun Mundle*.
 ('69) 12 Suth W R Cr 65 (66) : 4 Beng L R A Cr 1, *Queen v. Goberdhan Bera*.
 [See also ('98) 22 Bom 711 (713), *In re Samsudin*.]
 See also S. 245 Note 5 and S. 403 Note 14.

to have committed only an offence triable as a summons-case, when such course is likely to prejudice the accused in his defence.¹ Similarly, a Magistrate who has commenced a trial under this chapter (chapter 21) cannot subsequently change the procedure to one under chapter 22 (summary trials), as such a course would be prejudicial to the interests of the accused.² But where the irregularity has not in fact occasioned a failure of justice it will not invalidate the trial.³

Section 251
Notes 4-6

5. Joint trial of offences triable as summons and warrant-cases. —
See Notes under Section 241.

6. Presidency Magistrates, procedure of. — The provisions of this chapter are applicable to trials before Presidency Magistrates except in so far as their applicability is otherwise specifically excluded.¹

252.* (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution :

Section 252

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

*1882 : S. 252 ; 1872 : Ss. 214, 190, 362, Para. 1 ;
1861 : Ss. 249, 186, 193.

Note 4

1. ('21) AIR 1921 All 282 (284) : 22 Cri L Jour 146, *Ganga Saran v. Emperor*.
(27) AIR 1927 All 270 (270) : 28 Cri L Jour 227, *Govind v. Emperor*.
(87) 1887 Pun Re No. 17 Cr. p. 34 (36), *Empress v. Ghulam Hosain*.
(16) AIR 1916 Mad 610 (610) : 16 Cr. L. J. 250 (251), *In re Appavu Padayachi*.
(28) AIR 1928 Lah 294 (295) : 29 Cr. L. J. 235, *Devi Dayal v. Mt. Rattan Devi*.
(21) 22 Cr. L. J. 683 (683, 684) : 63 Ind Cas 619 (Pat), *Munshi Teli v. Emperor*.
[See also ('25) AIR 1925 Oudh 200 (200) : 25 Cr. L. J. 1271, *Ram Ratan v. Ram Sagar*. (Summons-case tried as warrant-case—Procedure not to be changed to that of summons-case.)]
[See however ('84) 7 Mad 454 (457) : 2 Weir 551, *Queen-Empress v. Papadu*.]
[But see ('23) AIR 1923 Mad 439 (440) : 24 Cri L Jour 469, *Venkatrama Iyer v. Sundaram Pillai*. (Accused entitled to acquittal under S. 247 on complainant's failure to appear at hearing.)]

See also S. 256 Note 2.

2. ('74) 21 Suth W R Cr 89 (91), *Dwarkanath Mazoomdar v. Nalu Das*.
(23) AIR 1923 Cal 105 (106) : 24 Cr. L. J. 157, *Gosta Behary v. Baisram Das*.
[But see ('99) 22 Mad 459 (460) : 2 Weir 254, *Queen-Empress v. Rangamani*. (Commitment proceedings—Magistrate finding original charges not sustainable but charge of other offence triable summarily maintainable—He can try summarily for such offence instead of discharging accused if he has acted bona fide in the interests of justice.)
(04) 1 All L Jour 272n (273n), *Basudeo v. King-Emperor*.]
3. ('17) AIR 1917 Sind 69 (70) : 18 Cr. L. J. 621 (621) : 10 Sind L R 185, *Adoo v. Emperor*. (Stealing a cow and taking it to slaughter-yard is not trivial offence.)

Note 6

1. ('32) AIR 1932 Cal 865 (865) : 33 Cr. L. J. 828, *Raghubir Kahar v. Emperor*. (Presidency Magistrate is bound to frame charge under S. 254.)
(15) AIR 1915 Bom 14 (15) : 16 Cr. L. J. 538 (539), *Dosabhai J. Dhondy v. Emperor*.
(91) 1891 Rat 539 (540), *Queen-Empress v. Abdul*. (Offence of adultery cannot be tried summarily by a Presidency Magistrate.)

Section 252
Notes 1-3

(2) The Magistrate shall ascertain, from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of the section. 3. "Appears or is brought." 4. "Shall proceed to hear the complainant." 5. "Take all such evidence as may be produced in support of the prosecution." 6. Proviso to sub-section (1). | <ol style="list-style-type: none"> 7. "Shall ascertain" — Sub-section (2). 8. Process-fee. See Notes to S. 544. 9. Production and inspection of documents. 10. Cross-examination of witnesses. 11. Procedure under the section — Trial or inquiry. See S. 4 (1) (k). 12. Revision. |
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Other Topics (miscellaneous)

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|---|--|
| <p>Duty confined to ready evidence. See Note 5.</p> <p>Duty of prosecution and inference from non-examination. See Note 5.</p> <p>Duty to summon witnesses. See Note 7.</p> <p>Hearing—Not examination. See Note 4.</p> | <p>Irregularity in arrest. See Note 3.</p> <p>Section mandatory. See Note 5.</p> <p>Subsequent list of witnesses. See Note 5.</p> <p>Vakil's admissions. See S. 205 and S. 255, Note 7.</p> <p>Warrant to a witness. See Note 7.</p> |
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1. Legislative changes.

(1) The Code of 1861 did not contain any express provision entitling the accused to cross-examine the prosecution witnesses *before the framing of the charge*. The Code of 1872 contained such express provisions. (Sections 218, 191, 214.) The express provisions were omitted in the later Codes.

(2) The proviso to sub-s.(1) has been added by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923. [*Cf.* S. 200 (aa) and S. 244, proviso.]

2. Scope of the section. — This section requires that the trial of a warrant-case must commence with the hearing of the complainant (if any) and the examination of the prosecution witnesses. The Magistrate has no power to forthwith require the accused to state his plea and on his admission of his guilt, convict him without taking any evidence as in a summons-case.¹ (See Ss. 242 and 243.)

This section, like the other sections in this chapter, applies to warrant-cases generally. Hence, it applies to a case started on a police challan.²

3. "Appears or is brought." — This section empowers the Magistrate to proceed with the trial of an accused person whenever he appears or is "brought before a Magistrate." The legality or otherwise of the arrest under which the accused is brought before the Magistrate

Section 252 — Note 2

1. ('06) 4 Cr. L. J. 231 (231, 232) : 29 Mad 372, *Emperor v. Chinnapayan*.
2. ('40) AIR 1940 Nag 390 (391) : 1940 N L J 449 (450), *Hansraj v. Emperor*.
[See ('38) AIR 1938 Nag 103 (104) : 39 Cr. L. J. 62, *Rahat Ali v. Md. Murad*.]

does not affect the jurisdiction of the Magistrate to try the accused.¹

As to the right of the accused to appear by pleader, see S. 205 and Notes thereunder.

Section 252.
Notes 3-5.

4. "Shall proceed to hear the complainant." — This section only requires that the complainant should be *heard*. It does not require the *examination* of the complainant on oath.¹

The Magistrate must proceed to hear the case though the complainant wishes to withdraw his complaint.² The reason is that in warrant-cases the complainant is not entitled to withdraw his complaint. See S. 248 and Notes thereunder.

5. "Take all such evidence as may be produced in support of the prosecution." — This section casts upon the Magistrate the duty of taking *all* the evidence produced on behalf of the prosecution unless it is irrelevant.¹ But this duty applies only to the evidence which is ready when the case is taken up for hearing and the Magistrate is *not bound* to go on taking the evidence that may be offered subsequently from time to time.²

Note 3

1. ('11) 12 Cri L Jour 356 (356) : 10 I. C. 956 : 35 Bom 225 (SB), *Emperor v. Vinayak Damodar*.
 - ('04) 1 Cri L Jour 535 (537) : 31 Cal 557, *Emperor v. Madho Dhobi*.
 - ('99) 1899 Pun Re No. 6 Cr, p. 17 (18), *Sobha v. Empress*.
 - ('28) AIR 1928 Sind 161 (163, 164) : 29 Cr. L. J. 1089, *Wheeler v. Emperor*.
 - ('08) 26 Mad 124 (125) : 1 Weir 630, *Public Prosecutor v. Ravalu Kesigadu*. (Case under Madras Abkari Act S. 34 — Power of a Circle Inspector to arrest accused in another circle.)
 - [See however ('25) AIR 1925 Bom 131 (133, 134) : 49 Bom 212 : 26 Cr. L. J. 441, *Candri Baroo v. Emperor*.]
- See also S. 46 Note 6, S. 177 Note 8, S. 190 Note 17 and S. 537 Note 9.

Note 4

1. ('22) AIR 1922 Mad 126 (128) : 23 Cri L Jour 203, *In re Kunhi Kadir*.
- ('29) AIR 1929 Cal 229 (230) : 30 Cr. L. J. 942, *Santiram Mandal v. Emperor*. [See also ('35) AIR 1935 Pat 515 (520) : 36 Cr. L. J. 1354 : 15 Pat 69, *Kewal Ram v. Emperor*. (Conviction not vitiated by absence of examination of complainant.)]
- ('38) AIR 1938 Nag 103 (104) : 39 Cr. L. J. 62, *Rahat Ali v. Md. Murad*. (Failure to examine complainant does not vitiate trial.)
2. ('29) AIR 1929 Mad 7 (8), *Narasimhan Naidu v. Naina Pillai*.
- ('27) AIR 1927 Rang 174 (174, 175) : 5 Rang 136 : 28 Cr. L. J. 649, *Maung Thu Daw v. U Po Nyun*. (Public Prosecutor on the instructions from the District Magistrate may however withdraw the prosecution.)
- ('89) 13 Bom 600 (603), *In re Ganesh Narayan Sathu*.

Note 5

1. ('08) 7 Cri L Jour 272 (273) (Lab), *Mt. Begam Bibi v. Ghulam Mohammad*.
- ('13) 14 Cr. L. J. 412 (412) : 20 I. C. 236 (All), *Gokul Chand v. Mahabir Misir*. (Complaint dismissed on examination of one out of several prosecution witnesses — Procedure illegal.)
- ('69) 1869 Rat 21 (21, 22), *Reg. v. Daya Kesur*.
- ('15) AIR 1915 Mad 825 (825) : 16 Cr. L. J. 156 (157), *Venkatappayya v. Venkataramanayya*. (Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties which witnesses should be examined.) [See ('33) AIR 1933 Nag 374 (377) : 30 Nag L R 76 : 35 Cri L Jour 404, *Tulsidas v. Chetandas*. (Whether witness is necessary or not should be determined by complainant and not by Magistrate.)]
2. ('38) AIR 1938 Nag 103 (104) : 39 Cr. L. J. 62, *Rahat Ali v. Md. Murad*.
- ('14) AIR 1914 All 430 (431) : 15 Cri L Jour 363, *Govind Sahai v. Emperor*. (Case under S. 110, Cr. P. C. — Twenty witnesses named by the police at the beginning were examined — Further, thirty-one witnesses were also examined — Transfer ordered.)
- ('26) AIR 1926 Mad 989 (990) : 49 Mad 978 : 27 Cri L Jour 1123, *K. C. Menon v. Krishna Nayar*. (Magistrate not bound to grant time for production of evidence.)

Section 252
Notes 5-7

When a Magistrate, for sufficient reasons, refuses to issue a commission, or to move the District Magistrate for issue of a commission, for the examination of a witness, he cannot be deemed to have refused, or omitted to take the evidence *produced* in support of the prosecution.³

When witnesses are common to a number of cases before the Court, the evidence in each case should be taken separately. It is not proper to take the depositions in one case and have them copied and used in another case.⁴

As to the right of the prosecution to lead evidence after the accused has entered on his defence, see S. 256 and Notes thereunder.

On general principles the duty of the prosecution is not to work for a conviction, but to see that justice is done and it is bound to produce all witnesses who are acquainted with the facts of the case although they may not favour the prosecution, unless their evidence is unnecessary or there is reasonable ground for believing that they will not speak the truth.⁵ Where a material witness is withheld by the prosecution without any sufficient cause, the Court can draw an inference that his evidence if produced will be against the prosecution. See Evidence Act, S. 114, Illustration (g).⁶ See also Notes under sections 208, 244 and 286.

6. Proviso to sub-section (1). — For cases where the complaint of a Court is necessary for taking cognizance of an offence, see S. 195.

7. "Shall ascertain" — Sub-section (2). — The Magistrate is *bound* under this section, to ascertain from the complainant or otherwise the names of any persons who are likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and he may summon to give evidence before himself such of them as he thinks necessary.¹ In discharge of this obligation, the Magistrate

3. ('37) AIR 1937 Rang 398 (399) : 1937 R L R 159 : 39 Cr. L. J. 29, *D. K. Nath v. P. K. Nath*.

4. ('23) AIR 1923 Cal 196 (197) : 50 Cal 223 : 24 Cr. L. J. 198, *Mazahur Ali v. Emperor*.
[See also ('71) 15 Suth W R Cr 23 (24), *Tukheya v. Tupsee Koocr*.]

See also S. 244 Note 3 and Notes under S. 356.

5. ('04) 1 Cri L Jour 305 (308, 309) : 28 Bom 479 : 6 Bom L R 324, *Emperor v. Bal Gangadhar Tilak*.

('05) 9 Cal W N 438 (439) : 2 Cri L Jour 176, *Munni Sonar v. Emperor*.

('33) AIR 1933 Cal 600 (602) : 60 Cal 1361 : 35 Cr. L. J. 33, *Bhuban Bejoy v. Emperor*.

(Prosecution not bound to produce witnesses who are not likely to tell the truth.)

('14) AIR 1914 Lah 565 (566) : 16 Cri L Jour 266, *Sardar Ahmad v. Emperor*.

('18) AIR 1918 Cal 314 (315) : 19 Cr. L. J. 81, *Ashraf Ali v. Emperor*. (If witness can on reasonable grounds, be regarded as an accomplice, prosecution need not produce and examine him.)

('28) AIR 1928 Pat 46 (48) : 28 Cri L Jour 868, *Prabhu Dusadh v. Emperor*.
(Unnecessary witnesses need not be produced.)

See also S. 208 Note 7 and S. 286 Note 6.

6. ('19) AIR 1919 Lah 158 (159) : 20 Cri L Jour 519, *Emperor v. Amolak Ram*.

('28) AIR 1928 Pat 98 (100) : 28 Cri L Jour 906, *Jogi Raut v. Emperor*.

Note 7

1. ('40) AIR 1940 Pat 355 (356) : 19 Pat 413, *Musahru v. Emperor*.

('36) AIR 1936 Nag 192 (197) : 1 L R (1936) Nag 205 : 38 Cr. L. J. 307, *Thakur Das v. Narayan*.

('26) AIR 1926 Mad 989 (990) : 49 Mad 978 : 27 Cr. L. J. 1123, *Menon v. Krishna Nayar*.

('13) 14 Cr. L. J. 682 (682) : 21 I. C. 1002 (All), *Sital Singh v. Dalganjan Singh*.

must *specifically question* the complainant as to whether he knows of any witnesses who will have to be summoned. The Magistrate is not bound or expected to exercise this duty of ascertaining more than once, and the proper time for such ascertainment is when the evidence already "produced" in support of the prosecution has been taken.²

The Magistrate is not bound to summon *every* one of the witnesses named by the complainant: he must only summon such of the witnesses as he *thinks necessary*.³ But he cannot arbitrarily refuse to summon any witness: he should issue summons to all witnesses named by the complainant, who, he considers, are likely to give useful evidence.⁴ This power of summoning witnesses named by the complainant may be exercised from time to time as the occasion requires.⁵

The section only authorizes the issue of a *summons* to a witness, and a warrant for his arrest can be issued only if the conditions laid down in S. 90 are satisfied.⁶ See also the undermentioned case.⁷

It is open to a Magistrate, under this sub-section, to take such evidence as he considers necessary in order to find whether an offence has really been committed or not, even if the complainant states that he does not wish to proceed with the complaint.⁸

8. Process-fee. — See Notes to S. 514.

(25) AIR 1925 Oudh 667 (667): 26 Cr. L. J. 1266, *Emperor v. Maiku Lal*. (Duty of seeing that all evidence essential to the prosecution case is before the Court is thrown by the Code upon the Magistrate himself—Hence it is not open to a Magistrate to acquit on the ground that the prosecution has failed to produce a necessary witness.)

2. (26) AIR 1926 Mad 989 (990, 991): 49 Mad 978: 27 Cr.L.J. 1123, *K. C. Menon v. P. Krishna Nayar*.

3. (40) AIR 1940 Pat 355 (358): 19 Pat 418, *Musahru v. Emperor*.

(38) AIR 1938 Nag 103 (105): 39 Cri L Jour 62, *Rahat Ali v. Md. Murad*. (It is only where a list is unduly long and appears to have been filed vexatiously that the Magistrates should avail themselves of the power to scrutinize the list to prevent harassment of the accused and an unwarranted prolongation of the trial.)

(38) AIR 1938 Lah 444 (445): 39 Cr.L.J. 624, *Ghulam Mokiyyuddin v. Sardara*. (Magistrate is bound to summon at Government expense such of complainant's witnesses as he considers necessary—Mere fact that same case was investigated by police and no challan was put up is no ground for refusal.)

(14) AIR 1914 All 526 (526): 14 Cri L Jour 682 (682), *Sital Singh v. Dalganjan Singh*. (Where a fresh list of witnesses is put in by the complainant after the first hearing, it is irregular on the part of the Court to accept the list without scrutiny.)

(26) AIR 1926 Mad 989 (990): 49 Mad 978: 27 Cri L Jour 1123, *K. C. Menon v. P. Krishna Nayar*.

(14) AIR 1914 All 430 (431): 15 Cri L Jour 363, *Govind Sahai v. Emperor*.

(75) 23 Suth W R Cr 9 (9), *Jeldhari Singh v. Shunkur Doyal*.

4. (26) AIR 1926 Mad 989 (991): 49 Mad 978: 27 Cri L Jour 1123, *K. C. Menon v. P. Krishna Nayar*.

[See also (36) AIR 1936 Nag 192 (197): 1 L R (1936) Nag 205: 38 Cr. L. J. 307, *Thakurdas v. Narayan*. (Magistrate refusing to summon witness cited by complainant even before prosecution has begun—It amounts to grave error.)]

5. (40) AIR 1940 Nag 390 (391): 1940 Nag L Jour 449 (450), *Hansraj v. Emperor*.

6. (07) 6 Cri L Jour 275 (275) (Lah), *Kala Singh v. Emperor*. (In a case under S. 498, I. P. C., there is no legal sanction for the Magistrate to issue a warrant for compelling the complainant's wife to attend as a witness, without first requiring her to attend by a summons as laid down under S. 252, Cr. P. C.)

7. (73) 1873 Pun Re No. 4 Cr, p. 5 (5), *Crown v. Ruttun Singh*

8. (37) 1937 Mad W N 727 (727, 728), *Nagaswami Naidu v. Ramaswamy Naicken*.

Section 252
Notes 9-10

9. Production and inspection of documents. — Where during the examination of the complainant several documents are produced as evidence against the accused, and are admitted by the Magistrate and marked as exhibits, the accused is entitled to the inspection of all documents filed as exhibits in the case and such inspection should not be refused with the direction that he may apply for and obtain certified copies.¹

10. Cross-examination of witnesses. — This section does not expressly refer to the right of the accused to cross-examine the prosecution witnesses. But on general principles and under S. 183 of the Evidence Act, the liability to cross-examination by the adverse party is part of the conception of legal evidence¹ and under sections, like S. 244, which also do not expressly confer a right of cross-examination, it has been held that such a right undoubtedly exists.² But S. 256 provides that after the *charge is framed* the accused must be required to state if he desires to cross-examine any of the prosecution witnesses and if he says he wishes to do so, the witnesses named by him should be re-called and he should be allowed to cross-examine them. The question has arisen as to what is the effect of this provision. Does it impliedly negative the right of the accused to cross-examine at an earlier stage, *viz.*, before the charge is framed, or does it confer on the accused an additional right to cross-examine the prosecution witnesses a second time after the charge is framed? On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras³ and Patna,⁴ the Chief Court of Lower Burma,⁵ the Judicial Commissioner's Courts of Upper Burma,⁶ Sind⁷ and Nagpur⁸ that the accused is entitled as of right to cross-examine prosecution witnesses before the charge is framed as well as afterwards.

Note 9

1. ('99) 1 Bom L R 433 (433), *In re Francis Domingo Fernandes*.
(82) 10 Cal L R 54 (55), *In the matter of Abdul Guffoor*.

Note 10

1. ('32) AIR 1932 Oudh 298 (299) : 34 Cri L Jour 58 : 8 Luck 135, *Mohammed Hossein v. Mirza Fakhrulla Beg.* (Per Srivastava, J.)
2. See Notes under S. 244.
3. ('20) AIR 1920 Mad 201 (203) : 43 Mad 411 : 21 Cr. L. J. 297, *W. H. Lockley v. Emperor*.
(23) AIR 1923 Mad 609 (610) : 46 Mad 449 : 24 Cr. L. J. 547 (FB), *Varisai Rowther v. Emperor*.
- (24) AIR 1924 Mad 735 (735) : 25 Cri L Jour 556, *In re Muthiah Chetty*.
- (26) AIR 1926 Mad 989 (991) : 49 Mad 978 : 27 Cri L Jour 1123, *K. C. Menon v. P. Krishna Nayyar*.
4. ('20) AIR 1920 Pat 149 (150) : 21 Cr. L. J. 814 : 5 Pat L. J. 94, *Ramyad Singh v. Emperor*.
5. ('11) 12 Cr. L. J. 277 (279) : 10 I. C. 917 (LB), *Mohammed Ally v. Emperor*.
6. ('97-01) 1 Upp Bur Rul 74 (74), *Nga O v. Queen-Empress*. (There is no provision prohibiting the cross-examination — Hence, if the accused so wishes he may be allowed to do so.)
7. ('35) AIR 1935 Sind 13 (19) : 29 Sind L R 92 : 36 Cri L Jour 581 (FB), *Muhammad Rahim v. Emperor*. (Evidence in S. 252 includes examination, cross-examination and re-examination of a witness.)
8. ('35) AIR 1935 Nag 8 (9 to 11) : 31 Nag L R 276 : 36 Cr. L. J. 578, *Gurudin v. Emperor*. (Conflicting case-law discussed.)

But it has been held by the Allahabad⁹ and Calcutta¹⁰ High Courts that the accused is not entitled as of right to cross-examine prosecution witnesses before the charge is framed, but is only entitled to do so afterwards under s.256. At the same time the Allahabad¹¹ and Calcutta¹² High Courts have held that s. 256 does not *prohibit* cross-examination by the accused before the charge is framed and the Magistrate can, as a matter of discretion, allow, and indeed will be well-advised to allow, the accused to cross-examine prosecution witnesses even before the charge is framed. The Punjab Chief Court also seems to hold the same view.¹³ The question came up for decision before a Bench of the Oudh Chief Court, but the Judges constituting the Bench differed in their opinion, one of them expressing his concurrence with the Madras and Patna view and the other agreeing with the Allahabad and Calcutta view.¹⁴

An accused is entitled to decline to exercise his right of cross-examination (assuming that it is held that he has such a right).¹⁵

The fact that certain evidence has not been tested by cross-examination does not affect its *admissibility* but only its probative *value*.¹⁶

11. Procedure under the section — Trial or inquiry. — See S. 4 (1) (k).

12. Revision. — The section leaves it to the discretion of the Magistrate as to what witnesses named by the prosecution should be summoned to give evidence before himself and a Court of revision

9. ('31) AIR 1934 All 621 (623, 624): 54 All 212: 33 Cr. L. J. 310, *Lachmi Narain v. Emperor*.

10. ('29) AIR 1929 Cal 822 (823, 824): 31 Cr. L. J. 809, *Emperor v. C. A. Mathews*. ('72) 17 Suth W R Cr 51 (51), *In the matter of Thakoor Dyal Sen*. (Case under Code of 1861 which did not expressly confer right of cross-examination.)

('73) 19 Suth W R Cr 53 (53): 3 Beng L R App 151, *Shanto Teorni v. Mrs. Belilias*. [But see ('23) AIR 1923 Cal 727 (728): 50 Cal 939: 25 Cri L Jour 27, *Dibakanta Chatterjee v. Gour Gopal Mukherjee*. (Per Rankin and Buckland, JJ.; Cumming, J., dissenting.)]

11. ('31) AIR 1931 All 621 (624): 54 All 212: 33 Cr. L. J. 310, *Lachminarain v. Emperor*.

12. ('29) AIR 1929 Cal 822 (823): 31 Cr. L. J. 809, *Emperor v. C. A. Mathews*. [See also ('04) 1 Cr. L. J. 838 (839) (Cal), *Ashirbad Muchi v. Maju Muchini*. ('94) 21 Cal 642 (663), *Empress v. Sagal Samba Sajad*.]

13. ('16) AIR 1916 Lah 445 (445): 17 Cr. L. J. 278 (279), *Sher Singh v. Emperor*.

14. ('32) AIR 1932 Oudh 298 (299, 305): 34 Cri L. Jour 58:8 Luck 135, *Mahomed Husain v. Fakhrullah Beg*.

15. ('23) AIR 1923 Cal 727 (728): 50 Cal 939: 25 Cri L Jour 27, *Dibakanta Chatterjee v. Gour Gopal Mukherjee*.

('73) 19 Suth W R Cr 53 (53, 54): 3 Beng L R App 151, *Shanto Teorni v. Mrs. Belilias*.

16. ('25) AIR 1925 Mad 497 (537): 48 Mad 1, *Maharaja of Kolhapur v. Sundaram Iyer*.

('29) AIR 1929 Lah 840 (842): 30 Cr. L. J. 951, *Mangal Sen v. Emperor*.

('13) 14 Cr. L. J. 70 (71): 18 Ind Cas 406 (Cal), *Ibrahim v. Emperor*.

('03) 1903 Pun Re No. 5 Cr, p. 15 (16), *Gunga Ram v. Emperor*.

('10) 11 Cr. L. J. 145 (145): 5 Ind Cas 512 (Mad), *Rosi v. Yadala Pillamma*.

('25) AIR 1925 Oudh 726 (727): 26 Cr. L. J. 1236, *Sarju Singh v. Emperor*.

('23) AIR 1923 Pat 53 (55): 24 Cr. L. J. 595, *Moti Singh v. Dhanukdhari Singh*.

('32) AIR 1932 Oudh 298 (299): 34 Cr. L. J. 58: 8 Luck 135, *Mohamad Husain v. Fakhrullah Beg*.

[See ('37) AIR 1937 Oudh 168 (169): 37 Cr. L. J. 1144: 12 Luck 553, *Ram Kumar v. Emperor*. (Testimony of witness not a legal evidence unless subjected to cross-examination.)]

Section 252
Note 12

will not interfere with this discretion unless there are strong and exceptional reasons for doing so.¹

Section 253

253.* (1) If, upon taking all the evidence referred to in section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

Synopsis

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| 1. Legislative changes. | 4. "The Magistrate shall discharge him." |
| 2. "If, upon taking all the evidence referred to in S. 252." | 5. Grounds of discharge. |
| 3. Examination of accused (if any) as he thinks necessary. | 6. Sub-section (2). |
| | 7. "For reasons to be recorded." |

Other Topics (miscellaneous)

Benefit of doubt. See S. 254 Note 4.	Duty to examine whole evidence. See Note 2.
Decisions of civil Courts. See Note 7.	When discharge amounts to acquittal. See Note 4.
Discharge without evidence. See Notes 6 and 7.	

1. Legislative changes.

1. The words "if he finds that no offence has been proved against the accused" which occurred in the corresponding sections of the Codes of 1861 and 1872 have been replaced in the later Codes by the words "if . . . he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction."

* Code of 1882 : S. 253 — Same as that of 1898 Code.

Code of 1872 : S. 215 para. 1 and Expl. III.

215. When the evidence of the complainant and of the witnesses for the prosecution and such examination of the accused person as the Magistrate considers necessary, have been taken, the Magistrate, if he finds that no offence has been proved against the accused person, shall discharge him.

Explanation III. — An order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken.

Code of 1861 : S. 250.

250. When the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the Magistrate shall consider necessary, have been taken, the Magistrate, if he finds that no offence has been proved against the accused person shall discharge him.

Note 12

1. ('28) AIR 1928 All 684 (685) : 30 Cri L Jour 631, *Inayat Husain v. Emperor*.

2. The Codes of 1861 and 1872 did not contain any provision corresponding to sub-s.(2). On the other hand, Explanation III to S. 215 of the Code of 1872 expressly declared that an order of discharge could not be passed till after the examination of the witnesses named for the prosecution. This provision was removed and the provision contained in sub-s.(2) was introduced in the later Codes thus rendering obsolete the undermentioned decisions¹ under the prior Codes which held that a Magistrate could not discharge an accused before taking all the evidence for the prosecution.

Section 253
Notes 1-3

2. "If, upon taking all the evidence referred to in S. 252."
—This section makes it incumbent on the Magistrate to take *all* the evidence offered on behalf of the prosecution before he discharges the accused¹ unless he finds that the charge against the accused is groundless in which case he can discharge the accused even before he has taken all the prosecution evidence. (See Note 6.) It has been held that the Magistrate can discharge an accused on the basis of the evidence of a witness called at the instance of accused under S. 540, though this section refers only to the evidence for the prosecution.²

3. Examination of accused (if any) as he thinks necessary.
—This section enables the Magistrate in a warrant-case to examine the

Section 253 — Note 1

1. ('75) 7 N W P H C R 230 (232), *In the matter of Newar*.
 - ('82) 1882 All W N 179 (179), *Empress v. Ajudhia*.
 - ('81) 1881 All W N 145 (145), *Empress v. Shco Charan*.
 - ('79) 2 All 447 (448), *Empress of India v. Kashi*.
 - ('77) 1877 Rat 121 (121), *Kaladgi Magistrate's Letter No. 597*.
 - ('73) 1873 Rat 73 (73), *Reg. v. Sangapa*.
 - ('72) 3 Cal 389 (390), *Empress v. Hematulla*.
 - ('78) 2 Cal L R 369 (390), *In the matter of Gangoo Singh*.
 - ('78) 2 Cal L R 374 (376), *Beputoolia v. Nazim Sheikh*.
 - (1865) 2 Suth W R Cr 47 (48), *Queen v. Sheikh Edoos*.
 - ('67) 7 Suth W R Cr 47 (47), *Queen v. Hossein Ally*.
 - ('67) 7 Suth W R Cr 45 (45), *Queen v. Sreenath Mookopadhia*.
 - ('70) 13 Suth W R Cr 37 (38), *Queen v. Heera Lall*.
 - ('71) 16 Suth W R Cr 18 (19); 7 Beng L R App 55, *Runnoo Singh v. Kali Churn*.
 - ('71) 16 Suth W R Cr 48 (49), *Kishori Sahai v. Mungeri Sahai*.
 - ('73) 20 Suth W R Cr 67 (68), *Soondur v. Ramkumar*.
 - ('74) 22 Suth W R Cr 25 (26), *Queen v. Japit Ahir*.
 - ('75) 24 Suth W R Cr 9 (10), *Meer Azem Ali v. Hurnam Dass*.
 - ('75) 24 Suth W R Cr 62 (63), *Sreenath Mundle v. Sreenath Rajput*.
 - ('76) 25 Suth W R Cr 10 (10), *Syed Nissar Hossein v. Ramgolam Singh*.
 - ('80) 1880 Pun Re No. 8 Cr, p. 15 (16), *Kudan v. Sonun*.
 - ('74) 1874 Pun Re No. 17 Cr, p. 29 (30), *Nihal Singh v. Mohamda*.
 - ('81) 4 Mad 329 (329), *Queen v. Purasurama Naikar*.
- [See ('73) 12 Beng L R 253n (254n), *Queen v. Ramkanu*.]

Note 2

1. ('30) AIR 1930 Cal 515 (517); 31 Cr. L. J. 1055; 58 Cal 346, *Fazlur Rahman v. Emperor*.
- ('37) 1937 M W N 991 (992), *Shivakatacham Pillai v. Emperor*. (Though the complainant, after examining some of the witnesses, does not want to proceed further.)
- ('29) AIR 1929 Cal 479 (480); 31 Cr. L. J. 128, *Mukunda Patre v. Purushottam Shah*. (Complainant not examined — Discharge order is irregular.)
- ('13) 14 Cr. L. J. 412 (412, 413); 20 I.C. 236 (All), *Gokul Chand v. Mahabir Misir*.
- ('20) AIR 1920 Mad 131 (131); 21 Cri L Jour 478, *In re Packianathan*.
- ('08) 7 Cri L Jour 272 (273) (Lah), *Mt. Begam Bibi v. Ghulam Muhammad*.
2. ('33) AIR 1933 Lah 561 (566, 567); 34 Cr. L. J. 735, *Diwan Singh v. Emperor*.

Section 253
Notes 3-4

accused *before* the charge is framed.¹ But such an examination is entirely discretionary with the Magistrate and he is not *bound* to examine the accused before the charge is framed.²

As to whether the examination of an accused before the charge is framed dispenses with the examination of the accused under S. 342 after the charge is framed and the prosecution evidence is closed and before the accused is called on to enter upon his defence, see S. 342 Note 9.

As to the scope and effect of an examination of the accused in criminal cases, see Notes under S. 342.

4. "The Magistrate shall discharge him." — This section contemplates an order *discharging* the accused. An order *dismissing a complaint* is not the proper order to be passed under the section.¹ A *formal* and *express* order of discharge is, however, not necessary. It may be implied and presumed from the circumstances of a case.² Thus, where a person is accused of a major offence but the Magistrate frames only a charge for a minor offence, there is an implied discharge in respect of the major offence.³ To determine whether a particular order is one of discharge, the *substance* of the order and not its *form* should be taken into consideration. Thus, where no charge has been drawn up and the prisoner has not been asked to make his defence, and the Magistrate finds that no case has been made out against the accused, his order is only one of discharge though he styles it as an order of acquittal.⁴ Similarly, if the defence of the accused is taken and witnesses are examined in support thereof, the order of the

Note 3

1. ('93-1900) 1893-1900 Low Bur Rul 642 (645), *Pat Tha U v. Queen-Empress*. ('27) AIR 1927 All 475 (475) : 49 All 551 : 28 Cr. L.J. 399, *Sudaman v. Emperor*. (The examination is intended to enable the Court to decide whether it should frame a charge.)
2. ('22) AIR 1922 Mad 512 (512) : 45 Mad 820:24 Cri L Jour 124, *Marudamuthu Vanian v. Emperor*. (Overruled on another point in AIR 1923 Mad 609 (FB).)
- ('26) AIR 1926 Nag 459 (460) : 27 Cri L Jour 830, *Deoji v. Emperor*.

Note 4

1. ('13) 14 Cr L. J. 412 (412) : 20 I. C. 236 (All), *Gokulchand v. Mahabir Misir*. ('34) AIR 1934 Pat 548 (549, 550):36 Cr.L.J. 285, *Jotindra Nath v. Radhakrishna*. (Dismissal of complaint after issue of process not legal — When process has once been issued, an accused person can only be discharged under this section or S. 259.)
2. (75-77) 1 Bom 610 (619, 620), *Reg. v. Hanmanta*.
3. ('36) AIR 1936 Nag 87 (88) : 37 Cri L Jour 715 : ILR (1936) Nag 54, *Ganga Datta v. Emperor*. ('33) AIR 1933 Mad 65 (66): 33 Cr.L.J. 825, *P. Venkatasubbayya v. M. Venkata Lakshmayya*. ('31) AIR 1931 Lah 402 (403, 404) 32 Cri L. J. 1029, *Mahomed v. Emperor*. (It is necessary that the Magistrate must visualize the possibility of framing a more serious charge.)
[But see ('26) AIR 1926 Oudh 194 (195) : 27 Cr L. J. 417, *Bilodar v. Emperor*.]
See also S. 209 Note 6, S. 403 Note 14 and S. 437 Note 8.
4. ('66) 6 Suth W R Cr 13 (14), *Queen v. Robert Sheriff*. ('67) 8 Suth W R Cr 45 (46), *Queen v. Bipro Doss*. ('68) 1868 Pun Re No. 32 Cr, p. 90 (100), *Sekundar Khan v. Crown*. ('68) 9 Suth W R Cr 15 (16), *Goonath Mudli v. Troylocko Chukerbutty*. ('69) 12 Suth W R Cr 65 (65, 66): 4 Beng L R A C 1, *Queen v. Goburdhun Bera*. ('71) 15 Suth W R Cr 55 (55), *Queen v. Rajkishore Roy*.
[See also ('04) 1 Cri L Jour 355 (356): 8 C W N 456, *Nagendra Nath v. Korb*. (Order of release on bail.)]
See also S. 209 Note 6, S. 403 Note 14 and S. 437 Note 8.

Magistrate where he finds the accused not guilty is one of acquittal though he styles it as one of discharge.⁵

Section 253
Notes 4-5

5. Grounds of discharge. — Under sub-s.(1) of this section a Magistrate can discharge an accused when, upon considering the evidence for the prosecution, he comes to the conclusion that no case has been made out against the accused, which, if unrebutted, would warrant his conviction.¹ But where the Magistrate has not come to such a conclusion, he has no power to discharge the accused under this section. Thus, an accused person cannot be discharged under this sub-section merely because a civil suit touching the same dispute is pending between the parties² or the *complaint* is vague³ or because it is desirable to try the accused along with another co-accused whose attendance before the Court it has not so far been possible to procure.⁴ Similarly, except in cases falling under S. 259, the absence of the complainant at the hearing is no ground for discharging an accused (see Notes under S.259). But in such a case the accused may be discharged for want of evidence against him.⁵ It is not sufficient to enable a Magistrate to discharge an accused person under this section that there can be no conviction for the particular offence which was originally alleged against the accused but only in respect of some other offence⁶ or that the accused appears to have committed the offence only in respect of a smaller sum than that alleged by the prosecution.⁷ Where an accused person escapes into a foreign jurisdiction and the Magistrate holding the enquiry in connexion with the extradition proceedings

5. ('72) 18 Suth W R Cr 10 (10), *Ramjoy Surmah v. Mirza Ali*.

('17) AIR 1917 Low Bur 88 (89) : 18 Cri L Jour 1006 (1006, 1007), *Orilal v. Kalu*.

('83) 1883 Pun Re No. 29 Cr, p. 76 (76), *Taba v. Hira Singh*.

('25) AIR 1925 Oudh 60 (60) : 25 Cri L Jour 39, *Dal Chand v. Ram Lal*. (Order of first class Magistrate refusing to commit to sessions a case under S. 494, Penal Code, amounts to an acquittal).

('79) 3 Cal L R 131 (132), *In the matter of Joja Pashan*.

('03) 1903 Pun Re No. 14 Cr, p. 35 (39) : 1903 P L R No. 175, *Crown v. Nathu*.

('15) AIR 1915 Mad 23 (24) : 15 Cri L Jour 673 (674, 675) : 38 Mad 585, *Sriramulu v. Krishna Row*. (Recommencement of trial under S. 350 does not cancel a charge framed and the Magistrate must acquit and not discharge.)

('35) AIR 1935 All 834 (835) : 36 Cr. L. J. 912, *Raza Husain v. Emperor*. (Magistrate by inadvertence referring to S. 253 and not S. 258; still, order is one of acquittal.) [See ('73) 19 Suth W R Cr 55 (55), *Okhoy Teli v. Modhoo Sheikh*.]

Note 5

1. ('25) AIR 1925 All 298 (299) : 26 Cri L Jour 736, *Daya Nand v. Emperor*.

('27) AIR 1927 AH 804 (805) : 49 All 879 : 28 Cri L Jour 601, *Alam v. Emperor*. (If prosecution does not choose to put the correct version of facts before the Court and itself attempts to spoil a true case by adducing false and perjured evidence, a Magistrate cannot but discharge the accused.)

('09) 10 Cr. L. J. 14 (16) : 1908 Upp Bur Rul 15, *Nga Maung Gyi v. Nga Lu Gale*.

('34) AIR 1934 Oudh 321 (323) : 35 Cri L Jour 939 : 10 Luck 82, *Emperor v. Chandewa Pasi*. (If Magistrate considers that no case has been made out against the accused the proper procedure is to discharge the accused under this section and not to acquit him after framing the charge.)

2. ('25) AIR 1925 All 298 (299) : 26 Cri L Jour 736, *Daya Nand v. Emperor*.

3. ('76) 25 Suth W R Cr 35 (35), *Queen v. Thakoor Ram*. (Complaint by civil Court.)

4. ('22) AIR 1922 Cal 334 (335) : 49 Cal 182; 22 Cr. L. J. 465, *Billinghurst v. Meek*.

5. [See ('69) 11 Suth W R Cr 47 (48), *Queen v. Pooran Jolaha*.]

6. ('67) 8 Suth W R Cr 82 (82, 83), *Degumbar v. Kally Das*.

('74) 1874 Pun Re No. 17 Cr, p. 29 (29), *Nihal Singh v. Mohamda*.

7. ('83) 6 Mad 25 (26), *Queen v. Vengu Vayyangar*.

Section 253
Notes 5-6

reports that there is no sufficient ground for *extradition*, this is not by itself a sufficient ground for the discharge of the accused under this section.⁸ It is the absence of sufficient evidence for *conviction* that can justify a discharge under this section.

6. Sub-section (2).—Although sub-s.(1) of this section requires the Magistrate to take all the evidence for the prosecution before discharging the accused, sub-s.(2) empowers the Magistrate to discharge the accused at any *previous* stage of the case if he finds that the charge against the accused is a groundless one.¹ Thus, the accused can be discharged even before any evidence for the prosecution is taken or when such evidence is being taken,² or before the complainant is heard under S. 252,^{2a} or before the date of hearing.³ The Calcutta⁴ and the Patna⁵ High Courts have held that even an order refusing to issue process for the appearance of the accused may amount to an order of discharge though the Madras High Court has expressed the opinion that neither an order of discharge nor one of acquittal can be passed in a case where the accused has not been directed to appear at all.⁶ But an order of discharge can be passed only after the Magistrate has taken *cognizance* of the offence. An order refusing to take cognizance of an offence is therefore not an order of discharge.⁷

Under this sub-section, the Magistrate can discharge the accused before he has taken the evidence for the prosecution if he finds that the charge against the accused is *groundless*. A finding that the *charge is groundless* is not the same as a finding under sub-s.(1) that no case has been made out against the accused.⁸

8. ('05) 2 Cri L Jour 211 (212) (Kathiawar), *Manilal Ajitrai v. Modi Musa Yakub*.
Note 6

1. ('11) 12 Cri L Jour 105 (106) : 9 I C 606 (Mad), *Narasanna v. Venkatarayadu*.

2. ('30) AIR 1930 Cal 515 (517, 518) : 58 Cal 346 : 31 Cri L Jour 1055, *Fazlar Rahman v. Emperor*.

('39) AIR 1939 Cal 329 (330) : I L R (1939) 1 Cal 474 : 40 Cri L Jour 658, *Sundar Das v. Fardun Rustom*. (Order of discharge after hearing parties and examining documents, without taking prosecution evidence is legal.)

('30) AIR 1930 Lah 158 (159) : 31 Cri L Jour 239, *Hakim Singh v. Lal Singh*. (Order of discharge during the course of prosecution evidence being taken.)

('26) AIR 1926 All 461 (461, 462) : 27 Cri L Jour 541, *Kunj Behari v. Emperor*. (Order of discharge before any prosecution evidence was taken.)

('11) 12 Cri L Jour 105 (106) : 9 I C 606 (Mad), *Narasanna v. Venkatarayadu*. (Order of discharge before examining all the prosecution witnesses.)

('34) AIR 1934 All 51 (52) : 56 All 285 : 35 Cri L Jour 418, *Bhagawandas v. Emperor*. (Complaint dismissed after summoning accused — Order is one of discharge under S. 253 (2).)

2a. ('40) AIR 1940 Lah 40 (41) : 41 Cri L Jour 354, *Shiv Datta v. B. K. Sood*. (Complaint disclosing no criminal offence — Fact being brought to notice of the Magistrate, on date of hearing Magistrate discharging accused without hearing complainant—Order is legal.)

3. ('25) AIR 1925 Pat 154 (155) : 25 Cr. L. J. 696, *W. J. Watson v. P. H. Metcalfe*.

4. ('05) 2 Cri L Jour 524 (530) : 9 C W N 810 : 32 Cal 783, *Ajab Lal v. Emperor*.

5. ('21) AIR 1921 Pat 474 (475), *Maunat Hossain v. Emperor*.

6. ('13) 14 Cri L Jour 559 (561) : 21 I C 159 : 36 Mad 315, *In re Muthia Moopan*.

7. See (1904) 1 Cri L Jour 980 (981, 982) : 1 A L J 609, *Bhiku Bari v. Emperor*.

8. ('28) AIR 1928 Mad 129 (129) : 51 Mad 185 : 28 Cri L Jour 995, *Mahomed Sheriff v. Abdul Karim*.

('30) AIR 1930 Lah 461 (462) : 31 Cri L Jour 481, *Mchtab v. Nathu*.

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Note 7

7. "For reasons to be recorded." — Sub-S.(2) requires the Magistrate to record his reasons for holding that the charge is groundless. No hard and fast rule can be laid down as to when a Magistrate will be justified in holding a charge to be groundless. The Magistrate should arrive at his conclusion judicially and not capriciously. If, acting judicially, a Magistrate has come to the conclusion on grounds to be recorded, that the charge must fail either because the allegations are false or because they disclose a dispute of a civil nature which is distorted into a criminal case or for any other reason, he can discharge the accused without taking the evidence for the prosecution.¹ In arriving at his conclusion the Magistrate can take into account a police-report² or a civil Court's judgment³ touching the dispute. Where the story related by the prosecutor himself is of such a nature that it does not disclose a criminal offence, the Magistrate will be justified in discharging the accused under this sub-section without taking the evidence for the prosecution.⁴

But where the complaint discloses *prima facie* a case against the accused, the Magistrate cannot discharge the accused unless he knows what is the sort of evidence that is going to be adduced in support of the charge and unless he considers that even if such evidence were taken into consideration the charge would be groundless.⁵

The mere fact that the matter is one of rendition of accounts does not justify a Magistrate in holding a charge of criminal breach of trust to be groundless.⁶ In such a case, the question of trust must be fully inquired into, and for this purpose it is necessary that the whole of the prosecution evidence should be recorded. An order of discharge after examination of some of the prosecution witnesses, on the ground that the case is of a civil nature, is premature.⁷ Similarly, it would not be a proper exercise of the discretion of the Magistrate under this

(135) AIR 1935 Pesh 23 (24) : 36 Cri L Jour 632, *Saran Singh v. Kirpal Singh*.
(Distinction between the two clauses pointed out.)

Note 7

1. (129) AIR 1929 Mad 754 (755) : 52 Mad 987 : 31 Cri L Jour 275, *Kasinatha Pillai v. Shanmugham Pillai*.
2. (126) AIR 1926 All 461 (461) : 27 Cri L Jour 541, *Kunj Behari v. Emperor*.
3. (130) AIR 1930 Cal 515 (518) : 58 Cal 346 : 31 Cr. L. J. 1055, *Fazlar Rahman v. Emperor*.
3. (116) AIR 1916 Bom 163 (163, 164) : 17 Cri L Jour 153 (154) : 41 Bom 1, *In re Markur*.
4. (140) AIR 1940 Lah 40 (42) : 41 Cri L Jour 354, *Shiv Datta v. B. K. Sood*. (Examination of complainant under Section 252 of the Code, not disclosing criminal offence — Magistrate may discharge accused without taking the rest of complainant's evidence.)
- (1900) 1900 Pun L R Cr, p. 68 (69), *Ram Chand v. Empress*.
- (184) 1884 Rat 201 (201), *Empress v. Ramachandra*.
- (128) AIR 1928 Lah 945 (946) : 30 Cri L Jour 162, *Amar Nath v. Emperor*.
- See also Section 209, Note 12.
5. (128) AIR 1928 Mad 129 (129) : 51 Mad 185 : 28 Cri L Jour 995, *Muhammad Sheriff v. Abdul Karim*.
- (130) AIR 1930 Lah 461 (462) : 31 Cri L Jour 481, *Mehtab v. Nathu*.
6. (130) AIR 1930 Lah 461 (462) : 31 Cri L Jour 481, *Mehtab v. Nathu*.
7. (139) AIR 1939 Rang 377 (378) : 41 Cr. L. J. 25, *Chan Elliam v. L. H. Wellington*.

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Note 7

sub-section to discharge an accused merely on a statement of a prosecution witness that the complainant had previously admitted that the case was a false one.⁸

A Magistrate should give his reasons at the time he pronounces the order of discharge, and if it is the final order in the case, he is bound to give his reasons because, the moment he pronounces the final order he becomes *functus officio*. But where several accused are being tried before him and he discharges some of them without giving any reasons in the order of discharge, it is competent for him to give his reasons in regard to the order of discharge at any time until the charge against the remaining accused is disposed of by a final order.⁹

Section 254

254.* If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused.

Synopsis

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|---|--|
| 1. Legislative changes. | 6. "Which in his opinion could be adequately punished by him." |
| 2. "When such evidence and examination have been taken and made." | 7. Magistrate shall frame a charge. |
| 3. "Or at any previous stage." | 8. Charge—What it should contain. See Ss. 221 to 223. |
| 4. "Ground for presuming." | 9. Effect of the framing of the charge. |
| 5. "Offence triable under this Chapter." | |

Other Topics (miscellaneous)

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|---|--|
| Basis of charge — Evidence and not complaint. See Note 5. | Framing charge — Acquittal without further evidence. See Note 4. |
| Charge — When not to be framed. See Note 4. | Scope of the section. See Notes 2 and 7. |
| Charge — When to be framed. See Notes 6 and 7. | Splitting up offences into summons-cases. See S. 251 Note 2. |
| Cross-examination before charge. See S. 252, Note 10. | Summons and warrant-cases — Charges. See Note 5. |
| Duty to summon witnesses. See S. 252, Note 7. | Summons and warrant-cases compared. See Note 2. |
| Enquiry under S. 117. See S. 255 Note 2. | Whole prosecution evidence need not be taken. See Note 3. |
| Failure to frame charges. See S. 255, Note 4. | |

1. Legislative changes.

Difference between the Codes of 1861 & 1872 and the later Codes —

- (1) The Codes of 1861 (S. 250) and 1872 (S. 216) contained the words "if the Magistrate finds that an offence is apparently proved"

* 1882 : S. 254; 1872 : S. 216; 1861 : S. 250.

8. (1929) AIR 1929 Lah 623 (624) : 30 Cr. L. J. 854, *Ram Lubhaya v. Jagannath*.
9. (1938) AIR 1938 Mad 396 (398) : 39 Cri L Jour 335, *In re Govindraj*.

against the accused person" instead of the words "if the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence" which occurred in the later Codes.

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Notes 1-3

(2) The words "triable under this chapter" qualifying the word "offence" did not occur in the Codes of 1861 and 1872 but were inserted in the later Codes.

(3) The Code of 1872, S. 216, contained two explanations the provisions of which have now been transferred to S. 535.

Changes made in 1898 —

The words "or at any previous stage of the case" were first inserted in the Code of 1898.

2. "When such evidence and examination have been taken and made." — The section contemplates that in warrant-cases, the Magistrate should take the evidence for the prosecution before framing a charge. In this respect the procedure is different from that adopted in summons-cases where at the very commencement of the proceedings the particulars of the offence are explained to the accused and he is required to state his plea.¹ This section authorizes the Magistrate to take into consideration the statement of the accused person himself in framing a charge against him. Hence, in a proper case, the Magistrate will be within his powers in framing a charge on the mere statement of the accused himself.²

See also Notes under section 253.

3. "Or at any previous stage." — Under this section the Magistrate is not bound in every case to take the *whole* of the evidence for the prosecution before framing a charge. He is entitled to frame a charge, even before the evidence for the prosecution has been completely recorded, at any moment he is satisfied that a *prima facie* case has been made out against the accused.¹ It may be noted in this connexion that the procedure in this respect is different in inquiries before commitment to sessions, in that it is obligatory in such inquiries

Section 254 — Note 2

1. ('24) AIR 1924 Cal 63 (64) : 25 Cri L Jour 1270, *Natabar Khan v. Emperor*.
2. ('16) AIR 1916 All 298 (299) : 17 Cri L Jour 70 (71), *Janu Bhar v. Emperor*. (Case under Criminal Tribes Act, III of 1911.)

Note 3

1. ('40) AIR 1940 Nag 233 (283) : 41 Cr.L.J. 585 : 198 Ind Cas 413 (414), *Bhanwar Singh v. Sukhram Singh*. (Framing of charge after prosecution evidence but before examination of accused is not irregular.)
- ('36) AIR 1936 Pesh 211 (211) : 38 Cr. L. J. 399, *Hassan v. Emperor*. (Charge can be framed even after hearing the first witness.)
- (1900) 2 Bom L R 542 (544), *Queen-Empress v. Nasarvanji Edalji*.
- (1900) 1900 Pun L R Cr, p. 63 (65), *Uttam Chand v. Empress*.
- ('11) 12 Cr. L. J. 471 (472) : 11 Ind Cas 1007 (All), *Mulua v. Sheoraj Singh*.
- (1900) 27 Cal 370 (372) : 4 C W N 469, *Zamunia v. Ram Tahal*.
- [See ('37) AIR 1937 All 189 (190) : 38 Cri L Jour 394, *Raghubir Sahai v. Wali Husain Khan*.]
- [See also ('27) AIR 1927 All 660 (661, 662) : 50 All 71 : 28 Cr. L. J. 792, *Tirlok v. Emperor*. (Ss. 254 and 255 apply to proceedings under S. 110.)
- ('66) 3 Mad H C R App ii (iii). (Case under Code of 1861.)]

Section 254
Notes 3-5

for the Magistrate in every case to take the entire evidence produced on either side before framing a charge.² See S. 203 and Notes thereunder; see also section 210.

4. "Ground for presuming." — The section does not require the Magistrate to give reasons for holding that there are good grounds for framing a charge.¹ In forming his opinion as to whether there is sufficient ground for presuming that the accused has committed an offence, it is open to the Magistrate to disbelieve the evidence given by the prosecution witnesses. Merely because the prosecution examines a number of witnesses who depose to the guilt of the accused, it is not obligatory on the Magistrate, if he disbelieves them, to frame a charge.² When the evidence recorded does not lead to a presumption that the accused has committed an offence but merely raises a *doubt*, the Magistrate should give the benefit of doubt to the accused and discharge him.³ Although the section contemplates the framing of a charge only when a *prima facie* case has been made out against the accused by the prosecution, it is up to the Magistrate to consider the whole of the evidence and the probabilities of the case at the time of proceeding to judgment and he may acquit an accused against whom he has framed a charge though the accused has failed to adduce any satisfactory evidence to rebut the evidence for the prosecution.⁴ The discretion of the Magistrate in framing a charge under this section should not be lightly interfered with in revision.⁵

5. "Offence triable under this Chapter." — Where a Magistrate commences a case as a warrant-case, he can convict the accused of an offence triable as a summons-case when he finds that only such an offence has been committed.¹ As seen in Note 4 to S. 251, in such a case, it is not open to the Magistrate to abandon the procedure prescribed for the trial of warrant-cases and adopt that of summons-cases. It is necessary for the Magistrate to frame a charge

2. ('12) 13 Cri L Jour 443 (445) : 15 Ind Cas 75 (All), *Durga Dutt v. Emperor*.

Note 4

1. ('35) AIR 1935 Sind 223 (223) : 37 Cr. L. J. 152 : 29 S. L. R. 339, *Bagomal v. Emperor*.

2. ('30) AIR 1930 Lah 543(543):32 Cr.L.J. 302, *Mt. Mubarak Jan v. Mt. Rahat Jan*. [See ('10) 11 Cr. L. J. 110(111) : 4 I.C. 990 (Lah), *Radhi v. Phul Chand*. (Where the evidence if believed, justifies conviction, it is better to draw up a charge and dispose of a case finally.)]

3. ('06) 3 Cr. L. J. 345 (346) : 1906 Pun Re No. 2 Cr, p. 6, *Mul Chand v. Emperor*. ('30) AIR 1930 Lah 543(544):32 Cr.L.J. 302, *Mt. Mubarak Jan v. Mt. Rahat Jan*.

4. ('96) 1896 Rat 854 (854), *Queen-Empress v. Chanbasapa Madiapa*. ('26) AIR 1926 Nag 115(116) : 23 Nag L R 99 : 26 Cr.L.J. 1348, *Damodar v. Jujhar Singh*.

See also S. 256 Note 10 and S. 258 Note 3.

5. ('35) AIR 1935 Rang 292 (293) : 36 Cri L Jour 1293, *U Nyo Sein v. Emperor*. See also S. 439 Note 26.

Note 5

1. ('01) 3 Bom L R 675 (676), *King-Emperor v. Luis Mingel Fonccca*. (Initial charge under S. 500, Penal Code—Further charge under S. 352—Conviction under S. 352 only not bad.)

even in such cases.² The contrary view taken in the undermentioned cases cannot be supported.³ It has been seen in Notes under S. 241 that in a joint trial of two offences one of which is triable as a warrant-case and the other as a summons-case, the procedure prescribed in respect of the graver charge should be followed in regard to both the offences. Hence, in such a case the charge should be framed even in respect of the offence triable as a summons-case.⁴

The section does not restrict the power of the Magistrate to frame a charge to cases where the offence disclosed on the evidence is the same as the one mentioned in the complaint or police-report on which cognizance was taken. A Magistrate can and ought to frame a charge for the offence made out on the evidence though it may be different from the one alleged in the complaint or police-report provided that the other conditions mentioned in the section are present.⁵

As to the procedure to be followed where the offence disclosed is exclusively triable by a Court of Session or is one which in the opinion of the Magistrate ought to be tried by such Court, see S. 347 and Notes thereunder.

6. "Which, in his opinion could be adequately punished by him." — The section contemplates that a charge should be framed under it only when the offence is one for which, in the opinion of the Magistrate, he can award an *adequate punishment*. If, in his opinion, he cannot do so, he cannot frame a charge and try the case.¹ In such a case he must follow the procedure laid down in S. 346 or S. 347. It

2. ('21) AIR 1921 All 282 (283) : 22 Cri L Jour 146, *Ganga Saran v. Emperor*.
(27) AIR 1927 All 270 (270) : 28 Cri L Jour 227, *Govind v. Emperor*.
(87) 1887 Pun Re No. 17 Cr, p. 34 (35, 36), *Empress v. Ghulam Hussain*.
(33) AIR 1933 Sind 173 (174) : 34 Cri L Jour 1044, *Sajan v. Emperor*.
(09) 4 I.C. 1039 (1039):11 Cr.L.J. 154 (Mad), *Public Prosecutor v. Thawasalandi Thevan*.

3. ('31) AIR 1931 All 7 (7):53 All 206:32 Cr.L.J. 313, *Ambica Prasad v. Emperor*.
(31) 1931 Mad W N 1319 (1319, 1320), *Patani Goundan v. Emperor*.

4. ('04) 3 Cri L Jour 350 (350) : 3 Low Bur Rul 113, *Emperor v. Maung Gale*.
(15) AIR 1915 Mad 1200(1200):16 Cr.L.J. 540 (540):39 Mad 503, *In re Sobhanadri*.
(02) 29 Cal 481 (482) : 6 Cal W N 599, *Hossein Sardar v. Kalu Sardar*.

(18) AIR 1918 Pat 628 (630) : 19 Cri L Jour 202, *Bhow Nath Singh v. Emperor*.
(Charge under S. 379, Penal Code and under S. 24 of the Cattle Trespass Act.)

See also S. 221 Note 7.

5. (1900-02) 1 Low Bur Rul 286 (287), *Mokun Maistry v. Valoo Maistry*.

(08) 11 C P L R Cr 9 (10), *Local Government v. Sukha Musalman*.

(29) AIR 1929 Lah 838 (839) : 30 Cri L Jour 957, *Mangal Sein v. Emperor*.

(68) 5 Bom H C R Cr 100 (102), *Reg v. Dhondur*.

(67) 8 Suth W R Cr 82 (83), *Degumber Paul v. Kally Doss*.

(95) 1895 Pun Re No. 23 Cr, p. 63 (65, 66), *Piran Ditta v. Queen-Empress*.

(25) AIR 1925 Lah 631 (632):6 Lah 375:27 Cr.L.J. 769, *Mt. Naurati v. Emperor*.

(24) AIR 1924 Lah 718 (718) : 26 Cri L Jour 420, *Gokal v. Phuman Singh*. (If a Magistrate finds that a girl is over sixteen years and was enticed away, he should find out if some other cognate offence could have been charged and should not throw out the case because girl is not minor.)

See also S. 210 Note 6.

Note 6

1. ('92) 16 Bom 580 (584, 585):1892 Rat 577, *Queen-Empress v. Abdul Rahiman*.

(90) 1890 Rat 499 (499), *Queen-Empress v. Fakira*.

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Notes 6-7

has, however, been held in the undermentioned Burma cases² that the provisions of this section are subject to those of S. 349 and that under that section it is competent to a Magistrate of the second or third class to frame a charge against the accused in a case which he has jurisdiction to try even though at the time of framing the charge he is of the opinion that he cannot award adequate punishment for the offence and intends, if the accused is proved to be guilty, to submit the proceedings under that section to the District or sub-divisional Magistrate to pass sentence.

As to whether this section precludes the Magistrate from committing a case to the Court of Session when he is not of the opinion that he cannot adequately punish the offence, see Notes under S. 347.

7. Magistrate shall frame a charge.— Unlike in summons-cases (see S. 242), in warrant-cases it is obligatory on the Magistrate to draw up a formal charge¹ in every case where he holds that a *prima facie* case has been made out by the prosecution and the other conditions laid down in the section are fulfilled. The duty is cast on the Magistrate to frame a charge and he must be careful to see that the charge, while it alleges all that is necessary to constitute the offence charged, does not contain any unnecessary allegation. Further, the charge ought not to allege positively anything of which the allegation in a positive form is not justified by the materials before the Court. The prosecution is entitled to insist that the charge be so framed by the Court as not to cast on it any unnecessary burden.² In framing a charge the Magistrate must be solely guided by the offence disclosed on the evidence and should not be influenced by any other considerations.³ As to the consequences of a failure to frame a formal charge, see S. 535 and Notes thereunder.

Where in a joint trial of several accused charged with several offences, the Magistrate after taking the prosecution evidence considers that a *prima facie* case has been made out against all the accused but is faced with the difficulty that misjoinder of charges would result if charges are framed against all the accused, he can in the exercise of

(‘29) AIR 1929 Bom 313 (319): 53 Bom 611: 30 Cr.L.J. 1090, *Krishnaji Prabhakar v. Emperor*. (A Magistrate’s discretion on the question of adequacy of punishment is subject to examination by the High Court in revision.)

(‘97) 24 Cal 429 (431, 432): 1 C W N 414, *Empress v. Kayemullah Mandal*.

2. (‘16) AIR 1916 Low Bur 65 (66): 17 Cr.L.J. 201, *Emperor v. Po Yin*.

(‘04) 1 Cr.L.J. 1010 (1015): 2 Low Bur Rul 285: 10 Bur L R 306 (FB), *Emperor v. Hla Gyi*.

(‘05) 2 Cri L Jour 464 (465): 1905 Upp Bur Rul 33, *Emperor v. Nga Po Si*.

See also S. 349 Note 9.

Note 7

1. (‘38) AIR 1938 Cal 205 (205): 39 Cr. L. J. 438, *Sufal Golai v. Emperor*.

(‘26) AIR 1926 Cal 537 (538): 27 Cri L Jour 406, *Mahomed Rafique v. Emperor*. (Case under S. 46, Bengal Excise Act V of 1909.)

(‘32) AIR 1932 Cal 865 (865): 33 Cr. L. J. 828, *Raghubir Kahar v. Emperor*. (S. 254 is mandatory and is applicable even to Presidency Magistrates.)

(‘92-96) 1 Upp Bur Rul 37 (37), *Empress v. Nga Po Ku*.

2. (‘89) 1889 Pun Re No. 26 Cr, p. 85 (89, 90) (FB), *Sant Singh v. Empress*.

3. (‘01) 1901 Pun Re No. 5 Cr, p. 11, (16): 1901 P L R No. 51, *Mukerji v. Empress*. See also S. 210 Note 6.

his inherent powers order a *de novo* trial with regard to some of the accused.⁴

**Section 255-
Notes 7-9**

As to the procedure to be followed where the offence disclosed is exclusively triable by the Court of Session or for other reason the Magistrate considers the case to be a fit one for commitment to the Court of Session, see S. 347 and Notes thereunder.

As to whether a charge need be drawn up in a warrant-case tried summarily, see Ss. 263 and 264 and Notes thereunder.

As to the power of the Magistrate to discharge the accused where the complainant fails to appear on the date of hearing, see S. 259 and Notes thereunder.

8. Charge — What it should contain. — See Sections 221 to 223.

9. Effect of the framing of the charge. — As to whether the fact that a charge is framed in respect of a less serious offence amounts to a discharge of the accused in respect of a more serious offence alleged against the accused, see Note 4 under S. 253.

255.* (1) The charge shall then be read
Plea. and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

Section 255-

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

Synopsis

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| 1. Legislative changes. | 7. Admission by pleader. |
| 2. Applicability of the section to security cases. | 8. Plea of guilty by one of several co-accused — Effect of such admission. |
| 3. "Read and explained." | 9. Shall be recorded. |
| 4. "Shall be asked." | 10. "May in his discretion convict." |
| 5. Plea of guilty, what is. | 11. Effect of non-compliance with the section. |
| 6. Plea of guilty — Value to be attached to. | |

Other Topics (miscellaneous)

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|---|---|
| Admission of facts but not of offence. See Note 10. | Conviction without evidence or charge on admission. See Note 4. |
| Aggravating circumstances to be explained to accused. See Note 3. | Effect of plea for S. 30, Evidence Act. See Note 8. |
| Confession to be taken as a whole. See Note 9. | Plea of guilty by pleader of accused. See Note 7. |

1. Legislative changes. — The words "and explained" were first inserted in S. 217 of the Code of 1872.

2. Applicability of the section to security cases. — This section applies also to an inquiry under S. 117 where security proceedings are taken for good behaviour, except in so far as the framing of a

* 1882 : S. 255; 1872 : Ss. 217, 324; 1861 : S. 251.

4. (1938) AIR 1938 Cal 258 (261) : ILR (1938) 1 Cal 588 : 39 Cr. L. J. 596, *Akhil Bandhu v. Emperor*.

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Notes 2-5

charge and the reading of the same to the accused is concerned. In such an inquiry, therefore, the Magistrate may ask the accused if he pleads guilty.¹

3. "Read and explained." — The charge must be read and explained by the *Magistrate* himself and not by his clerk or *Amlah*.¹ The accused is entitled to know with certainty and accuracy the charge brought against him.² It should, therefore, be so *explained* as to make the accused clearly understand the nature of the charge.³

The aggravating circumstances of the offence, if any, must also be made known to the accused.⁴

4. "Shall be asked." — The accused cannot be called upon to plead until a charge is framed upon the evidence recorded and the charge has been read and explained to him.

Where a Magistrate convicts the accused on his own admission without recording evidence and without framing a charge, the conviction is liable to be set aside.¹

5. Plea of guilty, what is. — A plea of guilty is an admission of all the facts on which the charge is founded, as well as an admission of guilt in respect of them.¹ A plea of guilty in a Criminal Court can only be made in response to a charge and an informal admission as to guilt does not amount to a formal plea of guilty and such an admission has not in fact or law, the same binding effect as a plea of guilty.²

Section 255 — Note 2

1. ('27) AIR 1927 All 660 (661, 662) : 50 All 71 : 28 Cr. L. J. 792, *Tirlok v. Emperor*.
[See also ('28) AIR 1928 All 270 (271, 272) : 30 Cr. L. J. 6 : 50 All 599, *Emperor v. Kishan Narain*. (S. 107, Cr. P. C.)]

Note 3

1. ('71) 16 Suth W R Cr 43 (43), *Queen v. Jehangeer Buksh Khan*. (This was, however, a summons-case.)
2. ('16) AIR 1916 Cal 188 (192) : 16 Cri L Jour 497 (501) : 42 Cal 957, *Amritalal v. Emperor*. (Defective charge under S. 4 (b), Explosive Substances Act, 1908.)
3. ('23) AIR 1923 Rang 141 (142) : 24 Cri L Jour 871, *Ah Lin v. Emperor*. (S. 12, Burma Gambling Act.)
[See also ('93-1900) 1893-1900 Low Bur Rul 328 (328), *Nga Nge v. Empress*.]
See also S. 221 Note 1, S. 223 Note 1, S. 286 Note 4 and S. 535 Note 3.
4. ('80) 5 Cal 826 (827), *Empress v. Vaimbilce*. (Charge of murder not fully explained to the accused through the interpreter.)
5. ('23) AIR 1923 All 285 (286) : 25 Cr. L. J. 592, *Jodha Singh v. Emperor*.
See also S. 271 Note 4.
6. ('71) 1871 Rat 55 (56), *Reg. v. Mukta Manka*.

Note 4

1. ('06) 4 Cri L Jour 231 (231) : 29 Mad 372, *Emperor v. Chinna Payan*.
[See also ('21) AIR 1921 All 282 (283) : 22 Cr. L. J. 146, *Ganga Saran v. Emperor*.]

Note 5

1. ('06) 4 Cri L Jour 471 (475) : 3 Low Bur Rul 208 (FB), *Abbas Ali v. Emperor*.
('25) AIR 1925 Lah 153 (154, 155) : 25 Cr. L. J. 707, *Emperor v. Ghulam Raza*.
(When the accused admitted that he obstructed the road under mistake without admitting that danger or injury was caused to any person, he cannot be convicted under S. 283, Penal Code.)
[See also ('35) AIR 1935 Cal 681 (682) : 37 Cr. L. J. 69, *Hemchandra Chongdar v. Emperor*. (Held that the so-called plea of guilty in the case was not a plea of guilty but an assertion of innocence.)]
2. ('36) AIR 1936 Cal 292 (293) : 37 Cr. L. J. 818, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Jiban Kumar*. (Informal admission of guilt in proceedings under S. 110, and in similar proceedings does not amount to formal plea of guilty.)

Where the accused pleads guilty to a particular offence, he cannot be convicted for a different offence.³ The plea of guilty with qualifications does not amount to a plea of guilty to the charge.⁴ A plea of guilty refers not to any *section* of the criminal statute but to acts alleged against the accused.⁵

See also S. 271 Note 7.

6. Plea of guilty — Value to be attached to. — A plea of guilty, no less than a confession, must be received with caution.¹ Where the accused belongs to a class of people ignorant of the most elementary principles of law, it is extremely dangerous to admit a plea of guilty without the closest scrutiny of the meaning of the acknowledgment.²

7. Admission by pleader. — A plea of guilty must ordinarily be made by the accused himself and not by his pleader¹ except where the accused is permitted under S. 205 to appear by his pleader.² See also S. 271 Note 10 and S. 340 Note 9.

A plea of self-defence is not inconsistent with a plea of not guilty

3. ('70) 13 Suth W R Cr 55 (56) : 4 Beng L R App 101, *Queen v. Gobardhan Bhuyan*. (Plea of guilty to a charge of murder—Conviction for culpable homicide not amounting to murder — Conviction set aside.)
4. ('20) AIR 1920 Cal 522(523, 524):21 Cr.L.J. 547, *Emperor v. Akub Ali Mazumdar*. ('69) 11 Suth W R Cr 6(6) *Queen v. Jaipal Koirce*. (Grievous hurt—Plea of anger.) ('20) AIR 1920 All 203 (204) : 21 Cri L Jour 665, *Banwari Lal v. Emperor*. (Admitted travelling without railway ticket, but pleaded no time to purchase one.) ('97) 19 All 119 (120) : 1896 All W N 192, *Empress v. Bhadu*. (Offence punishable under S. 302 — Plea was "I killed my wife; she abused and called me 'ware' — Held that it was not an unqualified plea.) ('91) 1891 Rat 532 (532, 533), *Queen-Empress v. Lakshman*. (Accused admits killing — Pleaded provocation on suspicion of infidelity of his wife.) ('94) 1894 Rat 698 (698), *Empress v. Mhatarya*. (Plea of guilty — But added he committed the homicide when he was subject to epileptic fits.) ('76) 25 Suth W R Cr 23 (23, 24), *Queen v. Sonavullah*. (Plea that "struck wife but did not intend to kill" is one of not guilty.) ('15) AIR 1915 Cal 153 (153) : 15 Cri L Jour 703, *Gaya Roy v. Emperor*. (Mere admission of possessing four annas in contravention of S. 13, Police Act, 1866, is not sufficient if off duty is pleaded.) ('30) AIR 1930 Bom 176 (176) : 31 Cri L Jour 926, *Emperor v. Mahadeo Govind*. ('19) AIR 1919 Bom 160 (160):43 Bom 842:20 Cr. L. J. 681, *Murarji Raghunath v. Emperor*. (Admitted facts did not disclose deceit, a necessary element of the charge — Conviction set aside.) [See also ('28) AIR 1928 Lah 827(828):29 Cr.L.J. 645, *Mt. Darkan v. Emperor*.]
5. ('26) AIR 1926 Lah 406(406): 7 Lah 359: 27 Cr.L.J. 907, *Basant v. Emperor*. ('32) AIR 1932 Lah 363 (364) : 33 Cri L Jour 646, *Bahadur Singh v. Emperor*. (S. 16, Motor Vehicles Act, 1914.)

Note 6

1. ('66) 1866 Pun Re No. 47 Cr, p. 55 (56), *Crown v. Zoolfoo*.
- ('35) AIR 1935 Rang 49 (51) : 12 Rang 616 : 36 Cri L Jour 336, *Nga Ywa v. Emperor*. (Court should carefully consider if the accused understood the nature of the charge to which he pleaded guilty.)
2. ('97-01) 1 Upp Bur Rul 72 (72), *Mi Nyein v. Queen-Empress*.

Note 7

1. ('71) 15 Suth W R Cr 42 (42), *Queen v. Roopa Gowalla*. ('04) 1 Cr. L. J. 939 (939) : 6 Bom L R 861, *Emperor v. Sursingh Mathuradas*. [See ('25) AIR 1925 Oudh 305 (306) : 26 Cr.L.J. 179, *Municipal Board, Lucknow v. Messrs. Tuls Ram & Sons*. (Case relating to offence triable as summons-case.)
2. ('13) 14 Cr. L. J. 272 (272) : 19 Ind Cas 544 : 6 Sind L R 206, *Emperor v. Mt. Jamal Katun*. ('26) AIR 1926 Bom 218 (221) : 50 Bom 250 : 27 Cri L Jour 440, *Dorab Shah v. Emperor*. (Summons-case.)

Section 255
Notes 7-9

and consequently where the accused pleads not guilty and in the course of the argument his pleader advances the plea of self-defence, it is the duty of the Court to admit the plea and say upon the facts of the case what offence, if any, has been committed.³ In the undermentioned case⁴ it was held that, though the Court could not at the *trial* convict an accused merely upon the admission of his pleader, yet, in an appeal, the Appellate Court could act upon an admission of fact made in the appeal by his pleader, especially where it does not cause prejudice to the accused.

8. Plea of guilty by one of several co-accused — Effect of such admission. — A plea of guilty by one of several co-accused may be taken into consideration against the other accused only where the latter are “tried jointly” with the former within the meaning of section 30 of the Evidence Act. In a warrant-case, it is only after the prosecution evidence is over that a charge is framed and the accused pleads guilty. In such a case, all the accused may be said to be tried jointly and the plea of one accused may be considered against the others also.¹ The case is, however, different in the sessions trial where the accused’s plea of guilty is recorded at the *outset* of the trial. A prisoner who then pleads guilty and is convicted on his plea cannot be held to be “tried jointly” with the others against whom the case proceeds under S. 272.² Where some of the accused jointly tried plead guilty and are convicted and sentenced on their plea, they can be examined as witnesses against the other accused and it is not for the latter to object that the plea of guilty of the former should not have been accepted.³

See also section 271 Note 15.

9. Shall be recorded. — The proceedings must show that the plea of the accused has been *recorded*. A conviction based upon a plea not so recorded is bad.¹

A plea of guilty must be so recorded as to avoid any misapprehension or mistake. As far as possible the very words used by the accused must be employed. Where there is an exculpatory statement before the charge, the exact words of a plea of guilty should be recorded by question and answer.² The *whole* and not *part* of the prisoner’s statement accompanying the plea should be recorded.³ Where the plea

3. ('36) AIR 1936 Rang 1 (2) : 37 Cri L Jour 293, *Nga Ba Sein v. Emperor*. ('96-97) 1 Cal W N 545 (547), *Pasupat Gope v. Ram Bhajan Ojha*.

4. ('28) AIR 1928 Bom 241 (242, 243); 52 Bom 686; 29 Cr L J 990, *Bansilal v. Emperor*.

Note 8

1. ('14) AIR 1914 Mad 45 (46) : 38 Mad 302 : 15 Cr. L. J. 13, *In re Bali Reddy*. (22 Mad 491, dissented from.)

2. [See ('14) AIR 1914 Mad 45 (46) : 38 Mad 302 : 15 Cr. L. J. 13, *In re Bali Reddy*.]

3. ('35) AIR 1935 Cal 580 (585) : 36 Cri L Jour 1322 (SB), *Pran Krishna Chakravarty v. Emperor*.

Note 9

1. ('04-05) 9 Cal W N lxxvi (lxxvi), *Shib Chandra Roy v. Nanda Rani Dasi*.

2. ('03) 5 Bom L R 999 (1000), *Emperor v. Abdul Hoosein Shamsuddin*.

[See also ('90) 1890 Pun Re No. 2 Cr, p. 3 (5), *Shib Ram v. Simla Municipality*.]

3. ('20) AIR 1920 Cal 522 (523) : 21 Cr. L. J. 547, *Emperor v. Akub Ali*. (Plea of guilty cannot be dissociated from the statement that accompanied it.)

[See also ('32) 33 Cr. L. J. 570 (571) : 138 I. C. 217, *Faqir Muhammad v. Emperor*.]

of the accused is interpreted to the Court, the language in which the plea should be recorded is the language in which it is conveyed to the Court by the interpreter.⁴

Section 255.
Notes 9-11

10. "May in his discretion convict." — Under this section, the Magistrate *may* convict the accused on his plea of guilty without calling upon him to enter upon his defence. But he is not *bound* to do so.¹ In an ordinary criminal case, however, (to which possibly a charge of murder is the only exception) the Court should, as a general rule, accept the plea of guilty and act upon it. It would be a waste of public time to hold an elaborate inquiry in such cases.² But the plea of guilty must be clear and unambiguous and embrace all the elements of the offence charged. Where the accused admits some or all the facts alleged by the prosecution but pleads 'not guilty,' the proper course for the Court is to proceed with the trial.³

Where the offence is not proved upon the evidence, the accused cannot be convicted, even though he does not deny the offence.⁴

11. Effect of non-compliance with the section. — The record must show that the procedure laid down in the section was followed. Where the record does not show that the charge was read and explained to the prisoner¹ or that the accused was asked to plead,² the conviction is liable to be set aside on the ground of prejudice to the accused.

255A. In a case where a previous conviction is charged under the provisions of section 221, sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under section 255, sub-section (2), or section 258, take evidence in respect of the alleged previous conviction, and shall record a finding thereon.

Section 255A

Procedure in case of previous convictions.

4. ('80) 5 Cal 826 (829), *Vaimbilce v. Empress*.

Note 10

1. ('07) 5 Cri L Jour 416 (416) : 3 Low Bur Rul 279, *Emperor v. Taw Pyu*.
(1933) AIR 1933 Oudh 86 (89) : 8 Luck 286 : 34 Cr. L. J. 124, *Kunwar Sen v. Emperor*.
(1921) AIR 1921 Cal 260 (260) : 22 Cr. L. J. 574, *Emperor v. Rash Behari Ghose*.
(1915) AIR 1915 All 221 (224) : 37 All 247 : 16 Cri L Jour 327, *Emperor v. Dip Narain*. (Plea of guilty by one co-accused not accepted.)
2. ('78) 3 Cal 756 (756) : 2 Cal L R 317, *In the matter of Chumman Shah*.
(1928) AIR 1928 All 270 (270) : 50 All 599 : 30 Cri L Jour 6, *Emperor v. Kishan Narain*. (Per Walsh, J.)
- (1934) AIR 1934 Lah 89 (90) : 35 Cri L Jour 1453, *Martin, Private, Surrey Regiment, Lahore v. Emperor*. (Conviction can be sustained solely on confession—But Court expects some corroboration as act of prudence.)
3. ('07) 6 Cr. L. J. 424 (425) : 9 Bom L R 1346, *Emperor v. Somabhai Nathabhai*.
4. ('33) AIR 1933 All 612 (613, 614) : 55 All 857 : 34 Cr. L. J. 1053, *R.N. Basu v. Emperor*.

Note 11

1. ('81) 7 Cal 96 (97) : 8 Cal L R 471, *Empress v. Gopal Dhanuk*.
(186) 9 Mad 61 (63) : 2 Weir 337, *Aiyavu v. Queen-Empress*. (Charge not explained.)
See also S. 271 Note 4.
2. ('15) AIR 1915 Bom 14 (15) : 16 Cr. L. J. 538, *Dosabhai J. Dhondi v. Emperor*. (Other irregularities also.)

Section 255A
Notes 1-4

1. Scope of the section. — This section is new and was introduced into the Code by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923. It provides that evidence of a previous conviction for the purpose of affecting the punishment to be awarded can be taken only *after* the Magistrate has convicted the accused.¹ It gives effect to the undermentioned decisions² which held that it was illegal to take such evidence *before* the conviction. The undermentioned decision³ which took a contrary view is now obsolete.

2. Admission of previous conviction by accused. — The mere admission by the accused that he had been in jail once, is *not* sufficient to show that he pleaded guilty to a previous conviction for an offence rendering him liable to enhanced punishment.¹

3. May, after conviction. — See Note 1.

4. Evidence of previous conviction. — Whenever it is required to prove a previous conviction against an accused for the purpose of enhancement of punishment, such previous conviction must be proved strictly and in accordance with law.¹ The accused must also be called upon to *plead* to the charge of previous conviction.² See also Ss. 311 and 511 and Notes thereunder.

Section 256

256.* (1) If the accused refuses to plead, or
Defence. does not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons

* Code of 1882 : S. 256.

256. If the accused refuses to plead or does not plead, or claims to be tried, he shall be called upon to enter upon his defence and to produce his
Defence. evidence, and shall, at any time while he is making his defence, be allowed to recall and cross-examine any witness for the prosecution present in the Court or its precincts.

If the accused puts in any written statement, the Magistrate shall file it with the record.

Section 255A — Note 1

1. ('37) AIR 1937 Pat 131 (132) : 38 Cr.L.J. 484, *Ishar Singh v. Shama Dusadh*. (This procedure, though not prescribed for Magisterial trials prior to 1923, has been deliberately laid after the amendment of 1923 and has to be followed by the Courts, notwithstanding the inconvenience or difficulty in following it.)

2. ('03) 5 Bom L R 1034 (1035), *Emperor v. Itur Ped Duming*.

('92-96) 1 Upp Bur Rul 82 (82), *Queen-Empress v. Nga Yan Gon*.

[See also ('05-06) 10 Cal W N exev (exev), *Golan Hossein v. Emperor*.]

3. ('23) AIR 1923 Cal 707 (707) : 50 Cal 367 : 25 Cr.L.J. 527, *Delhi Sonar v. Emperor*.

Note 2

1. ('02) 4 Bom L R 177 (177), *King-Emperor v. Govind Sakharan*.

Note 4

1. ('16) AIR 1916 Cal 344 (345) : 17 Cr.L.J. 185 (186) : 43 Cal 1123, *Emperor v. Sh. Abdul*. (Presidency Magistrates must also take strict proof of previous convictions.)

('17) AIR 1917 Mad 186 (187) : 17 Cr.L.J. 179 (180), *In re Turimella Kurmanna*.

('81) 2 Weir 266 (266), *In re Yippaka Daligadu*.

2. ('02) 4 Bom L R 177 (177), *King-Emperor v. Govind Sakharan*.

('32) AIR 1932 Sind 107 (111) : 33 Cri L Jour 902, *Jethmal v. Emperor*.

[See also ('30) AIR 1930 Sind 58 (59) : 31 Cri L Jour 763, *Murido v. Emperor*. (Previous security proceedings against accused taken into consideration in awarding punishment, without questioning accused—Procedure held improper.)]

to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

Section 256

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

Synopsis

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|---|--|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and applicability of the section. 3. "Refuses to plead, or does not plead, or claims to be tried." 4. The accused shall be required to state. 5. "At the commencement of the next hearing" 6. Right of accused to cross-examine the prosecution witnesses. 7. Waiver of the right under this section. 8. Recall and discharge of the witnesses. | <ol style="list-style-type: none"> 9. Examination of the remaining witnesses. 9a. Production of documents by prosecution during cross-examination of prosecution witnesses. 10. The accused shall then be called upon to enter on his defence and produce his evidence. 11. Expenses of witnesses. See Notes to S. 554. 12. Written statement of accused. 13. Effect of non-compliance with this section. See Note 20 to S. 537. |
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Other Topics (miscellaneous)

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| <p>Accused unrepresented. See Note 5.</p> <p>Adjournment for accused's evidence. See Note 10.</p> <p>Adjournment for cross-examination. See Notes 5 and 6.</p> <p>Adjournment for prosecution witnesses. See Note 9.</p> <p>Commencement of trial. See Note 3.</p> <p>Cross-examination after defence evidence. See Note 7.</p> <p>Defence by cross-examination. See Note 10.</p> <p>Fresh prosecution witnesses. See Note 9.</p> | <p>Inapplicability to disciplinary jurisdiction under Letters Patent. See Note 12.</p> <p>Joint trial of summons and warrant cases. See Note 2.</p> <p>Reservation of cross-examination. See Note 2.</p> <p>Several accused — Right of each. See Note 6.</p> <p>Summary cases — Further cross-examination. See Note 2.</p> <p>Waiver by accused's counsel. See Note 7.</p> <p>Warrant-case — Subsequent conversion into summons-case. See Note 2.</p> <p>Written statement and examination of accused. See Note 12.</p> |
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Code of 1872 : S. 218.

218. If the accused person have any defence to make to the charge he shall be called upon to enter upon the same and to produce his witnesses
Defence. if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution.

If the accused person puts in any written statement, the Magistrate may file it with the record, but shall not be bound to do so.

Code of 1861 : S. 252—Same as the first para. only of S. 218 of 1872 Code.

Section 256
Notes 1-2

1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

In 1872 a sub-clause was added by which the accused's written statement, if any, might be received and filed with the record.

Differences between the Codes of 1872 and 1882 —

- (1) Instead of the clause "if the accused person to enter upon the same" the clause "if the accused refuses to plead to enter upon his defence" was inserted. The decision bearing on the interpretation of the former expression¹ is only of academic interest now.
- (2) For the words "to produce his witnesses if in attendance"² the words "to produce his evidence" were substituted in 1882.
- (3) The clause "and shall, *at any time while he is making his defence*, be allowed to recall and cross-examine the witnesses for the prosecution, *present in Court or its precincts*" was substituted for the clause "and shall be allowed to recall and cross-examine the witnesses for the prosecution" occurring in the Code of 1872.
- (4) In the clause regarding the filing of the written statement of the accused the word "shall" was substituted for the word "may" and the words "but shall not be bound to do so" were omitted.

Differences between the Codes of 1882 and 1898 —

In the 1898 Code after the words "if the accused refuses to plead, or does not plead, or claims to be tried" the words "he shall be required to state they shall also be discharged" were added. At the same time, the provision in the Code of 1882 by which the accused was given the right to "recall and cross-examine prosecution witnesses at any time while making his defence" was repealed and it was provided that the accused should be called upon to enter upon his defence *after* the examination, cross-examination, and re-examination of the prosecution witnesses.

Changes made by Act XVIII of 1923 —

After the words "he shall be required to state" the words "at the commencement of the next hearing of the case forthwith" were added thereby requiring the Magistrate to ask the accused if he wished to cross-examine the prosecution witnesses already examined, not on the day on which a charge is framed, but at the next hearing only, unless for reasons to be recorded in writing the Magistrate thinks fit to put the question on the same day as he frames the charge.

2. Scope and applicability of the section. — Section 255 provides that when the accused pleads guilty in a warrant-case the Magistrate may convict him upon such plea. This section provides for the procedure to be followed when the accused does not plead guilty. It provides *inter alia* that the accused should be asked to state

Section 256 — Note 1

1. ('73) 19 Suth W R Cr 53 (53, 54), *Belilios v. Queen*.
2. ('69) 11 Suth W R Cr 15 (15), *Queen v. Totaram*. (Witnesses not in attendance—Failure to ask accused to produce evidence not a flaw.)

Section 256
Note 2

whether he wishes to cross-examine any of the prosecution witnesses whose evidence has been taken and if he so wishes, the witnesses named by him should be recalled and he should be allowed to cross-examine them. It has been seen in the Notes under S. 252 that in warrant-cases the accused can be allowed to cross-examine the prosecution witnesses even before the charge is framed. The present section confers on the accused an opportunity of cross-examining the prosecution witnesses a *second time* after the charge is framed. The reason for this provision is that in warrant-cases the accused is in a position to know the exact case he has to meet only after the charge is framed.¹ As to whether the accused is entitled *as of right* to cross-examine the prosecution witnesses before the charge is framed, see Notes under S. 252.

A second opportunity to cross-examine prosecution witnesses is vouchsafed to the accused only in warrant-cases. The accused has no such right in summons cases. But where a case is commenced as a warrant-case but subsequently it appears that only an offence triable as a summons-case has been committed, it is not open to the Magistrate to suddenly revert to the procedure of summons-cases and he is bound to allow the accused further opportunity of cross-examining the prosecution witnesses if he desires for it.² (See Notes under S. 251.) Similarly, as has been seen in the Notes under S. 241, where a summons-case and a warrant-case are tried together, the procedure prescribed for warrant-cases should be followed. In such a case also if the Magistrate finds that the charge in respect of the warrant-case is unsustainable and decides to proceed with the other offence alone, it is not open to him to deny to the accused the opportunity of further cross-examination of the prosecution witnesses provided for by this section.³

Section 262 provides that in warrant-cases tried summarily the procedure prescribed for the trial of warrant-cases should be followed. Section 263 provides that in summary trials, in cases in which no appeal lies, a formal charge need not be drawn up. The question has arisen whether this section (S. 256) applies to warrant-cases tried summarily in which a charge is not framed. On this question there is a conflict of decisions. On the one hand it has been held by the High

Note 2

1. ('74) 6 N W P H C R 284 (287), *Queen v. Lall Mahomed*.
(16) AIR 1916 Lah 295 (296) : 17 Cr.L.J. 84 (85) : 1916 Pun Re No. 1 Cr, *Ahmad Baksh v. Emperor*.
(14) AIR 1914 Lah 556 (557) : 1914 Pun Re-No. 11 Cr : 16 Cr.L.J. 146, *Moola v. Emperor*.
(33) AIR 1933 Rang 29 (29, 30) : 34 Cri L Jour 468, *Zamin v. Emperor*.
[See also ('79) 2 All 253 (258), *Empress of India v. Baldeo*.]
2. ('16) AIR 1916 Mad 610 (610) : 16 Cr.L.J. 250 (251), *In re Appavu Padayachi*.
(28) AIR 1928 Lah 294 (295) : 29 Cri L Jour 235, *Devidhal v. Mt. Rattan Devi*.
(25) AIR 1925 Oudh 200 (200) : 25 Cri L Jour 1271, *Ram Ratan v. Ram Sagar*.
(21) 22 Cri L Jour 683 (684) : 63 Ind Cas 619 (Pat), *Mumshi Teli v. Emperor*.
See also S. 251 Note 4.
3. ('15) AIR 1915 Mad 1200 (1200) : 16 Cri L Jour 540 (540) : 39 Mad 503, *In re Sobhandari*. (Failure to follow S. 256 — Absence of prejudice must be proved by prosecution.)

Section 256
Notes 2-3

Courts of Calcutta,⁴ Madras,⁵ Nagpur⁶ and Patna⁷ and the Judicial Commissioner's Court of Sind⁸ relying on the general provisions of S. 262, that the section applies to such cases notwithstanding the absence of a formal charge. But, on the other hand, it has been held by the High Court of Bombay⁹ and the Chief Court of Oudh¹⁰ that the section does not apply to such cases as it only contemplates cases where a charge is framed.

As a general rule, the cross-examination of a witness should be made immediately after his examination-in-chief is over and the cross-examination cannot be reserved till the other witnesses have been examined unless the Court, in its discretion, permits the cross-examination to be reserved. This section provides an exception to this general rule because it entitles an accused person in a warrant-case to defer the cross-examination of the prosecution witnesses till the witnesses have been examined-in-chief and a charge is framed.¹¹

The section applies not only to cases where the charge is framed before the prosecution has completed its evidence, but also to cases where the charge is framed *after* all the prosecution witnesses have been examined-in-chief.¹²

As to the applicability of the section to proceedings for the taking of security for good behaviour, see S. 117 Note 4.

As to the applicability of the section to proceedings under S. 145, see Notes under that section.

As to whether the accused is entitled to cross-examine prosecution witnesses a second time after the charge is framed in preliminary inquiries before commitment to sessions, see S. 213 Note 7.

3. "Refuses to plead, or does not plead, or claims to be tried." — If the accused "refuses to plead, or does not plead, or claims to be tried," the procedure laid down in this section should be followed. The expression "claims to be tried" includes cases where the accused pleads not guilty. Where the accused denies the charge and pleads not guilty, he is entitled to be dealt with under this section

4. ('20) AIR 1920 Cal 769 (770): 22 Cri L Jour 271, *Nepal Bagdi v. Emperor*.
5. ('27) AIR 1927 Mad 78 (80): 50 Mad 740: 28 Cr. L. J. 12, *In re Raju Achari*. (Magistrate must record reasons for refusing to allow time to accused for saying if he wishes to cross-examine.)
6. ('39) AIR 1939 Nag 87 (88): 1 L R (1939) Nag 457: 40 Cr. L. J. 846, *Munna v. Emperor*.
7. ('20) AIR 1920 Pat 492 (493): 21 Cr. L. J. 630, *Tillu Sahu v. Emperor*. (Right to re-cross-examine.)
8. ('30) AIR 1930 Sind 146 (147): 24 Sind L R 336: 31 Cri L Jour 683, *Shidu v. Emperor*. (Accused is entitled to have further time for producing his evidence.)
9. ('26) AIR 1926 Bom 226 (226, 227): 27 Cr. L. J. 431, *Umaji Krishnaji v. Emperor*.
10. ('32) AIR 1932 Oudh 242 (243, 244): 7 Luck 699: 33 Cr. L. J. 506, *Gokaran v. Emperor*.
11. ('38) AIR 1938 Cal 205 (205): 39 Cr. L. J. 438, *Sufal Golai v. Emperor*. ('10) 11 Cr. L. J. 156(156): 4 Ind Cas 1043 (Mad), *In re Asadulla Hussain Khan*. [See also ('06) 3 Cr. L. J. 23 (25): 11 Bur L R 293: 3 Low Bur Rul 109, *Po Wa v. Emperor*.]
12. ('32) AIR 1932 Mad 559 (559): 33 Cr. L. J. 738, *Muthiah Pillai v. Emperor*. [But see ('25) AIR 1925 Nag 147 (151): 25 Cr. L. J. 1152, *Gangadhar v. Bhanghi Sa*. (Submitted not correct.)]

although he may admit all or any of the allegations of the prosecution.¹ The procedure provided in the section should be followed not only when the accused pleads not guilty or claims to be tried but also where he refuses to plead at all or does not plead.² The effect of this provision is that an accused is not bound to answer at all any question put to him and can, if he likes, decline to plead. Hence, by declining to plead he does not commit any offence under S. 179 of the Penal Code.³

Does the expression "claims to be tried" in this section show that in warrant-cases the "trial" does not begin till the charge is framed and the accused claims to be tried? For a discussion on this question, see Notes under S. 4 (1) (k).

4. The accused shall be required to state. — This provision, requiring the Magistrate to ask the accused if he wishes to cross-examine the prosecution witnesses examined before charge, was introduced for the first time in the Code of 1893. In two old decisions, one of the High Court of Calcutta decided in the year 1876¹ and the other of the High Court of Allahabad decided in 1874,² it was laid down that the Magistrate before discharging the prosecution witnesses should ask the accused if he required them for his further cross-examination. That was suggested only as a rule of convenience. Now, the Magistrate is bound to question the accused on that point; it has been made a statutory duty on the part of the Magistrate. It is of vital importance that the accused should in all cases be asked at the appropriate time if he wishes to cross-examine the prosecution witnesses.³ But as to whether such an omission is a material irregularity or not, see Note 20 to section 537.

The Code does not explicitly require the Magistrate to record the fact that he has observed the provisions of this section. But it is a safe and sound rule that when the law requires anything to be done, the fact that this has been done should be recorded.⁴ Hence, it is important that the record must show that the Magistrate has complied with the provisions of the section by questioning the accused in the manner laid down therein.⁵

Note 3

1. ('07) 6 Cr. L. J. 424 (425): 9 Bom L R 1346, *Emperor v. Somabhai Nathabhai*.
2. ('69) 1869 Rat 19 (19), *Reg. v. Sattya*. (Case under Code of 1861.)
3. ('24) AIR 1924 Mad 540 (540): 47 Mad 396: 25 Cr. L. J. 374, *In re Tirumala Reddy*.

Note 4

1. ('76) 25 Suth W R Cr 48 (49), *Queen v. Ramkishan Halwai*.
2. ('74) 6 N W P H C R 284 (288), *Queen v. Lall Mahomed*.
3. ('14) AIR 1914 Lah 556 (556, 557): 1914 Pun Re N. 11 Cr: 16 Cri L Jour 146, *Moola v. Emperor*. (Provisions of this section are imperative.)
4. (1900-02) 1 Low Bur Rul 238 (240), *Chit Tun v. Crown*.
5. ('37) AIR 1937 All 127 (128): 38 Cr. L. J. 361, *Har Kishan v. Emperor*. (A Magistrate is bound to record the question whether the accused desires to cross-examine witnesses and also the accused's answer thereto.)
6. ('11) 12 Cr. L. J. 89 (89): 9 Ind Cas 468 (LB), *Emperor v. Lamsa*.
7. ('01) 14 C P L R 137 (137), *Emperor v. Umrao Patel*.
8. [But see ('31) AIR 1931 Oudh 73 (74): 32 Cr. L. J. 330, *Sachchidanand v. Emperor*. (Accused having refused to make any answer to any question, High Court declined to presume that the Magistrate had not complied with section.)]

Section 256.
Notes 3-4

Section 256
Note 5

5. "At the commencement of the next hearing" — There was no provision in the section as it stood originally in the Code of 1898 as to the *particular time* at which the accused was to be asked to state whether he wishes to cross-examine any and, if so, which of the prosecution witnesses.¹ Under these circumstances, it was held in the undermentioned case^{1a} that the re-cross-examination of the prosecution witnesses must be made immediately after the charge was framed. Under the section as amended in 1923, it has been provided that the accused should be required to state at the next hearing whether he wished to cross-examine any witnesses unless the Magistrate, for reasons to be recorded by him, thinks fit to require him to do so immediately. The object of the provision is to give the accused sufficient time to consider whether he should cross-examine the prosecution witnesses.²

A Magistrate can adjourn the case to a later date solely for the purpose of asking the accused whether he wishes to cross-examine the prosecution witnesses; and, if he does so, it cannot be said that the proceedings on the adjourned date are not a 'hearing' merely because no other action is to be taken on that date.^{2a}

If the Magistrate requires the accused to state, on the same date on which the charge is framed, whether he wishes to cross-examine any of the prosecution witnesses, he should record his reasons for doing so.³ But it is not so much the recording of reasons as the adequacy thereof which should count in the determination of the question whether the provisions of the section have been complied with. If no good reasons are forthcoming, the mere fact that they have been recorded by the Magistrate in writing will not save the trial

Note 5

1. ('10) 11 Cri L Jour 128 (128) : 5 I. C. 408 : 37 Cal 236, *Inder Rai v. Emperor*.
- 1a. ('10) 12 Cri L Jour 471 (472) : 11 Ind Cas 1007 (All), *Mulua v. Sheoraj Singh*.
2. ('39) AIR 1939 All 238 (239) : 40 Cri L Jour 549, *Bhajja v. Emperor*.
- ('25) AIR 1925 Lah 339 (340) : 26 Cri L Jour 1158, *Phuman Singh v. Emperor*.
- ('27) AIR 1927 Mad 78 (79) : 50 Mad 740 : 28 Cri L Jour 12, *In re Raju Achari*.
- ('32) AIR 1932 Oudh 298 (300) : 34 Cr. L. J. 58 : 8 Luck 135, *Mohamed Hussain v. Fakhaullah Beg.*
- ('26) AIR 1926 Pat 214 (215) : 5 Pat 110 : 27 Cr. L. J. 499, *Ramchandra Modak v. Emperor*.
- 2a. ('39) AIR 1939 All 238 (239) : 40 Cr. L. J. 549, *Bhajja v. Emperor*. (Magistrate after framing charge explaining it to accused and adjourning case to a day for sole purpose of asking accused whether he desires further to cross-examine prosecution witnesses—Procedure held strictly complied with provisions of S. 256.)
3. ('39) AIR 1939 Pat 172 (173, 174) : 40 Cr. L. J. 419, *Nisar Ahmad v. Emperor*. (Failure to do so is irregularity and does not vitiate trial if accused is not prejudiced.)
- ('37) AIR 1937 All 127 (128) : 38 Cr. L. J. 361, *Har Kishan v. Emperor*. (Failure to record reasons is irregularity.)
- ('27) AIR 1927 All 217 (218) : 49 All 316 : 28 Cr. L. J. 229, *Chhajju v. Emperor*. (Failure to record reasons is mere irregularity.)
- ('29) AIR 1929 Bom 309 (310, 312) : 53 Bom 578 : 31 Cri L Jour 309, *Emperor v. Lakshman Ram Shet.*
- ('30) AIR 1930 Mad 977 (978) : 32 Cri L Jour 221, *Janardhanam v. Emperor*. (Whether reasons given are sufficient or not entirely depends upon circumstances of each case.)
- ('30) AIR 1930 Bom 241 (241) : 31 Cr. L. J. 743, *Vishram Narayan v. Emperor*. (Omission to record reasons is mere irregularity.)

from the taint of irregularity. As a general rule, sufficient time must be allowed to the accused to consider and decide whether he should cross-examine any of the prosecution witnesses and it is only in special cases that the Magistrate can require him to state forthwith if he wishes to do so.⁴

Section 256.
Note 5

Good, adequate and cogent reasons should be given for requiring the accused to state his intention on the same day.⁵ That it is the usual practice of the Magistrate to ask the accused to state his intention on the same day is not a sufficient reason.⁶ That the Magistrate had to go out for urgent work or that the prosecution witnesses had to leave the place of trial immediately is not a good reason for requiring the accused to state forthwith if he wishes to cross-examine any of the prosecution witnesses.⁷ But the fact that the prosecution witnesses come from a Native State and it would take a long time to secure their attendance again was held to be a sufficient reason.⁸ The convenience of the Magistrate and the witnesses alone should not be considered. In a Madras case,⁹ where the Magistrate required the accused to state his intention on the same day and recorded the reason "the accused is undefended," Pandalai, J., held that the reason was good and sufficient, and observed that the Magistrate might have considered that as the accused had not engaged a pleader, nor appeared desirous of doing so, it would simply be a waste of time to defer the question till the next hearing. But it is submitted that this reasoning is not sound as the fact that the accused is not represented by a lawyer is rather a reason for allowing him time for considering whether he should cross-examine any of the prosecution witnesses than for denying him such time.¹⁰

It has been held in the undermentioned case¹¹ that it would make no difference to the accused if the question is put to him on the date when the charge is framed and not on the next date when the witnesses for the prosecution are present and are in fact cross-examined.

As to the consequence of the failure to record reasons, see Note 20 to section 537.

Though under this section the accused is entitled to an adjournment to decide what witnesses, if any, he should cross-examine, it is open to his counsel to *waive* the right to such adjournment and where he does so, the failure to adjourn the case cannot be objected to later on.¹²

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4. ('30) AIR 1930 Nag 255 (257) : 31 Cri L Jour 705, *Girdhari v. Emperor*.
 5. ('30) AIR 1930 Nag 255 (257) : 31 Cri L Jour 705, *Girdhari v. Emperor*.
 6. ('29) AIR 1929 Bom 309 (310, 312) : 53 Bom 578 : 31 Cr. L. J. 309, *Emperor v. Lakshman Ram Shet.*
 7. ('30) AIR 1930 Nag 255 (258) : 31 Cri L Jour 705, *Girdhari v. Emperor*.
 8. ('26) AIR 1926 Lah 434 (434) : 27 Cri L Jour 720, *Kura v. Emperor*.
 9. ('30) AIR 1930 Mad 977 (978) : 32 Cri L Jour 221, *Janardhanam v. Emperor*.
 10. [See ('27) AIR 1927 Mad 78 (79) : 50 Mad 740 : 28 Cr. L. J. 12, *In re Raju Achari*.]
 11. ('36) AIR 1936 All 319 (320) : 37 Cri L Jour 710, *Hafiz Md. v. Emperor*.
 12. ('34) AIR 1934 Nag 209 (210) : 36 Cr. L. J. 41 : 31 Nag L R 117, *Ibrahim v. Emperor*.

Section 256
Note 6

6. Right of accused to cross-examine the prosecution witnesses. — In warrant-cases an accused has three opportunities to cross-examine the prosecution witnesses : (a) before the charge is framed under S. 252, (b) after charge under this section and (c) after the accused enters on his defence under S. 257.¹

As regards (a) it has been seen in the Notes under S. 252 that there is a conflict of decisions as to whether the accused is entitled as of *right* to cross-examine prosecution witnesses before the charge is framed. See Notes under S. 252.

But as regards the right of cross-examination granted under this section, it is an *absolute* right and the Magistrate has no power to disallow such cross-examination.² The accused is not bound to show that he has reasonable grounds for exercising his right under the section.^{2a} The fact that the witnesses have been already cross-examined by him before the charge does not deprive him of his right to cross-examine them again under this section.³ It has been held that even if the previous cross-examination was on the distinct understanding that the accused would not require the witnesses to be re-called for further cross-examination after the charge, he cannot be deprived of his rights under this section if he wishes to exercise them.⁴ If there are more

Note 6

1. ('20) AIR 1920 Mad 201 (203) : 43 Mad 411 : 21 Cr. L. J. 297, *W. H. Lockley v. Emperor*.
 - ('23) AIR 1923 Mad 609 (613) : 46 Mad 449 : 24 Cri L Jour 547 (FB). *Vearisai Rowther v. Emperor*.
 2. ('20) AIR 1920 Mad 201 (203) : 43 Mad 411 : 21 Cr. L. J. 297, *W. H. Lockley v. Emperor*.
 - ('24) AIR 1924 Nag 114 (114) : 25 Cri L Jour 912, *Radhakisan v. Rama Krishna*.
 - ('29) AIR 1929 Bom 309 (311):53 Bom 578:31 Cr.L.J. 309, *Emperor v. Lakshman*.
 - ('95) 1895 All W N 40 (41), *Empress v. Ram Charan Lal*.
 - [See also ('39) 1939 Nag L Jour 201 (201), *Emperor v. Nirpatsingh*. (Complainant refusing to pay process-fees for re-summoning witnesses for cross-examination by accused—Magistrate should not proceed to take defence evidence as accused would be deprived of his right of cross-examination — Complainant should be given another chance to pay process-fees.)
 - ('36) AIR 1936 Cal 356 (358) : 37 Cri L Jour 758 : ILR (1937) 1 Cal 711 (FB), *Harihar Sinha v. Emperor*. (Witness giving evidence against accused withdrawn from witness-box and made accused—No cross-examination—Conviction of accused should be set aside.)
 - ('09) 9 Cr. L. J. 146 (147):1 I. C. 54:32 Mad 218, *Palaniandi Goundan v. Emperor*.
 - ('10) 11 Cri L Jour 520 (520) : 7 I. C. 712 (Mad), *In re Krishnaswamy Udayan*.]
 - 2a. ('74) 21 Suth W R Cr 29 (30), *Queen v. Amiruddin Fakeer*.
 3. ('74) 6 N W P H C R 284 (287), *Queen v. Lall Mahomed*.
 - ('72) 17 Suth W R Cr 51 (52), *In re Thakoor Dayal Sen*.
 - ('76) 25 Suth W R Cr 32 (33), *In re Nobinchander Banerjee*.
 - (1900) 27 Cal 370 (371, 372) : 4 C W N 469, *Mt. Zamunia v. Ram Tahal*.
 - (1900) 2 Bom L R 542 (544), *Queen-Empress v. Nasarvanji Edalji*.
 - ('01) 14 C P L R 137 (137), *Emperor v. Umrao Patel*.
 - ('13) 14 Cri L Jour 388 (388) : 20 Ind Cas 212 (LB), *Nga Pya v. Emperor*.
 - [But see ('97) 1897 Rat 930(931), *Queen-Empress v. Govind*. (Submitted not good law.)
 - ('05) 2 All L Jour 202n (202n), *Sher Khan v. Emperor*. (Do.)]
 4. ('02) 6 Cal W N 424 (425), *Kokil Ghose v. Casimuddi Malita*. (Under circumstances of this case accused made to pay expenses.)
 - ('26) AIR 1926 Pat 214 (215) : 5 Pat 110 : 27 Cr. L. J. 499, *Ramchandra Modak v. Emperor*. (Cross-examination by accused's pleader before charge—Statement by him at that time that he did not any longer require the attendance of the prosecution witnesses, not sufficient to deprive accused of his right under this section.)
 - ('20) AIR 1920 Mad 201 (202):43 Mad 411:21 Cr.L.J. 297, *W. H. Lockley v. Emperor*.
- See also Note 7.

Section 256
Note 6

than one accused, each of them should be given an opportunity to cross-examine the witnesses.⁵ The accused should be given a full and reasonable opportunity to exercise his right under the section and he should be allowed sufficient time to engage a pleader to cross-examine the witnesses.^{5a}

This section does not prescribe the order in which the accused should cross-examine the prosecution witnesses. In these circumstances, under s. 135, Evidence Act, the matter is left to the discretion of the Magistrate and in a proper case he may allow the accused to cross-examine the witnesses in any order he chooses.⁶

Where a witness for the prosecution is examined on commission under the provisions of chapter XL of this Code, it is open to an accused person to refrain from putting in any interrogatories when the commission is first issued, and to apply, after the charge has been framed against him, for re-issue of the commission together with his cross-interrogatories for the purpose of the cross-examination of the witness.^{6a}

As to the point of time up to which the accused can exercise his right to have prosecution witnesses re-called for cross-examination under this section, see Note 7.

Below are given some decisions bearing on the extent to which cross-examination may be allowed.⁷

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5. ('07) 11 Cal W N exl (exl), *Lala Ram Thakur v. Emperor*.
 5a. ('25) AIR 1925 All 285 (286) : 47 All 147 : 26 Cr. L. J. 575, *Pita v. Emperor*.
 ('16) AIR 1916 Lah 445 (445) : 17 Cr. L. J. 278 (279), *Sher Singh v. Emperor*.
 ('11) 12 Cr. L. J. 548 (549) : 12 I. C. 524 (Mad), *Arumugam Pillai v. Emperor*.
 ('16) AIR 1916 Mad 933 (934) : 16 Cri L Jour 786, *Rangaswamy v. Emperor*.
 [See ('16) AIR 1916 Mad 142 (143) : 16 Cr. L. J. 334 (336), *In re Murugesu Naidu*.
 (Adjournment for obtaining copies of deposition of prosecution witnesses refused
 —Held accused was prejudiced and conviction cannot be supported.)
 ('20) AIR 1926 Pat 214 (215) : 5 Pat 110 : 27 Cr. L. J. 499, *Ramchandra Modak v. Emperor*.]
 See also S. 340 Note 4.
 6. ('33) AIR 1933 Cal 189 (190) : 34 Cr. L. J. 347, *Abdul Shakoor v. Emperor*.
 6a. ('34) AIR 1934 Cal 698 (698, 699) : 61 Cal 824 : 36 Cri L Jour 239, *Dombrain v. Someswar*.
 See also S. 505 Note 1.
 7. ('71) 15 Suth W R Cr 34 (35) : 6 Beng LR App 88, *Queen v. Ishan Dutt*. (Cross-examination need not be confined to matters mentioned in examination.)
 ('29) AIR 1929 Cal 1 (7) : 30 Cr. L. J. 494, *Bazlur Rahman v. Emperor*. (If the facts are already on record the skilful cross-examiner knows when not to make an unskilful use of cross-examination.)
 ('96) 1896 Rat 861 (863), *In re Janus Fitzgerald*. (Criminal Court has no right to tell the pleader to sit down in the middle of his cross-examination because he is asking irrelevant questions.)
 ('19) AIR 1919 Pat 565 (565) : 20 Cri L Jour 559, *Yusuf v. Bunilal Mandal*. (Advocate has a large discretion as to the mode of conducting the defence and the cross-examination and Court should avoid unnecessary interference with it.)
 ('19) AIR 1919 Pat 515 (516) : 20 Cri L Jour 566, *Mohomed Mian v. Emperor*. (Court has no discretion to forbid even scandalous or indecent questions if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.)
 ('11) 12 Cr. L. J. 277 (279) : 10 I. C. 917 (LB), *Mahomed Ally v. Emperor*. (The cross-examination is not limited to matters raised in evidence elsewhere.)
 ('14) AIR 1914 Lah 93 (95) : 15 Cri L Jour 148, *Lakha Singh v. Emperor*. (There is no hard and fast rule as to the right of a counsel to demand in cross-examination the repetition of the whole story told in examination-in-chief.)

Section 256
Note 7

7. Waiver of the right under this section.— Under the Codes of 1872 and 1861, there was a conflict of decisions as to whether the right to cross-examine was exercisable at any time. One set of cases¹ holding that the accused could claim the right at any time before the trial closed or after the close of the examination of his own witnesses, unless he had previously expressly abandoned it, and another set of cases² holding that the right should be exercised at the time when the charge framed was read and explained to the accused and that, if not exercised at that time, it could not afterwards be insisted on, though the Magistrate had a discretion to permit such cross-examination. But the Code of 1882 specifically laid down that the accused “shall, *at any time while he is making his defence*, be allowed to re-call and cross-examine any witness for the prosecution”

The present section has altered this procedure. It makes it quite clear that the accused is not entitled after he has entered upon his defence to insist upon re-calling and cross-examining any of the prosecution witnesses examined before the charge.³ If he does not exercise his right at the proper time and begins to adduce his own evidence, he will be deemed to have waived his right and cannot thereafter claim to exercise it.⁴ But as the right accrues only after the charge is framed, it cannot be deemed to be waived by a statement by the accused or his pleader before the charge that he would not require

(18) AIR 1918 Low Bur 22 (23): 9 L. B. R. 88 : 17 Cr. L. J. 500 (501), *Dey v. Emperor*. (The Judge has no power to shut out leading questions in cross-examination.)

(31) AIR 1931 Sind 38 (38, 39) : 32 Cri L Jour 666, *Harnam Singh v. Emperor*. (A counsel cannot be compelled to disclose the questions which he desires to put in cross-examination because one of the factors of successful cross-examination is that questions should be put suddenly to the witness.)

(92) 14 All 242 (256) : 1892 A W N 83, *Queen-Empress v. Hargobind Singh*. (It is illegal of a judge to threaten a witness with the penalties of the law.)

(86) 8 All 672 (675, 677) : 1886 A W N 257, *Queen-Empress v. Ishri Singh*. (Do.)

(16) AIR 1916 Pat 236 (237) : 17 Cri L Jour 353 (354) : 1 Pat L Jour 317, *Elknath Sahay v. Emperor*. (Court can restrict irrelevant cross-examination.)

(87) 1887 Rat 344 (346, 347), *Empress v. Sayad Sarfuddin*. (Court should prevent gross abuse and protect witnesses under S. 152, Evidence Act, from being terrified or browbeaten.)

(33) AIR 1933 Nag 136 (144) : 29 Nag L R 251 : 34 Cr. L. J. 505, *Rego v. Emperor*. (Where the defence alleged that certain statements made by certain witnesses before the Judge were not mentioned to the police, the defence has a right to cross-examine the witnesses as to such statements and seek their explanation.)

Note 7

1. ('74) 6 N W P H C R 270 (272), *Queen v. Lall Singh*.

('81) 4 Mad 130 (131) : 2 Weir 324, *Talluri Venkayya v. Queen*.

2. ('81) 7 Cal 28 (30) : 8 C L R 325, *Faiz Ali v. Koromdi*.

('74) 22 Suth W R Cr 44 (44), *Khurruckdharee Singh v. Pershadee Mundul*.

('78-80) 2 All 253 (258), *Empress of India v. Baldeo Sahai*.

3. See 20 Mad L. J. 337n (338n), Critical note on ('10) 11 Cri L Jour 128 (128): 5 I. C. 408 : 37 Cal 236, *Inder Rai v. Emperor*.

4. ('29) AIR 1929 Mad 201 (202, 203) : 52 Mad 355 : 30 Cri L Jour 908, *Public Prosecutor, Madras v. Chockalinga* (Failure to cross-examine witness present in Court and beginning to examine defence witnesses—*Held*, there was waiver.)

[See also ('35) AIR 1935 All 627 (628) : 36 Cri L Jour 1260, *Deep Chand v. Emperor*. (Prosecution witness summoned to appear for cross-examination—All accused represented by different counsel—One of them leading cross-examination and others helping him by suggesting questions to be asked—If no question is asked on behalf of one of accused who is present, inference is that he did not want to do so.)]

any witnesses to be re-called for further cross-examination after the charge is framed.⁵

Section 256,
Notes 7-9

8. Recall and discharge of the witnesses. — Under the Code of 1882, the accused was given the right to re-call and cross-examine the prosecution witnesses "*present in Court or its precincts.*"¹ But these words have been deleted in the Code of 1898. The question has arisen under this Code whether the right of cross-examination of the prosecution witnesses examined before the charge conferred by this section applies only to witnesses who have not been discharged or applies also to witnesses who have been discharged. On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras² and Allahabad³ that this section applies only to cases where the prosecution witnesses required for cross-examination have not been discharged and that where they have been discharged, the accused is not *entitled* to have them re-summoned under this section but they can only be re-summoned in the *discretion of the Magistrate* under S. 257. But, on the other hand, it has been held by the Calcutta High Court⁴ that the right of the accused under this section applies also to prosecution witnesses who have been discharged. It is submitted that the Calcutta view seems to be the better view as it is more consistent with the repeal of the words "*present in Court or its precincts*" which occurred in the previous Code as there is no reason to restrict the meaning of the word "*recalled*" so as to exclude the sense of "*re-summoning*" as suggested by the Allahabad and Madras rulings cited above. See also the undermentioned case.⁵

9. Examination of the remaining witnesses. — The words "*remaining witnesses*" do not necessarily refer only to those witnesses who have been named by the complainant as required by S. 252, sub-s.(2) and summoned by the Magistrate before the framing of the charge;

5. ('26) AIR-1926 Pat 214 (215): 5 Pat 110 : 27 Cr. L. J. 499, *Ramchandra v. Emperor*. ('02) 6 Cal W N 424 (425), *Kokil Ghose v. Kasimuddi*. ('20) AIR 1920 Mad 201 (202) : 43 Mad 411 : 21 Cri L Jour 297, *Lockley v. Emperor*. See also note 6.

Note 8

1. ('95) 1895 All W N 40 (41), *Empress v. Ramcharan*.
2. ('20) AIR 1920 Mad 201 (203, 205) : 43 Mad 411 : 21 Cri L Jour 297, *W. H. Lockley v. Emperor*.
3. ('11) 12 Cr. L. J. 471 (472) : 11 Ind Cas 1007 (All), *Mulua v. Shcoraj Singh*. ('30) AIR 1930 All 495 (496) : 31 Cri L Jour 764, *Baqridec v. Emperor*. [See also (1874) 6 N W P H C R 284 (288), *Empress v. Lall Mahommed*. (Magistrate not to discharge prosecution witnesses before cross-examination without consent of accused. Where he has been discharged before cross-examination with the consent of the accused he is not entitled to have him re-summoned after the charge is framed.)]
- [But see ('37) AIR 1937 All 127 (128): 38 Cr. L. J. 361, *Har Kishan v. Emperor*. ('Recalled' means that if the witnesses are not present, Magistrate should issue process to ensure their attendance—It does not mean calling out their names by chaprasi.)]
4. (1900) 4 Cal W N 351 (351), *Iswar Chunder Raut v. Kali Kumar Dass*.
5. ('39) 1939 Nag L Jour 201 (201), *Emperor v. Nirpat Singh*. (The ideal procedure under this section would be to examine all prosecution witnesses on one day or perhaps on two consecutive days, so that all would be present and ready to be cross-examined if the accused exercised his rights under S. 256.)

Section 256
Notes 9-10

these words include any witness who according to the prosecution is able to support its case, though he has not been summoned.¹ But the High Court of Allahabad has taken a contrary view in the undermentioned case.² The mere fact that certain witnesses are not present in Court does not prevent them from being included in the words "remaining witnesses" within the meaning of this section. But the prosecution is not entitled to get an adjournment of the case as of right in order to secure the attendance of such witnesses.³

9a. Production of documents by prosecution during cross-examination of prosecution witnesses. — This section as well as S. 252 does not *prohibit* the admission of relevant and admissible evidence at any stage of the trial. Hence, it is not illegal for a Magistrate to allow documents to be produced by the prosecution while the prosecution witnesses are being cross-examined by the accused.¹

10. The accused shall then be called upon to enter on his defence and produce his evidence. — The accused can be called upon to enter upon his defence and produce his evidence only *after* the charge has been framed, his plea asked for and after the examination-in-chief, cross-examination and re-examination of all the prosecution witnesses including the re-cross-examination of such of them as were examined before the charge.¹ After the accused *enters on his defence*, no

Note 9

1. ('09) 10 Cri L Jour 530 (531) : 4 Ind Cas 268 (Bom), *Emperor v. P. H. Burn*. (Provided that he is not sprung upon the defence all of a sudden and sufficient opportunity is given to the defence to prepare for his cross-examination.)
- (40) AIR 1940 Nag 390 (392) : 1940 Nag L Jour 449 (451), *Hansraj v. Emperor*.
2. ('37) AIR 1937 All 189 (190) : 38 Cr. L. J. 394, *Raghubir Sahai v. Wali Husain*.
3. ('25) AIR 1925 Sind 315 (315, 316) : 26 Cr. L. J. 958, *Ali Sher v. Mir Mohamed*. See also S. 344 Note 7.

Note 9a

1. ('38) AIR 1938 All 637 (638) : ILR (1938) All 968 : 40 Cr. L. J. 145, *Lala v. Emperor*.

Note 10

1. ('27) AIR 1927 All 475 (475) : 49 All 551 : 28 Cr. L. J. 399, *Sudaman v. Emperor*.
- (40) AIR 1940 Pesh 9 (9) : 41 Cri L Jour 590, *Abdul Ghafur v. Emperor*. (Court ordering further cross-examination of prosecution witnesses and production of defence evidence on same day—Order is illegal.)
- (40) AIR 1940 Pat 295 (297) : 41 Cri L Jour 267 (269), *Feroze Kazi v. Emperor*. (Accused asked to summon their witnesses before prosecution case was closed—Trial is vitiated.)
- (39) AIR 1939 All 238 (239) : 40 Cri L Jour 549, *Bhajja v. Emperor*. (Defence witnesses should not be asked to be summoned before ascertaining whether further cross-examination of prosecution witnesses is necessary.)
- (37) AIR 1937 Pat 131 (133, 134) : 38 Cri L Jour 484, *Ishar Singh v. Shama Dusadh*. (It is irregular to call upon the accused to submit his list of witnesses before the cross-examination of all the prosecution witnesses is finished.)
- (24) AIR 1924 All 320 (320) : 25 Cri L Jour 1003, *Keshab Deo v. Emperor*. (Order to accused to be ready with defence, before prosecution evidence is over is improper.)
- (23) AIR 1923 Cal 657 (657) : 50 Cal 689 : 24 Cri L Jour 849, *Makbul Ahmed v. A. J. L. Allen*.
- (24) AIR 1924 Lah 84 (88) : 4 Lah 61 : 25 Cri L Jour 801, *Byrne v. Emperor*.
- (31) AIR 1931 Mad 240 (240) : 54 Mad 251 : 32 Cri L Jour 779, *In re Ramireddi*. (Accused must wait for his defence till he is charged.)
- (12) 13 Cri L Jour 554 (555) : 8 Nag L R 65 : 15 I C 970, *Birdhi Chand v. Lakshmi Chand*.
- (22) AIR 1922 Pat 158 (159, 160) : 6 Pat L Jour 644 : 22 Cri L Jour 697, *Mitarjit Singh v. Emperor*.

further evidence can be admitted against him except under the provisions of S. 540.² See Notes under S. 540.

**Section 256
Note 10**

The section only requires the Magistrate to call upon the accused to enter upon his defence and to produce his evidence; it does not require him to ask the accused if he means to call witnesses or not.³ It is a *right* of the accused to be called upon to enter upon his defence and produce his evidence and an omission to ask him to do so is a flaw in the trial.⁴ The Magistrate should give every reasonable opportunity to the accused to produce his evidence.⁵ See also Note 27 to S. 537. The nature of the defence is to be gathered not only from the statement of the accused himself but also from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's pleader at the close of the trial.⁶

But the accused is not bound to produce any evidence in his defence merely because a charge has been framed against him; and he cannot be convicted on the mere ground that he has failed to produce any evidence.⁷ Similarly, where the prosecution has not established a *prima facie* case against the accused, the failure of the accused to produce any evidence in his defence cannot give rise to any adverse

{ '26) AIR 1926 Rang 13 (13) : 27 Cri L Jour 415, *Emperor v. Mg. San Nyein*. (It is irregular to call upon the accused, after charge is framed, to have his witnesses summoned before he has been informed of his right of recalling prosecution witnesses for cross-examination — Overruled on another point in AIR 1926 Rang 164 (FB).)

{ '17) AIR 1917 Low Bur 88 (89) : 18 Cri L Jour 1006, *Orilal v. Kalu*. (Asking accused to name his witnesses before framing charge is unwarranted.)

[See also ('84) 1884 Pun Re No. 28 Cr, p. 49 (49), *Gohar v. Empress*. (Accused can be called on to enter upon his defence only after charge—Case under old Code.) ('95) 1895 Rat 768 (769), *Queen-Empress v. Keru*. (Do.)]

2. ('12) 13 Cr. L. J. 772 (772) : 17 Ind Cas 404 (All), *Ganga Singh v. Emperor*.

{ '20) AIR 1920 Bom 339 (341) : 22 Cri L Jour 58, *Alex Pimento v. Emperor*.

{ '23) AIR 1923 All 322 (323) : 45 All 323 : 25 Cr. L. J. 305, *Mahadeo v. Emperor*.

{ '11) 12 Cri L Jour 7 (8) : 9 Ind Cas 46 (Cal), *Radha Madhab Pakra v. Emperor*.

{ '28) AIR 1928 Lah 953 (953) : 29 Cri L Jour 844, *Karam Chand v. Emperor*.

{ '71) 3 N W P H C R 271 (272), *Queen v. Chotey Lal*.

[See also ('81) 8 Cal 154 (156) : 10 Cal L R 51, *Empress v. Kalichuran Chunari*.] See also S. 244 Note 3 and S. 289 Note 2.

3. ('97) 1897 Rat 938 (938), *Queen-Empress v. W. E. Lapprey*.

4. ('68) 10 Suth W R Cr 7 (7), *Bhugwan v. Doyal Gope*.

See also S. 289 Note 11.

5. ('14) AIR 1914 Lah 84 (84) : 15 Cr. L. J. 521, *Lal Singh v. Emperor*. (Necessary adjournment to produce defence evidence must be given.)

{ '25) AIR 1925 All 318 (318) : 26 Cri L Jour 703, *Bhagwan Das v. Saddiq Ahmed*.

{ '97) 1 Cal W N 313 (314), *Sheikh Emtaz Ali v. Jagat Chandra*. (Accused entitled to adjournment to produce his evidence.)

{ '99) 1 Bom L R 856 (856), *Queen-Empress v. Vasudev Hari*. (Magistrate is bound to afford to accused and his friends every opportunity of making defence, and he should not interpose in any way between them.)

{ '27) 28 Cri L Jour 167 (168) : 99 Ind Cas 599 (Lah), *Hira Singh v. Emperor*.

6. ('30) AIR 1930 Cal 442 (442, 443) : 31 Cri L Jour 1203, *Kuti v. Emperor*.

7. ('96) 1896 Rat 854 (854), *Queen-Empress v. Chan Basapa Madiapa*.

[See ('40) 41 Cr. L. J. 795 (795, 796) : 189 I. C. 737 (Pat), *Tara Chand v. Emperor*.

(Accused's failure to raise defence open to him is no ground for conviction.)

{ '37) AIR 1937 Mad 968 (969) : 39 Cri L Jour 144, *Ramaswami v. Rangaswami*.

(A conviction should not be based upon the failure of the accused to make good their defence.)]

See also S. 254 Note 4 and S. 258 Note 3.

Section 256
Note 10

inference against him.⁸ But where the evidence for the prosecution established a *prima facie* case against the accused, the fact that he has not produced any evidence of rebuttal enhances the weight of the prosecution evidence.⁹

Where defence evidence is rejected by the Court, the situation simply is as if the evidence had never existed. If the defence evidence is believed, it would rebut the prosecution. But, if it is not believed, the prosecution is left just where it was before the defence witnesses were called.¹⁰

The accused is entitled to raise any defence technical or otherwise and *the Court is bound to pronounce judgment on it*.¹¹ An accused can raise inconsistent defences in the alternative and such defences, though they make the accused's case weaker,¹² cannot be disallowed by the Court.¹³ The burden of proving the guilt of the accused is on the prosecution and it cannot succeed merely because of the weakness¹⁴ or falseness¹⁵ of the case for the defence.

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8. ('95) 1895 Rat 779 (782), *Queen-Empress v. Narayan Nathu*.
 ('81) 8 Cal 121 (125) : 10 Cal L R 151, *Empress v. Dhunno Kazi*.
 ('84) 10 Cal 140 (149) : 13 Cal L R 358, *Hurry Churn v. Empress*.
 9. ('04) 6 Bom L R 481 (489) : 1 Cri L Jour 568, *Emperor v. Baji Krishna*.
 ('19) AIR 1919 Oudh 160 (174) : 20 Cri L Jour 465, *Sushil Chandra v. Emperor*.
 ('28) AIR 1928 Pat 100 (101) : 6 Pat 627 : 29 Cr. L. J. 239, *Ghanshyam v. Emperor*.
 ('34) AIR 1934 Oudh 401 (405) : 35 Cr. L. J. 1244, *Ganesh Baksh Singh v. Emperor*.
 See also S. 257 Note 1.
 10. ('37) AIR 1937 Mad 975 (975) : 39 Cri L Jour 147, *In re Ramalinga Goundan*.
 11. ('14) AIR 1914 Cal 456 (459) : 41 Cal 350 : 15 Cr. L. J. 385, *Romesh Chandra v. Emperor*. (Ordinarily, when a new defence is raised at a late stage that circumstance goes to some extent against the new defence unless such a defence could not have been raised at an earlier stage.)
 12. ('23) AIR 1923 Cal 717 (718) : 25 Cr. L. J. 190, *Nagendra Chandra v. Emperor*.
 ('33) AIR 1933 Pat 481 (482, 483) : 34 Cr. L. J. 828, *Emperor v. Kameshwar Lal*.
 13. ('20) AIR 1920 Pat 843 (844) : 5 Pat L Jour 64 : 21 Cr. L. J. 799, *Faudi Keot v. Emperor*. (Right of private defence can be pleaded specifically or in alternative.)
 ('27) AIR 1927 Lah 710 (712) : 29 Cri L Jour 117, *Santa Singh v. Emperor*.
 ('24) AIR 1924 Lah 733 (734) : 25 Cri L Jour 1005, *Kakar Singh v. Emperor*. (Accused is not bound to speak truth and he cannot be pinned down to any statement that he may have made.)
 ('19) AIR 1919 Cal 439 (441) : 20 Cri L Jour 661, *Afiruddi Chakdar v. Emperor*. (Alternative defence such as no assault was made and if made it was in self-defence can be taken.)
 ('23) AIR 1923 Cal 717 (718) : 25 Cri L Jour 190, *Nagendra Chandra v. Emperor*.
 ('18) AIR 1918 All 189 (190) : 19 Cri L Jour 371 : 40 All 284, *Yusuf Husain v. Emperor*. (Accused can plead alibi as well as right of private defence.)
 ('15) AIR 1915 Cal 786 (787) : 16 Cri L Jour 76, *Kali Prasad v. Emperor*. (An accused is not bound by any statement denying any fact against him if he desires subsequently to take a defence inconsistent with the denial.)
 [See ('36) AIR 1936 Rang 1 (2) : 37 Cri L Jour 293, *Nga Ba Scin v. Emperor*. (Pleader of the accused can take a different line of defence from that taken by the accused.)]
 14. ('36) AIR 1936 Cal 73 (84) : 37 Cr. L. J. 394 : 63 Cal 929, *Benoyendra Chandra v. Emperor*. (But where accused is involved by evidence in state of considerable suspicion, he must for his own safety prove facts reconciling suspicious circumstances with his innocence.)
 ('25) AIR 1925 Oudh 78 (88) : 27 Oudh Cas 188 : 26 Cri L Jour 225, *Hira Lal v. Emperor*.
 ('18) AIR 1918 Oudh 71 (75) : 19 Cri L Jour 689, *Emperor v. Sahab Din*.
 15. ('40) AIR 1940 Lah 54 (57) : 41 Cri L Jour 447, *Bhag Singh v. Emperor*.
 ('40) AIR 1940 Pat 365 (370) : 41 Cr. L. J. 114 (120), *Rambrichh Singh v. Emperor*. (Defence story untrue—Prosecution must still establish truth of their story.)
 ('37) AIR 1937 Mad 968 (969) : 39 Cri L Jour 144, *Ramaswami v. Rangaswami*.

Though the onus of proving that the case of the accused falls within one of the general exceptions in the Penal Code is on him, it is not necessary that he should specifically raise such plea. Thus, a Court is bound to consider the plea of private defence as appearing from the prosecution evidence even though it is not specifically pleaded by the accused.¹⁶

The right of the accused to produce evidence in his defence under this section is one that can be waived and if the accused when asked to produce his evidence has said that he has no witnesses to examine, he will not afterwards be *entitled* to let in any evidence.¹⁷

The Magistrate should, as far as possible, allow the accused to select the order in which the defence witnesses are to appear.¹⁸

See also the undermentioned case,¹⁹ section 290 Note 1 and section 342 Note 29.

11. Expenses of witnesses. — See Notes to Section 544.

12. Written statement of accused. — This is the only section in the Code which provides for the filing of a written statement by the accused.¹ There is no provision in the Code for the filing of a written statement in sessions trials (see S. 290 Note 6) or in preliminary inquiries before commitment to sessions² or in summons-cases.

Under this section the Court is *bound* to receive and file the written statement submitted by the accused.³ Though great weight is to be attached to the written statement filed by the accused,⁴ it is not

- (23) AIR 1923 Mad 365 (367) : 24 Cri L Jour 426, *Ramudu Iyer v. Emperor*.
 ('66) 1866 Pun Re No. 57 Cr, p. 64 (64), *Accem v. Crown*. (Resort to false alibi is no sufficient evidence of guilt, though it may add probability to suspicion of guilt.)
 ('67) 1867 Pun Re No. 37 Cr, p. 61 (68), *Crown v. Shah Mahomed*.
 ('68) 1868 Pun Re No. 22 Cr, p. 52 (57) *Jehangeer Khan v. Crown*.
 ('72) 1872 Pun Re No. 5 Cr, p. 6 (9), *Crown v. Gulab*.
 ('90) 1890 Pun Re No. 21 Cr, p. 47 (49), *Empress v. Harjas Rai*.
 ('06) 3 Cri L Jour 299 (300) (Lab), *Emperor v. Muhammada*.
 ('21) AIR 1921 Lah 89 (90) : 22 Cri L Jour 595, *Hari Ram v. Emperor*. (No inference of guilt can be drawn from accused's false statement.)
 ('22) AIR 1922 Lah 1 (25) : 3 Lah 144 : 23 Cr. L. J. 513, *Mahant Narain v. Emperor*.
 ('11) 12 Cri L Jour 584 (584) : 12 Ind Cas 848 (LB), *Kyaw Hla U. v. Emperor*.
 See also S. 290 Note 5 and S. 367 Note 6.
 16. ('36) AIR 1936 Rang 1 (2) : 37 Cri L Jour 293, *Nga Ba Sein v. Emperor*.
 ('40) AIR 1940 Lah 54 (57) : 41 Cri L Jour 447, *Bhag Singh v. Emperor*.
 ('27) AIR 1927 Mad 97 (97) : 27 Cri L J 1198, *In re Jogali Bhaigo*.
 ('15) AIR 1915 Mad 532 (533) : 15 Cri L Jour 710, *In re Pachai Gounden*.
 17. ('24) AIR 1924 All 673 (674), *Mustaq Hussain v. Emperor*.
 18. ('40) AIR 1940 Lah 354 (356), *Mirza Jaffar Beg v. Emperor*. (But if there are important official witnesses, they must be consulted and their convenience taken into account.)
 19. ('35) AIR 1935 Cal 513 (520) : 62 Cal 238 : 36 Cri L Jour 1115 (SB), *Emperor v. Nirmal Jiban Ghose*. (Witness to prove alibi must be called by accused who takes such defence.)

Note 12

1. (1900) 2 Weir 255 (257), *Chinnasami Naidu v. Veeriah Naidu*.
2. (1900) 2 Weir 255 (257), *Chinnasami Naidu v. Veeriah Naidu*.
3. ('28) AIR 1928 Mad 1135 (1136) : 29 Cr. L. J. 1041, *Md. Salia Rowther v. Emperor*.
 [But see ('17) AIR 1917 Cal 687 (692) : 17 Cri L Jour 9 (14, 15), *Deputy Legal Remembrancer, Behar & Orissa v. Matukdhari Singh*. (Submitted not correct.)]
4. ('28) AIR 1928 All 222 (228) : 30 Cr. L. J. 530, *Emperor v. Jhabhar Mal*.

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like a pleading in a civil suit and does not preclude the raising of any defence not mentioned in the written statement.⁵

It has been held by the Madras High Court⁶ that the right to file a written statement under this section carries with it the right to file any documents to which the accused was a party and that as the accused cannot give evidence on oath the Court is bound to consider such documents, though not proved in the regular way.

The section does not specify the point of time at which the written statement is to be filed under this section. It has been said that the written statement is to be filed at the time of recording the accused's plea to the charge.⁷

There is a conflict of decisions as to whether the filing of a written statement by the accused under this section dispenses with his oral examination after the close of the prosecution evidence, under S. 342. (See Note 18 under S. 342.) But the fact that a written statement has been filed may be taken into consideration in determining whether the accused was prejudiced by the failure to comply with the provisions of section 342.⁸

It has been held in the undermentioned case⁹ that a written statement put in by the accused under this section can be used to fill up gaps in the prosecution case.

This section does not apply to disciplinary proceedings against legal practitioners under the Letters Patent and the legal practitioner is not entitled to file any written statement in such proceedings.¹⁰

See also Note 18 to section 342.

13. Effect of non-compliance with this section. — See Note 20 to S. 537.

Section 257

257.* (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-

* 1882 : S. 257; 1872 : Ss. 359, 362, para. 2; 1861 : S. 253.

5. ('11) 12 Cr. L. J. 585 (587) : 12 I. C. 961 (Mad), *Jeremiah v. Vas*. (It is for prosecution to prove its case—In a case of defamation, omission of accused to deny publication in his written statement does not relieve prosecution from proving publication.)

[See also ('30) AIR 1930 Cal 442 (442, 443) : 31 Cr. L. J. 1203, *Kuti v. Emperor*. (Defence of accused is to be gathered not only from his statement but also from the trend of cross-examination of prosecution witnesses, the arguments of accused's pleader, etc.)]

6. ('28) AIR 1928 Mad 1135 (1136) : 29 Cri L Jour 1041, *Mad. Salia v. Emperor*. See also S. 244 Note 7.

7. ('25) 29 Cal W N cxviii (cxviii).

8. ('28) AIR 1928 All 222 (228) : 30 Cri L Jour 530, *Emperor v. Jhabhar Mal*.

9. ('36) AIR 1936 Lah 28 (29) : 37 Cr. L. J. 428, *Hasham v. Emperor*. (It is proper for the Court to take into consideration the written statement of an accused person admitting striking the deceased, where the prosecution has without such statement proved that the fatal injury was inflicted by one of the accused persons.)

10. ('24) AIR 1924 Lah 123 (124) : 4 Lah 271 : 25 Cri L Jour 161 (SB). *In re Abdul Rashid*.

examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing :

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Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

Synopsis

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|---|---|
| 1. Scope and applicability of the section. | 5. Production of documentary evidence by accused. |
| 2. "After he has entered upon his defence." | 6. Right of accused to cross-examine prosecution witnesses. |
| 2a. Right of prosecution to lead evidence after accused has entered on his defence. | 7. Proviso to sub-section (1). |
| 3. Right of accused to apply for process for compelling attendance of witnesses. | 7a. Examination of witness present in Court though not summoned. |
| 4. Reasons for refusal to issue process. | 8. Power to require deposit of expenses of witnesses before summoning them. |

Other Topics (miscellaneous)

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| Absence of defence evidence. See Note 1. | Delay in application for summons. See Notes 2 and 4. |
| Accused summoning prosecution witness and right of cross-examination. See Note 6. | Duty of Magistrate to issue process and his discretion. See Note 3. |
| Accused's witnesses to rebut other evidence. See Note 2. | Duty to record reasons. See Note 4. |
| Adjournment — Right of accused. See Note 2. | Duty to secure attendance of witnesses. See Note 3. |
| Application to summon witnesses—Each case to be specifically dealt with. See Note 4. | Inspection by Court before rejecting document. See Note 5. |
| Citing trying Magistrate as witness. See Note 3. | Power to restrict defence witnesses. See Note 4. |
| Cross-examination of co-accused's witness. See Note 6. | Written statement — Legal value. See S. 256 Note 12. |
| | Wrong refusal — Illegality. See Note 3. |

1. Scope and applicability of the section. — In criminal cases the prosecution must succeed on its own merits and an accused cannot be convicted *merely* by reason of his failure to produce any evidence in his defence.¹ But, where the prosecution has established a *prima*

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1. ('66) 1866 Rat 5 (5), *Reg. v. Jenkoo*.

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facie case against the accused, he is liable to be convicted unless he rebuts the presumption raised by the prosecution evidence.² He is entitled to a sufficient opportunity to defend himself and to prove his innocence.³ The Court is bound to take the evidence which he offers in his defence,⁴ subject to the provisions of the Evidence Act. He is further entitled to call upon the Court to assist him in the production of evidence material for his defence. This section deals with the last mentioned right of the accused in warrant-cases and lays down under what circumstances he is entitled to apply to the Court for process to compel the production of evidence on his behalf. The section applies also to warrant-cases tried summarily.⁵ It has been held that the principle of the section applies to summons-cases.⁶

See also the undermentioned cases.⁷

2. ('28) AIR 1928 Cal 27 (39) : 29 Cri L Jour 49, *Hari Narayan v. Emperor*. (If *prima facie* case is made out against accused, he should rebut it by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock.)
- ('18) AIR 1918 Cal 314 (315) : 19 Cri L Jour 81, *Ashraf Ali v. Emperor*. (Non-production of evidence will raise adverse presumption.)
- [See ('28) AIR 1928 Pat 100 (101) : 6 Pat 627 : 29 Cri L Jour 239, *Ghanshyam Singh v. Emperor*. (It will not avail the accused merely to rely upon a discrepancy here and a discrepancy there or upon the absence of motive or upon exaggerations in the prosecution story — He must lead evidence.)]
- [See also ('71) 16 Suth W R Cr 59 (59), *Jungi Khan v. Hur Chunder Rai*.]
- See also S. 256 Note 10, S. 290 Note 5 and S. 342 Note 29.
3. ('66) 1866 Pun Re No. 62 Cr, p. 68 (69), *Municipal Committee v. Deen Mohamad*. ('09) 9 Cri L Jour 583 (584) : 5 Low Bur Rul 20 : 2 Ind Cas 365, *Ameer Batcha v. Emperor*. (Accused entitled to adjournment to enable him to produce evidence.)
- ('03) 7 Cal W N 714 (716), *Emperor v. Keso Singh*. (Do.)
- ('97) 1 Cal W N 313 (314), *Sheikh Emtaz Ali v. Jagat Chandra*. (Do.)
- ('14) AIR 1914 Lah 84 (84) : 15 Cri L Jour 521, *Lal Singh v. Emperor*. (Do.)
4. ('02) 4 Bom L R 461 (463), *Emperor v. Nagar Purshottam*. (It is not open to a Magistrate to refuse to examine a witness for the accused when he (the witness) is present in Court.)
- ('15) AIR 1915 Mad 825 (825) : 16 Cri L Jour 156 (157), *Venkatappaya v. Venkataramanayya*. (Magistrates should always be chary of taking upon themselves the duty of deciding on behalf of the parties which witnesses should be examined.)
- ('12) 13 Cri L Jour 523 (523) : 15 Ind Cas 795 (Bom), *Emperor v. Nandbasappa Basappa*. (Magistrate cannot arbitrarily decline to examine witnesses.)
- ('69) 11 Suth W R Cr 9 (9), *Queen v. Bhugner Putwa*. (Accused is entitled to have his witnesses examined ; they cannot be dismissed on their mere allegation of knowing nothing in his favour.)
- [See also ('01) 3 Bom L R 562 (563), *King-Emperor v. Bajya Anandrao*. (Threatening by Court to report to the High Court the conduct of the pleader on calling witnesses is improper.)
- ('11) 12 Cri L Jour 465 (467) : 11 Ind Cas 1001 (Rang), *Nga Po Kya v. Emperor*. (It is not improper to arrest a witness for the defence for giving false evidence while the defence evidence is being taken.)]
5. ('09) 9 Cr. L. J. 583 (584) : 2 I. C. 365 : 5 Low Bur Rul 20, *Ameer Batcha v. Emperor*.
6. ('28) AIR 1928 Pat 253 (255) : 29 Cri L Jour 308, *Rameshwar Sahu v. Emperor*. (Court cannot dictate to the accused terms upon which witness shall be examined.)
7. ('96) 1896 Rat 854 (854), *Queen-Empress v. Chanbasappa Madiapa*. (A Magistrate being subordinate to a Sessions Court must treat its judgments with respect and be guided by them on such matters of procedure as arise in S. 257.)
- ('97) 1897 Rat 938 (938), *Queen-Empress v. Sadashiv*. (Accused's pleader stating that he would examine witnesses but actually summoning no witnesses — Prosecutor has no right to reply.)
- ('26) AIR 1926 Lah 627 (628) : 27 Cr. L. J. 1037, *Sammun v. Emperor*. (Evidence of defence witnesses produced by one accused cannot be treated as prosecution evidence against other accused.)

2. "After he has entered upon his defence." — This section comes into play only after the accused has entered on his defence.¹ The accused is entitled to a reasonable interval for considering what evidence he should produce.² It is open to a Magistrate even after a case has been closed, at any time before judgment is pronounced, to allow the accused to let in evidence; it depends on the circumstances of each case whether a belated application for the production of evidence should be granted or not.³

Where, after the close of the evidence for the defence, the Magistrate examines witnesses on the side of the prosecution, the accused is entitled to an opportunity to rebut the new evidence.⁴

2a. Right of prosecution to lead evidence after accused has entered on his defence. — Where the accused leads evidence of good character by way of defence, the Code does not entitle the

- (1925) AIR 1925 All 769 (769) : 26 Cri L Jour 1018, *Bahoru v. Emperor*. (Do.)
 (1931) AIR 1931 Lah 57 (58) : 12 Lah 385 : 32 Cri L Jour 672, *Chaturbhuj v. Emperor*. (Do.)
 (1864) 1 Suth W R Cr Letters 12 (12).
 (1906) 3 Cri L Jour 23 (24, 25) : 3 Low Bur Rul 109, *Po Wa v. Emperor*. (Cross-examination of defence witnesses cannot be deferred — Deferring cross-examination of defence witnesses until the examination-in-chief of other defence witnesses is wrong.)
 (1919) AIR 1919 Oudh 79 (80) : 21 Cr. L. J. 60, *Rohan v. Emperor*. (Mere fact that some of accused's witnesses are his caste fellows is not by itself a sufficient reason for discrediting their testimony.)
 (1919) AIR 1919 Oudh 310 (311) : 22 Oudh Cas 375 : 20 Cr. L. J. 748, *Rameshwar Tewari v. Emperor*. (Do.)
 (1925) AIR 1925 Oudh 501 (501) : 27 Oudh Cas 327 : 26 Cri L Jour 530, *Bahadur v. Emperor*. (Where number of respectable persons have given evidence in favour of accused, their evidence should not be rejected.)

Note 2

1. (1940) AIR 1940 Pesh 9 (9) : 41 Cri L Jour 590, *Abdul Ghafur v. Emperor*. (Court ordering cross-examination after charge and production of defence evidence on same day—Defence cannot be struck out for failure to summon witnesses for that date—Opportunity should be given to accused to produce his witnesses.)
- (1914) AIR 1914 Sind 135 (135) : 8 Sind L R 267 : 16 Cri L Jour 245, *Tahilram Lilaram v. Pitamberdas Valabdas*. (Accused not entitled to inspection of complainant's documents before charge is framed.)
- (1925) AIR 1925 Nag 44 (47) : 20 Nag L R 174 : 26 Cri L Jour 971 (FB), *Local Government v. Maria*. (Prosecution case does not close until all the prosecution witnesses are discharged and their discharge does not take place till they have been cross-examined after the charge, if the accused so desires.)
- (1884) 1884 Pun Re No. 28 Cr, p. 48 (49), *Gohar v. Empress*. (Accused is entitled to have an opportunity given to him, after he had been charged, of producing his witnesses or causing them to be produced with aid of the Court, notwithstanding an order passed previously asking him to be ready with his witnesses on a particular date.)
 [See also (1924) AIR 1924 All 320 (320) : 25 Cr. L. J. 1003, *Keshabdeo v. Emperor*. (Order to accused to be ready with defence, before prosecution evidence is over, is improper.)]
2. (1920) AIR 1920 Pat 25 (28) : 21 Cr. L. J. 321, *Rameshwar Dusadh v. Emperor*. (Demand of two days' time for this purpose is not unreasonable.)
3. (1911) 12 Cri L Jour 150 (151) : 9 Ind Cas 897 (Mad), *In re Vyasa Rao*.
4. (1925) AIR 1925 Lah 531 (532) : 26 Cr. L. J. 1035, *Shugan Chand v. Emperor*.
 (1970) 13 Suth W R Cr 15 (15), *Queen v. Assanoolah*.
 (1981) 6 Cal 714 (715) : 8 Cal L Rep 70, *In re Deela Mahton*. (Fact that accused had declined to examine a witness previously is no ground for refusing to summon such witness when required to meet fresh evidence taken by Magistrate after close of defence arguments.)

See also S. 257 Notes 2-2a, 2-2b, 2-2c, 2-2d, 2-2e, 2-2f, 2-2g, 2-2h, 2-2i, 2-2j, 2-2k, 2-2l, 2-2m, 2-2n, 2-2o, 2-2p, 2-2q, 2-2r, 2-2s, 2-2t, 2-2u, 2-2v, 2-2w, 2-2x, 2-2y, 2-2z, 2-2aa, 2-2ab, 2-2ac, 2-2ad, 2-2ae, 2-2af, 2-2ag, 2-2ah, 2-2ai, 2-2aj, 2-2ak, 2-2al, 2-2am, 2-2an, 2-2ao, 2-2ap, 2-2aq, 2-2ar, 2-2as, 2-2at, 2-2au, 2-2av, 2-2aw, 2-2ax, 2-2ay, 2-2az, 2-2ba, 2-2bb, 2-2bc, 2-2bd, 2-2be, 2-2bf, 2-2bg, 2-2bh, 2-2bi, 2-2bj, 2-2bk, 2-2bl, 2-2bm, 2-2bn, 2-2bo, 2-2bp, 2-2bq, 2-2br, 2-2bs, 2-2bt, 2-2bu, 2-2bv, 2-2bw, 2-2bx, 2-2by, 2-2bz, 2-2ca, 2-2cb, 2-2cc, 2-2cd, 2-2ce, 2-2cf, 2-2cg, 2-2ch, 2-2ci, 2-2cj, 2-2ck, 2-2cl, 2-2cm, 2-2cn, 2-2co, 2-2cp, 2-2cq, 2-2cr, 2-2cs, 2-2ct, 2-2cu, 2-2cv, 2-2cw, 2-2cx, 2-2cy, 2-2cz, 2-2da, 2-2db, 2-2dc, 2-2dd, 2-2de, 2-2df, 2-2dg, 2-2dh, 2-2di, 2-2dj, 2-2dk, 2-2dl, 2-2dm, 2-2dn, 2-2do, 2-2dp, 2-2dq, 2-2dr, 2-2ds, 2-2dt, 2-2du, 2-2dv, 2-2dw, 2-2dx, 2-2dy, 2-2dz, 2-2ea, 2-2eb, 2-2ec, 2-2ed, 2-2ee, 2-2ef, 2-2eg, 2-2eh, 2-2ei, 2-2ej, 2-2ek, 2-2el, 2-2em, 2-2en, 2-2eo, 2-2ep, 2-2eq, 2-2er, 2-2es, 2-2et, 2-2eu, 2-2ev, 2-2ew, 2-2ex, 2-2ey, 2-2ez, 2-2fa, 2-2fb, 2-2fc, 2-2fd, 2-2fe, 2-2ff, 2-2fg, 2-2fh, 2-2fi, 2-2fj, 2-2fk, 2-2fl, 2-2fm, 2-2fn, 2-2fo, 2-2fp, 2-2fq, 2-2fr, 2-2fs, 2-2ft, 2-2fu, 2-2fv, 2-2fw, 2-2fx, 2-2fy, 2-2fz, 2-2ga, 2-2gb, 2-2gc, 2-2gd, 2-2ge, 2-2gf, 2-2gg, 2-2gh, 2-2gi, 2-2gj, 2-2gk, 2-2gl, 2-2gm, 2-2gn, 2-2go, 2-2gp, 2-2gq, 2-2gr, 2-2gs, 2-2gt, 2-2gu, 2-2gv, 2-2gw, 2-2gx, 2-2gy, 2-2gz, 2-2ha, 2-2hb, 2-2hc, 2-2hd, 2-2he, 2-2hf, 2-2hg, 2-2hh, 2-2hi, 2-2hj, 2-2hk, 2-2hl, 2-2hm, 2-2hn, 2-2ho, 2-2hp, 2-2hq, 2-2hr, 2-2hs, 2-2ht, 2-2hu, 2-2hv, 2-2hw, 2-2hx, 2-2hy, 2-2hz, 2-2ia, 2-2ib, 2-2ic, 2-2id, 2-2ie, 2-2if, 2-2ig, 2-2ih, 2-2ii, 2-2ij, 2-2ik, 2-2il, 2-2im, 2-2in, 2-2io, 2-2ip, 2-2iq, 2-2ir, 2-2is, 2-2it, 2-2iu, 2-2iv, 2-2iw, 2-2ix, 2-2iy, 2-2iz, 2-2ja, 2-2jb, 2-2jc, 2-2jd, 2-2je, 2-2jf, 2-2jg, 2-2jh, 2-2ji, 2-2jj, 2-2jk, 2-2jl, 2-2jm, 2-2jn, 2-2jo, 2-2jp, 2-2jq, 2-2jr, 2-2js, 2-2jt, 2-2ju, 2-2jv, 2-2jw, 2-2jx, 2-2jy, 2-2jz, 2-2ka, 2-2kb, 2-2kc, 2-2kd, 2-2ke, 2-2kf, 2-2kg, 2-2kh, 2-2ki, 2-2kj, 2-2kl, 2-2km, 2-2kn, 2-2ko, 2-2kp, 2-2kq, 2-2kr, 2-2ks, 2-2kt, 2-2ku, 2-2kv, 2-2kw, 2-2kx, 2-2ky, 2-2kz, 2-2la, 2-2lb, 2-2lc, 2-2ld, 2-2le, 2-2lf, 2-2lg, 2-2lh, 2-2li, 2-2lj, 2-2lk, 2-2ll, 2-2lm, 2-2ln, 2-2lo, 2-2lp, 2-2lq, 2-2lr, 2-2ls, 2-2lt, 2-2lu, 2-2lv, 2-2lw, 2-2lx, 2-2ly, 2-2lz, 2-2ma, 2-2mb, 2-2mc, 2-2md, 2-2me, 2-2mf, 2-2mg, 2-2mh, 2-2mi, 2-2mj, 2-2mk, 2-2ml, 2-2mm, 2-2mn, 2-2mo, 2-2mp, 2-2mq, 2-2mr, 2-2ms, 2-2mt, 2-2mu, 2-2mv, 2-2mw, 2-2mx, 2-2my, 2-2mz, 2-2na, 2-2nb, 2-2nc, 2-2nd, 2-2ne, 2-2nf, 2-2ng, 2-2nh, 2-2ni, 2-2nj, 2-2nk, 2-2nl, 2-2nm, 2-2nn, 2-2no, 2-2np, 2-2nq, 2-2nr, 2-2ns, 2-2nt, 2-2nu, 2-2nv, 2-2nw, 2-2nx, 2-2ny, 2-2nz, 2-2oa, 2-2ob, 2-2oc, 2-2od, 2-2oe, 2-2of, 2-2og, 2-2oh, 2-2oi, 2-2oj, 2-2ok, 2-2ol, 2-2om, 2-2on, 2-2oo, 2-2op, 2-2oq, 2-2or, 2-2os, 2-2ot, 2-2ou, 2-2ov, 2-2ow, 2-2ox, 2-2oy, 2-2oz, 2-2pa, 2-2pb, 2-2pc, 2-2pd, 2-2pe, 2-2pf, 2-2pg, 2-2ph, 2-2pi, 2-2pj, 2-2pk, 2-2pl, 2-2pm, 2-2pn, 2-2po, 2-2pp, 2-2pq, 2-2pr, 2-2ps, 2-2pt, 2-2pu, 2-2pv, 2-2pw, 2-2px, 2-2py, 2-2pz, 2-2qa, 2-2qb, 2-2qc, 2-2qd, 2-2qe, 2-2qf, 2-2qg, 2-2qh, 2-2qi, 2-2qj, 2-2qk, 2-2ql, 2-2qm, 2-2qn, 2-2qo, 2-2qp, 2-2qq, 2-2qr, 2-2qs, 2-2qt, 2-2qu, 2-2qv, 2-2qw, 2-2qx, 2-2qy, 2-2qz, 2-2ra, 2-2rb, 2-2rc, 2-2rd, 2-2re, 2-2rf, 2-2rg, 2-2rh, 2-2ri, 2-2rj, 2-2rk, 2-2rl, 2-2rm, 2-2rn, 2-2ro, 2-2rp, 2-2rq, 2-2rr, 2-2rs, 2-2rt, 2-2ru, 2-2rv, 2-2rw, 2-2rx, 2-2ry, 2-2rz, 2-2sa, 2-2sb, 2-2sc, 2-2sd, 2-2se, 2-2sf, 2-2sg, 2-2sh, 2-2si, 2-2sj, 2-2sk, 2-2sl, 2-2sm, 2-2sn, 2-2so, 2-2sp, 2-2sq, 2-2sr, 2-2ss, 2-2st, 2-2su, 2-2sv, 2-2sw, 2-2sx, 2-2sy, 2-2sz, 2-2ta, 2-2tb, 2-2tc, 2-2td, 2-2te, 2-2tf, 2-2tg, 2-2th, 2-2ti, 2-2tj, 2-2tk, 2-2tl, 2-2tm, 2-2tn, 2-2to, 2-2tp, 2-2tq, 2-2tr, 2-2ts, 2-2tt, 2-2tu, 2-2tv, 2-2tw, 2-2tx, 2-2ty, 2-2tz, 2-2ua, 2-2ub, 2-2uc, 2-2ud, 2-2ue, 2-2uf, 2-2ug, 2-2uh, 2-2ui, 2-2uj, 2-2uk, 2-2ul, 2-2um, 2-2un, 2-2uo, 2-2up, 2-2uq, 2-2ur, 2-2us, 2-2ut, 2-2uu, 2-2uv, 2-2uw, 2-2ux, 2-2uy, 2-2uz, 2-2va, 2-2vb, 2-2vc, 2-2vd, 2-2ve, 2-2vf, 2-2vg, 2-2vh, 2-2vi, 2-2vj, 2-2vk, 2-2vl, 2-2vm, 2-2vn, 2-2vo, 2-2vp, 2-2vq, 2-2vr, 2-2vs, 2-2vt, 2-2vu, 2-2vv, 2-2vw, 2-2vx, 2-2vy, 2-2vz, 2-2wa, 2-2wb, 2-2wc, 2-2wd, 2-2we, 2-2wf, 2-2wg, 2-2wh, 2-2wi, 2-2wj, 2-2wk, 2-2wl, 2-2wm, 2-2wn, 2-2wo, 2-2wp, 2-2wq, 2-2wr, 2-2ws, 2-2wt, 2-2wu, 2-2wv, 2-2ww, 2-2wx, 2-2wy, 2-2wz, 2-2xa, 2-2xb, 2-2xc, 2-2xd, 2-2xe, 2-2xf, 2-2xg, 2-2xh, 2-2xi, 2-2xj, 2-2xk, 2-2xl, 2-2xm, 2-2xn, 2-2xo, 2-2xp, 2-2xq, 2-2xr, 2-2xs, 2-2xt, 2-2xu, 2-2xv, 2-2xw, 2-2xx, 2-2xy, 2-2xz, 2-2ya, 2-2yb, 2-2yc, 2-2yd, 2-2ye, 2-2yf, 2-2yg, 2-2yh, 2-2yi, 2-2yj, 2-2yk, 2-2yl, 2-2ym, 2-2yn, 2-2yo, 2-2yp, 2-2yq, 2-2yr, 2-2ys, 2-2yt, 2-2yu, 2-2yv, 2-2yw, 2-2yx, 2-2yy, 2-2yz, 2-2za, 2-2zb, 2-2zc, 2-2zd, 2-2ze, 2-2zf, 2-2zg, 2-2zh, 2-2zi, 2-2zj, 2-2zk, 2-2zl, 2-2zm, 2-2zn, 2-2zo, 2-2zp, 2-2zq, 2-2zr, 2-2zs, 2-2zt, 2-2zu, 2-2zv, 2-2zw, 2-2zx, 2-2zy, 2-2zz.

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Notes 2a-3

prosecution to lead rebutting evidence as a matter of *right*. But the Magistrate may, in his discretion, allow such evidence to be given.¹

3. Right of accused to apply for process for compelling attendance of witnesses. — This section makes it obligatory on the part of the Magistrate, except in the cases specified therein, to issue process at the instance of the accused to compel the attendance of the witnesses named by him.¹ A non-compliance with the section in this respect is not a mere irregularity curable by the application of S. 537 of the Code.² It is *prima facie* an illegality which will cause serious

Note 2a

1. ('30) AIR 1930 Mad 448 (448) : 31 Cri L Jour 1198, *Ramasami Mudaliar v. Ramalinga Udayar*.

Note 3

1. ('37) AIR 1937 Pat 131 (133) : 38 Cr. L. J. 484, *Ishar Singh v. Shama Dusadh*.
(97) 1 Cal W N 19 (20, 21), *Mowla Bux v. Derasatulla*.
(70) 14 Suth W R Cr 81 (82), *In re Boolakee*.
(70) 13 Suth W R Cr 56 (58), *Queen v. Siddhoo*.
(04) 1 Cri L Jour 1002 (1002) : 2 Low Bur Rul 270, *Shwe Bwen v. Emperor*.
(75) 24 Suth W R Cr 60 (60), *In re Huri Pershad*.
(31) AIR 1931 Lah 56 (56) : 32 Cri L Jour 620, *Emperor v. Nand Lal*.
(94) 1894 Rat 723 (723), *Queen-Empress v. Purushotam*.
(02) 26 Bom 418 (421) : 4 Bom L R 38, *Emperor v. Purushotam Kara*.
(66) 5 Suth W R Cr 65 (65), *Queen v. Kalee Thakoor*.
(1865) 3 Suth W R Cr 35 (36), *Queen v. Abdool Setar*.
(69) 11 Suth W R Cr 55 (55), *Queen v. Doorgagutty*.
(33) AIR 1933 Lah 1020 (1021) : 35 Cri L Jour 396, *Baksha v. Emperor*.
(05) 2 Cal L Jour 50n (50n), *Jassim Sheikh v. Jadub Chandra*.
(70) 5 Mad H C R App xxvii.
(09) 9 Cr. L. J. 583 (584) : 2 I. C. 365 : 5 L. B. R. 20, *Ameer Batcha v. Emperor*.
(09) 10 Cri L Jour 207 (207) : 2 Sind L R 5, *Emperor v. Dabud*.
(71) 3 N W P H C R 271 (272), *Queen v. Choley Lal*.
(70) 2 N W P H C R 148 (149), *Queen v. Mudsooddeen*.
(81) 3 All 392 (394), *In re Sat Narain Singh*.
(81) 6 Cal 714 (715) : 8 Cal L Rep 70, *In re Deola Mahton*.
(25) AIR 1925 Cal 80 (80) : 25 Cri L Jour 310, *Abdul Jabbar v. Emperor*.
(29) AIR 1929 All 914 (915) : 30 Cri L Jour 1155, *Parbhu v. Emperor*.
(31) AIR 1931 Oudh 386 (387) : 32 Cr. L. J. 1176, *Bhuneskwari Pershad v. Emperor*.
(26) 28 Cr. L. J. 167 (168) : 99 I. C. 599 (Lah), *Hira Singh v. Emperor*. (Trial Magistrate must make all attempts to secure the evidence of defence witnesses either by procuring their attendance or by having their evidence taken on commission.)
(33) AIR 1933 Rang 29 (30) : 34 Cri L Jour 468, *Zamin v. Emperor*.
(24) AIR 1924 Pat 142 (143) : 24 Cr. L. J. 831, *Debi Singh v. Emperor*. (Inability or even refusal to pay costs of witnesses is no excuse.)
(05) 9 Cal W N celiv (celiv), *Ashutosh Mallick v. Emperor*.
(84) 1884 Pun Re No. 28 Cr, p. 48 (49), *Gohar v. Empress*. (Accused entitled to aid of Court in producing witnesses notwithstanding order of Court passed prior to the charge that he should be ready with his witnesses on a particular date.)
(21) 22 Cr. L. J. 683 (684) : 63 Ind Cas 619 (620) (Pat), *Munshi Teli v. Emperor*. [See also ('24) AIR 1924 All 320 (320) : 25 Cr. L. J. 1003, *Keshab Deo v. Emperor*. (Order to the accused that he must be ready with his witnesses on a certain date is improper.)]
(17) AIR 1917 All 81 (84) : 18 Cr. L. J. 317 (319), *Tapeswari Prasad v. Emperor*. (Where accused does not press for further postponement, on the Court's undertaking to assume what the witness would prove, the prosecution is bound by the undertaking though the Court may thereafter summon and examine the witness.)]
See also S. 211 Note 3, S. 216 Note 2 and S. 291 Note 3.
2. ('11) 12 Cr. L. J. 548 (549) : 12 I. C. 524 (Mad), *Arumugam Pillai v. Emperor*.
(08) 7 Cri L Jour 425 (427) : 31 Mad 131, *Narayana Mudali v. Emperor*.
(29) AIR 1929 All 914 (916) : 30 Cri L Jour 1155, *Parbhu v. Emperor*.
(25) AIR 1925 Cal 411 (411) : 51 Cal 1044 : 26 Cr. L. J. 384, *Manomohan Dastidar v. Bankim Behari*.

prejudice to the accused and hence the conviction will be set aside in such cases.³ But the section does not compel the Magistrate to ask the accused if he means to call witnesses; it is his right to apply for process and if he fails to do so, he cannot afterwards complain that he was not given an opportunity to adduce evidence.⁴

The duty of the Magistrate under the section is not exhausted with his issuing a summons for the attendance of a witness in the first instance. If the process first issued fails, the accused is entitled to call upon the Court to issue further processes to compel the attendance of the witness.⁵ But in exceptional cases the Magistrate can re-consider his decision to issue process and may refuse to compel the attendance of a witness if he finds that the application for process against him

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Note 3 .

- (109) 10 Cr. L. J. 207 (207) : 2 S L R 5, *Emperor v. Dabud*. (Conviction arrived at in violation of this section cannot be supported.)
3. ('25) AIR 1925 Cal 80 (80) : 25 Cri L Jour 310, *Abdul Jabbar v. Emperor*.
4. ('12) 13 Cr.L.J. 828 (829) : 17 I.C. 572 (Mad), *Vaithinatha Iyer v. Kuppu Thevan*. [See ('97) 1897 Rat 938 (938), *Queen-Empress v. Lapprey*.]
5. ('36) 42 Cal W N 843 (844), *Ramdhani Mondal v. Girdhari Mondal*. (Failure to pass an order on application for issue of fresh process vitiates the trial.)
- (109) 9 Cri L Jour 72 (73) : 35 Cal 1093, *Rohimuddi Howladar v. Emperor*. (1865) 9 Suth W R Cr 21 (21), *Queen v. Nobo Coomar Banerjee*.
- (105) 9 Cal W N cccxix (cccix), *Kedarnath Das v. Bhaba Sankar Bhattacharjee*.
- (106) 10 Cal W N vii (vii), *Jassem Sheikh v. Emperor*.
- (132) 1932 Mad W N 1349 (1350), *Ramasamy Mudaliar v. Ramalinga Odayan*.
- (122) AIR 1922 Lah 71 (71) : 22 Cr.L.J. 497, *Muhammad Din v. Emperor*. (Refusal to resummon witnesses is material irregularity and cannot be cured by S. 537.)
- (122) AIR 1922 Lah 143 (144) : 22 Cri L Jour 501, *Sohara v. Emperor*. (Do.)
- (124) AIR 1924 Cal 196 (197) : 25 Cri L Jour 293, *Ponthiram Joab v. Emperor*.
- (126) AIR 1926 Cal 1058 (1058) : 27 Cr.L.J. 841, *Upendranath v. Jogendranath*.
- (120) AIR 1920 All 59 (60) : 21 Cri L Jour 340, *Jhabboo v. Emperor*.
- (102) 6 Cal W N 548 (550), *Bhomar Munshi v. Digambar Das*.
- (192) 1892 Rat 594 (595), *Queen v. Shamsherka*.
- (178) 3 Cal 573 (583) : 1 Cal L Rep 352, *Empress v. Rajcoomar Singh*.
- (81) 4 All 53 (54) : 1881 All W N 102, *Empress of India v. Rukn-ud-din*.
- (84) 10 Cal 931 (931, 932), *Queen v. Dhananjoi Chowdhury*.
- (120) AIR 1920 Pat 714 (714) : 21 Cri L Jour 336, *Amrit Mander v. Emperor*.
- (118) AIR 1918 Pat 272 (272) : 19 Cri L Jour 902 : 3 Pat L Jour 632, *Mahomed Zamiruddin v. Emperor*.
- (131) AIR 1931 Pat 207 (208) : 32 Cri L Jour 613, *Dwaraka Singh v. Emperor*.
- (126) AIR 1926 Pat 139 (140) : 26 Cri L Jour 1627, *Ramsakal Rai v. Emperor*.
- (121) AIR 1921 All 142 (142) : 23 Cri L Jour 124, *Bissay v. Emperor*. (It is the business of the Court to see that its summonses and warrants are duly executed.)
- (124) AIR 1924 Cal 534 (534) : 24 Cri L Jour 370, *Mihir Lal Roy v. Emperor*. (When accused informs the Court that witness summoned by him was ill, and asks for adjournment to produce him, the application should not be refused on the ground that it was not accompanied by medical certificate.)
- [See also ('25) AIR 1925 Pat 55 (56) : 3 Pat 591 : 25 Cri L Jour 1255, *Jamuna Singh v. Emperor*. (If witness is unable to attend Court owing to illness the Court should ascertain whether it will be possible for the witness to attend within a reasonable time, if not, then his evidence should be taken on commission.)]
- (134) AIR 1934 Nag 39 (42) : 35 Cr.L.J. 411, *Samuel v. Emperor*. (District Magistrate cited as witness before a subordinate Magistrate; the former issuing a memo to the latter to consider with reference to S. 257, whether it is not a case of causing vexation or annoyance and the Magistrate thereupon cancelling his previous order; the accused applied for transfer on the ground that he was apprehensive of not having a fair trial — Held; that the procedure adopted by the District Magistrate was irregular and that it was a proper case for transfer.)]
- [But Compare ('26) AIR 1926 All 298 (298) : 27 Cri L Jour 383, *Puran v. Emperor*. (Where the application for summonses was made late and granted on the understanding that no adjournment would be allowed if the witnesses did not appear, the accused cannot insist on adjournment.)]

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Notes 3-4

is made for purpose of vexation or delay.⁶ A Court should not order the accused to pay adjournment costs on the absence of a witness summoned on his behalf.⁷ See also the undermentioned case.⁸

Under this section the accused is entitled to compel the appearance, as a witness, even of the trying Magistrate himself and to enable the accused to do so, the case should be transferred to some other Court if he applies for such transfer.⁹

That Magistrate can issue a process who is seised of the case and not any other Magistrate.¹⁰

Where an application is made under this section for summoning witnesses, the Magistrate must deal with the application and pass an order either granting or refusing it; merely keeping it on the file is not proper.¹¹

4. Reasons for refusal to issue process. — The right of the accused to claim the issue of process under this section to compel the production of evidence on his behalf is not an absolute one. The Magistrate can refuse to issue process at his instance if he considers that the application for process has been made for the purpose of *vexation or delay or for defeating the ends of justice.*¹ But the

6. ('30) AIR 1930 Mad 632 (632): 31 Cri L Jour 720, *Sadayan Chetty v. Emperor*. (Section confers a large discretion and by the mere fact that a Magistrate has once subpoenaed witnesses under the section, he is not bound to compel their attendance if he is satisfied that it is unnecessary for the purposes of justice.)

7. ('26) AIR 1926 Pat 139 (140): 26 Cr. L. J. 1627, *Ramsakal Rai v. Emperor*. (As a general proposition it should be considered that once a Magistrate has given orders that a certain witness should be called, he should take such steps as may be necessary and possible to enforce his attendance but it cannot be suggested that in no case it is possible for the Magistrate, if he comes to the conclusion that the attendance of the witness is not really necessary to dispense with that person's attendance.)

8. ('28) AIR 1928 Mad 652 (652): 29 Cri L Jour 725, *Saminatha v. Kuppusamy*.

9. ('31) AIR 1931 Pat 207 (208): 32 Cri L Jour 613, *Dwarka Singh v. Emperor*.

10. ('37) AIR 1937 Pat 131 (133): 38 Cr. L. J. 484, *Ishar Singh v. Shama Dusadh*.

11. ('81) 1881 All W N 38 (38), *Empress v. Dhan Kishan*. (Complainant cited by accused as his principal witness being in a Native State was not available as a witness—*Held*, that the Magistrate acted wrongly in having acquitted the accused on ground of the absence of the statement of the principal witness for the defence but he should have pronounced judgment upon the evidence on the record.)

9. ('04) 1 Cr. L. J. 338 (339): 26 All 536: 1904 All W N 94, *Emperor v. Abdul Latif*. [See also ('70) 13 Suth W R Cr 60 (62): 4 Beng L R App Cr 15, *Queen v. Mookta Singh*.]

10. ('14) AIR 1914 All 197 (198): 36 All 13: 15 Cr. L. J. 164, *Mangal v. Emperor*.

11. ('38) 42 Cal W N 843 (844), *Ramadhan Mondal v. Girdhari Mondal*. (Failure to pass an order on an application for issue of fresh process on the failure of the first process vitiates the trial.)

1. ('35) AIR 1935 Sind 69 (70): 29 S. L. R. 64: 36 Cr. L. J. 889, *Kundanlal v. Emperor*.

Note 4

1. ('14) AIR 1914 All 382 (386): 36 All 239: 15 Cr. L. J. 212, *Juggan v. Emperor*. (Twenty witnesses in first list summoned — Second list of 200 witnesses refused as vexatious.)

2. ('26) AIR 1926 Lah 454 (454): 27 Cr. L. J. 543, *Yusuf Ali v. Emperor*. (Magistrate cannot arbitrarily limit number of witnesses to be produced by the accused.)

3. ('34) AIR 1934 Lah 136 (136): 36 Cr. L. J. 559, *Joty Parshad v. Amba Parshad*.

4. ('93) 20 Cal 469 (473), *Nilkanta Singh v. Queen-Empress*.

5. (1900) 27 Cal 370 (372): 4 C W N 469, *Zamunia v. Ram Tahal*.

6. ('33) AIR 1933 Rang 29 (30): 34 Cri L Jour 468, *Zamin v. Emperor*.

Magistrate must consider the case of each witness *individually* before deciding that the application with reference to him has been made for any of the purposes specified in the section.² Further, the section requires that the Magistrate must *record* his reasons for refusing to issue process in compliance with the accused's application.³ But it has been held that the Magistrate's order need not expressly state that the application for process has been made for the purpose of vexation or delay and that it is sufficient if it states facts which lead to the conclusion that the application has been made for such a purpose.⁴

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Note 4

An application for process under this section can be refused only on the ground of its having been made for the purpose of vexation or delay or for defeating the ends of justice. The mere fact that the Magistrate thinks that the evidence of the proposed witness will not be *material* is not sufficient for refusing the application for process.⁵ Nor can the Magistrate take upon himself the responsibility of selecting the witnesses for the defence.⁶ His duty is to issue process for the attendance of all the witnesses named by the accused unless the application for process is vitiated for the reasons mentioned in the section. But where an unduly large number of witnesses are asked to be summoned, it is open to the Magistrate to conclude, in the circumstances of a case, that the application for process is made for purposes of delay.⁷ But where in spite of the largeness of the number of

[See also ('71) 16 Suth W R Cr 28 (30, 31) : 7 Beng L R 564, *Queen-Empress v. Bholanath Mukerjee*.]

2. ('02) 26 Bom 418 (421) : 4 Bom L R 38, *Emperor v. Purshottam*.

3. ('24) AIR 1924 Pat 142 (143) : 24 Cri L Jour 831, *Debi Singh v. Emperor*.

('25) AIR 1925 Cal 411 (411) : 51 Cal 1044 : 26 Cri L Jour 384, *Manomohan v. Bankim Behari*. (Failure to record reasons is illegal.)

('02) 26 Bom 418 (421) : 4 Bom L R 38, *Emperor v. Purushottam*.

('05) 10 Cri L Jour 207 (207) : 2 Sind L R 5, *Emperor v. Dabud*.

('29) AIR 1929 All 914 (916) : 30 Cr. L. J. 1155, *Parbhu v. Emperor*. (Omission to record reasons is an illegality and defect cannot be cured by S. 537.)

('95) 1895 All W N 40 (41), *Empress v. Ram Charan Lal*.

('1900) 4 Cal W N 241 (242), *Sreenath v. Empress*.

4. ('07) 6 Cri L Jour 1 (6) : 11 C W N 789, *Wahid Ali Khan v. Emperor*.

('25) AIR 1925 Mad 106 (107) : 25 Cri L Jour 401, *In re Narayana Menon*.

5. ('37) AIR 1937 Rang 528 (530) : 39 Cr.L.J. 211, *Suppaya Chettyar v. Karuppaya Pillay*. (Mere fact that the accused is not able to satisfy Magistrate that witnesses named by him would give material evidence is not a sufficient reason.)

('11) 12 Cr.L.J. 548 (549) : 12 Ind Cas 524 (Mad), *Arumugam Pillai v. Emperor*. (Application refused on ground that witness would not give any reliable evidence.)

('82) 2 Weir 263 (264), *In re Marinagi Reddi*. (Magistrate cannot refuse application merely because evidence appears to be not material or reliable.)

('23) AIR 1923 Lah 420 (421) : 24 Cri L Jour 686, *Ganpat Rai v. Emperor*.

('71) 15 Suth W R Cr 15 (15, 16), *In re Mohima Chunder Shah*.

[See also ('32) AIR 1932 All 125 (126) : 33 Cr. L. J. 528 : 54 All 331, *Balkrishna Sharma v. Emperor*. (Under rules of the Allahabad High Court, the Magistrate can ask for certificate from pleader of accused that witness is material.)]

[But see ('25) AIR 1925 Mad 106 (110) : 25 Cr. L. J. 401, *In re Narayana Menon*. (Holding that evidence is not going to be of any use is tantamount to holding that the application is vexatious.)]

6. ('28) AIR 1928 Lah 125 (131) : 15 Lah 407 : 29 Cr.L.J. 212, *Taj Md. v. Emperor*.

[See also ('83) 1883 All W N 189 (190), *Empress v. Harpat*. (It is no part of the Judge's duty to examine the prisoner's witness, when his pleader has refused to do so.)]

7. ('32) AIR 1932 All 125 (126) : 54 All 331 : 33 Cr.L.J. 528, *Balkrishna v. Emperor*.

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Note 4

witnesses asked to be summoned, the Magistrate does not think that the application for process is made for the purpose of delay or vexation, he has no option but to accede to the prayer for process.⁸ Nor can he, in such a case, arbitrarily restrict the number of witnesses to be summoned.⁹

The mere fact that an application for process is made at a late stage of the proceeding is not by itself a ground for refusing it.¹⁰ But an unduly belated application for process is liable to be construed as made for the purpose of delay or vexation.¹¹

Where an application for process is first made in respect of some witnesses and then in respect of others, that by itself is no ground for holding that the latter application is made for the purpose of delay or vexation.¹²

Where a Magistrate summons a number of witnesses under this section, he must be presumed to have concluded that their production has not been sought for vexation or delay and the Magistrate cannot thereafter arbitrarily limit the number of witnesses to be examined.^{12a}

See also the undermentioned cases.¹³

(1908) 7 Cr. L. J. 146 (153) : 7 C L J 177 : 12 C W N 299 : 35 Cal 243, *Chintoman Singh v. Emperor*. (Demand to examine about 1000 witnesses was held to be vexatious.)

8. (1932) AIR 1932 All 125(126):54 All 331:33 Cr.L.J. 528, *Balkrishna v. Emperor*.

9. (1926) AIR 1926 Lah 454 (454) : 27 Cri L Jour 543, *Yusuf Ali v. Emperor*.

(1919) AIR 1919 Cal 69 (69) : 20 Cri L Jour 201, *Amirulla v. Emperor*.

(1907) 17 Mad L Jour (NRC) 62 (62).

10. (1937) AIR 1937 Pat 131 (133) : 38 Cri L Jour 484, *Ishar Singh v. Shama Dسادh*. (Although the accused files his list of witnesses late, if the Magistrate does not consider that the witnesses are being summoned in order to cause delay in the trial of the case, it is the duty of the Magistrate to summon the defence witnesses and to see that they attend the Court.)

(1911) 12 Cr. L. J. 150 (151) : 9 I. C. 897 (Mad), *In re Vyasa Rao*. (It depends upon the circumstances of each case whether a belated application should be granted or not.)

[See (1923) AIR 1923 Pat 536 (537) : 24 Cr. L. J. 835, *Beni v. Emperor*. (Trifling delay in applying should not be considered as material.)]

11. (1912) 13 Cr. L. J. 218 (221):14 I. C. 314:39 Cal 781, *Kudrutullah v. Emperor*.

(1911) 12 Cr. L. J. 150 (151) : 9 I. C. 897 (Mad), *In re Vyasa Rao*.

12. (1931) AIR 1931 Oudh 386(387) : 32 Cr. L. J. 1176, *Bhuneshwari v. Emperor*.

[See also (1923) AIR 1923 Pat 536 (537) : 24 Cri L Jour 835, *Beni v. Emperor*.]

[See however (1914) AIR 1914 All 197 (198) : 15 Cr. L. J. 164 : 36 All 13, *Mangal v. Emperor*. (Right of the accused is restricted to have those mentioned in the list to be summoned—If once he has exhausted his right by putting in a list he can only move the Court under S. 540.)]

12a. (1935) AIR 1935 All 638 (639) : 36 Cr. L. J. 1142, *Tekchand v. Emperor*. (At least reasons for not hearing the witnesses should be recorded in writing.)

13. (1911) 12 Cr. L. J. 566 (567) : 12 I. C. 654 (Mad), *Lunmo of Mahalunma v. Emperor*. (Accused charged with recruiting coolies from Agency tract—Application by him for summons to the persons alleged to have been recruited is not one for vexation or delay.)

(1924) AIR 1924 Mad 243 (244) : 24 Cri L Jour 840, *In re Ayaryali Pokker*. (The inconvenience and expense to the State entailed by the conveyance of three convicts from Coimbatore to Calicut was held to be not so serious that application for the attendance of these witnesses should be deemed to be made for the purpose of vexation or delay or defeating the ends of justice.)

(1971) 15 Suth W R Cr 7 (7) : 6 Beng L R App 65, *Ram Sahia v. Sunker Bahadur*. (Magistrate cannot refuse to summon witnesses on the ground that they are implicated in the charge.)

5. Production of documentary evidence by accused. — An accused is entitled to produce documentary as well as oral evidence in his defence. The Magistrate should inspect the documents offered by the accused before excluding them.¹ This section also entitles the accused to apply for process to compel the production of documentary evidence in his favour. Before issuing process, the Magistrate should satisfy himself that the documents called for have some bearing on the issues in the case and are relevant.² See also the undermentioned cases.³

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Notes 5-6

This section does not control the provisions of S. 94. Therefore, even before the case has reached the stage indicated by this section, it is open to the Magistrate to summon the production of a document at the instance of the accused if the conditions laid down in S. 94 are satisfied.⁴ See S. 94 Note 2.

Under S. 139 of the Evidence Act a person merely summoned to produce a document does not become a witness and cannot be cross-examined unless and until he is called as a witness.⁵

6. Right of accused to cross-examine prosecution witnesses. — It has been seen in the Notes under S. 253 that an accused in warrant-cases has three opportunities to cross-examine prosecution witnesses: (a) before the charge is framed; (b) after the charge is framed and before the accused is called upon to enter upon his defence and (c) under this section, after the accused has entered upon his defence. Hence, subject to the restrictions contained in this section, an accused is entitled, even after he has entered upon his defence, to have re-summoned for cross-examination any prosecution witness that he may name.¹ The distinction between the right of the accused

Note 5

1. ('09) 10 Cri L Jour 492 (493) : 4 Ind Cas 67 (Cal), *Brindaban v. Ishaquddin*. (Value of a document cannot be judged before it is produced and inspected.)
2. ('14) AIR 1914 Sind 135 (136) : 8 Sind L R 267 : 16 Cri L Jour 245, *Tahilram Lilaram v. Pitambardas*.
3. ('23) AIR 1923 Lah 420 (422) : 24 Cr. L. J. 686, *Ganpat v. Emperor*. (Accused is entitled to production of Court records instead of being put to the expense of obtaining copies.)
4. ('70) 14 Suth W R Cr 77 (77) : 6 Beng L R App 59, *In re Shib Prasad*. (Application for copies should be granted irrespective of question of their being material or necessary — Question of admissibility is to be determined at the hearing of the case.)
4. ('35) AIR 1935 Sind 13 (18) : 29 Sind L R 92 : 36 Cr.L.J. 581 (FB), *Mohamed Rahim v. Emperor*.
5. ('37) AIR 1937 Oudh 331 (337) : 38 Cri L Jour 491, *Kanhaiya Lal v. Emperor*. (Accused summoning complainant at the close of trial to produce account books — Cross-examination of complainant by prosecution to fill up gaps in evidence — Procedure condemned.)

Note 6

1. ('20) AIR 1920 Pat 149 (150) : 21 Cr.L.J. 814 : 5 Pat L J 94, *Ramnyad v. Emperor*.
- ('25) AIR 1925 Cal 411 (411) : 51 Cal 1044 : 26 Cri L Jour 384, *Manomohan v. Bankim Behari*.
- ('23) AIR 1923 Mad 609 (613) : 46 Mad 449 : 24 Cri L Jour 547 (FB), *Varisai Rowther v. Emperor*.
- ('29) AIR 1929 Lah 578 (579) : 30 Cri L Jour 380, *Emperor v. Sadhu Singh*.
- ('07) 11 Cal W N ccciii (ccciv), *Hemanta Kumar Sarkar v. Sayad Ali*.
- ('30) AIR 1930 Mad 632 (632) : 31 Cri L Jour 720, *Sadayan Chetti v. Emperor*.

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Notes 6-7

under this section and his right under S. 256 is that while his right to re-call and cross-examine prosecution witnesses under S. 256 is an absolute one, his right under this section is subject to the discretion of the Magistrate.² Where a prosecution witness is re-summoned under this section at the instance of the accused, he does not thereby lose his character as a prosecution witness and can be cross-examined by him.³ Where there are two accused in a case and their cases are adverse to each other, the witnesses called by one of the accused in his defence can be cross-examined by the other accused.⁴

See also Note 7.

7. Proviso to sub-section (1).— The first paragraph of sub-s.(1) provides *inter alia* that the accused is entitled to the issue of process for compelling the attendance of prosecution witnesses for *cross-examination* subject to the discretion of the Magistrate to refuse his application for process on the ground of its being made for the purpose of vexation or delay or for defeating the ends of justice. The proviso enacts an exception to this rule. It embodies a prohibition to the effect that if the accused has already cross-examined or has had the opportunity of cross-examining any witness after the charge was framed, the attendance of such witness should not be compelled except where it is necessary for the purposes of justice.¹ But where the accused has not had a sufficient opportunity of cross-examining

2. ('20) AIR 1920 Mad 201 (205) : 43 Mad 411 : 21 Cri L Jour 297, *W. H. Lockley v. Emperor*. (Application to resummon witness discharged on accused's representation falls under S. 257.)

(1900) 27 Cal 370 (372) : 4 Cal W N 469, *Zamunia v. Ram Tahal*.

3. ('97) 1 Cal W N 19 (21), *Mowla Bux v. Derasatulla*.

('01) 28 Cal 594 (596), *Sheopraakash Singh v. W. D. Rawlins*.

('22) AIR 1922 Mad 32 (32) : 23 Cri L Jour 192, *Venku Reddy v. Emperor*.

('27) AIR 1927 Mad 129 (129, 130) : 28 Cri L Jour 32, *Lakshmayya v. Emperor*. (Accused need not state in his application for summons that he wants the witness for cross-examination.)

4. ('40) AIR 1940 Lah 210 (215) : 41 Cri L Jour 639, *Chaman Lal v. Emperor*. (Reason for allowing one accused to cross-examine the witness of another co-accused is that the evidence of the witness may be used against the co-accused.)

('94) 21 Cal 401 (403), *Ram Chand v. Hanif Sheikh*.

[But see ('69) 12 Suth W R Cr 75 (76), *Queen v. Suroop Chunder Pal*.]

See also S. 290 Note 3.

Note 7

1. ('39) AIR 1939 Pat 24 (25) : 39 Cri L Jour 950, *Sonu Kurmi v. Emperor*. (Opportunity given to accused to cross-examine witnesses for prosecution after charge not availed of—Magistrate is justified in declining to resummon witnesses for cross-examination.)

('36) AIR 1936 Lah 914 (915) : 17 Lah 284 : 38 Cri L Jour 24, *Khuda Bakhsh v. Emperor*. (Accused refusing to cross-examine prosecution witnesses before and after charge—Refusal to recall them for cross-examination at the time of arguments is justified.)

('29) AIR 1929 Lah 578 (579) : 30 Cri L Jour 380, *Emperor v. Sadhu Singh*.

('93) 20 Cal 469 (473), *Nilkanta Singh v. Queen-Empress*. (It lies upon the party who thinks himself aggrieved to show that the ends of justice would be frustrated in consequence of the refusal to recall the witnesses.)

('25) AIR 1925 Pat 696 (697) : 27 Cri L Jour 353, *Ajo Mian v. Emperor*. (Mere fact that an accused's lawyers decline to cross-examine such witnesses or the mere fact that such witnesses were not cross-examined does not compel Court to, summon.)

a prosecution witness after the framing of the charge, his attendance may be compelled under this section.²

Section 257
Notes 7-8

The proviso restricts only the issue of *process* for compelling the attendance of witnesses. It does not restrict the cross-examination of witnesses who are *present in Court*.³ The Magistrate is not required by the proviso to record his reasons for not being satisfied that it is necessary for the ends of justice that the attendance of any witness should be compelled.⁴

7a. Examination of witness present in Court though not summoned. — This section does not apply to the examination of a witness who is present in Court though not summoned. Such a witness can be examined by the Court under S. 540, but there is no *obligation* on the Court to examine him.¹

8. Power to require deposit of expenses of witnesses before summoning them. — See Notes to S. 544.

258.* (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Section 258

(2)† Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Sub-section (2) was substituted for the original sub-section (2) by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

* 1882 : S. 258; 1872 : S. 220; 1861 : S. 255.

† Sub-section (2) of original section of 1898 Code ran thus :

Conviction. (2) If in any such case the Magistrate finds the accused guilty, he shall pass sentence upon him according to law.

[See also ('33) AIR 1933 Pat 598 (599) : 35 Cri L Jour 95, *Mohammad Rafi v. Emperor*. (Discretion exercised by Magistrate in disallowing further cross-examination of prosecution witness—Objection not taken in appeal before Sessions Judge—High Court will not entertain ground in revision.)]

[But see ('99) 4 Cal W N 241 (242), *Sreenath v. Empress*. (Submitted not good law.)]

2. ('31) AIR 1931 Lah 186 (188) : 32 Cri L Jour 1202, *Chint Ram v. Emperor*.

('32) AIR 1932 Nag 71 (72) : 33 Cri L Jour 731, *Chamru v. Emperor*. (Accused's pleader unable to appear and cross-examine on the previous occasion under S. 256.—Held his application under S. 257 was improperly refused.)

('21) 22 Cr. L. J. 572 (573) : 62 Ind Cas 588 (Pat), *Bisheshwar Singh v. Emperor*.

('27) AIR 1927 Nag 240 (240) : 28 Cri L Jour 425, *Jairam Kunbi v. Emperor*.

3. (32) AIR 1932 Nag 137 (137) : 28 Nag L R 254 : 33 Cr. L. J. 940, *Ramachandra v. Emperor*.

[See also ('28) AIR 1928 Pat 253 (255) : 29 Cri L Jour 308, *Rameshwar Sahu v. Emperor*. (Once a summons has been issued and the witness is before the Court, there is no jurisdiction in the Court, to dictate to the accused the terms upon which the examination of the witness shall be conducted—If the accused wishes to put questions in cross-examination, Magistrate is bound to allow them.)]

4. ('25) AIR 1925 Pat 696 (700) : 27 Cri L Jour 353, *Ajo Mian v. Emperor*.

Note 7a

1. ('34) 1934 Mad W N 97 (98), *Marimuthu Padayachi v. Emperor*.

Section 258
Notes 1-2

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. "In which a charge has been framed." 3. "The Magistrate finds the accused not guilty." | <ol style="list-style-type: none"> 4. "He shall record an order of acquittal." 5. Sub-section (2) — Procedure under S. 349. 6. Sentence. |
|---|---|

Other Topics (miscellaneous)

- | | |
|--|--|
| <p>Absence of charge—Effect. See Note 2.</p> <p>Absence of complainant. See Note 3.</p> <p>Acquittal — Not discharge or dismissal. See Note 4.</p> <p>No evidence after charge — Conviction not necessary. See Note 3.</p> | <p>Sending co-accused under S. 349. See Note 4.</p> <p>Strength of prosecution and not weakness of defence. See S. 257 Note 1.</p> <p>Withdrawal by complainant. See Note 3.</p> |
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1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

The following explanation was added to S. 220 of the Code of 1872:

"If a charge is drawn up, the prisoner must either be acquitted or convicted. If no charge is drawn up, there can be no judgment of acquittal or conviction except in the case provided for in Explanation 1 to S. 216."

This gave legislative effect to the undermentioned decisions¹ under the Code of 1861.

Changes made in 1882 —

The explanation to S. 220 of the Code 1872 was omitted and the words "if in any case . . . framed" were introduced into the section.

Changes made by Act XVIII of 1923 —

The words "where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 349 or section 562" were added in sub-section (2).

2. "In which a charge has been framed." — In warrant-cases, an order of acquittal or conviction can be passed only after a charge has been framed:¹ But the mere fact that a charge has not been framed does not invalidate the proceedings unless a failure of justice has in fact been occasioned thereby.² See S. 535. Moreover, in warrant-cases tried *summarily*, S. 263 expressly dispenses with the framing of a formal charge, and the absence of a charge is no bar to an order of acquittal or conviction.³

Section 258 — Note 1

1. ('66) 5 Suth W R Cr 58 (58), *In re Shoodun Mundle*.
2. ('67) 8 Suth W R Cr 45 (46), *Queen v. Bipro Doss*.
3. ('68) 9 Suth W R Cr 15 (15), *Goonath Mundle v. Troylocko*.
4. ('69) 12 Suth W R Cr 65 (65, 66): 4 Beng L R A Cr 1, *Queen v. Goburdhun Bera*.

Note 2

1. ('74) 22 Suth W R Cr 25 (26), *Queen v. Japit Ahir*. (Acquittal.)
2. ('91) 1891 All W N 80 (81), *Empress v. Kallu*. (Fact that charge has not been framed lends corroboration to view that a certain order is one of discharge and not of acquittal.)
[See also ('86) 1886 All W N 260 (260), *Empress v. Jadu*.]
3. ('79) 3 Cal L R 131 (133), *In the matter of Joja Pashan*.
4. ('81) 1881 All W N 142 (142), *Hanuman v. Ahmad Ali*.
5. ('17) AIR 1917 Low Bur 88 (89): 18 Cr. L. J. 1006 (1007) *Orilal v. Kalu*. (Where a case was tried in all respects as a warrant-case except that no charge was framed, it was held that order of discharge amounted to an order of acquittal.)
6. (1900-02) 1 Low Bur Rul 9 (10), *Queen-Empress v. Nga Po Lun*.

The law contemplates that where there is a *prima facie* case against the accused, a charge should be framed and, if after taking the evidence for the defence after such charge it is found that the evidence is not sufficient to justify conviction, the accused should be acquitted. Hence it is most improper for a Magistrate to proceed without framing a charge and after taking all the evidence for the defence discharge the accused on finding that he cannot be convicted. Such a course is most unfair to the accused as it deprives him of the benefit of an acquittal to which he is rightfully entitled under the circumstances. The order of discharge in such a case virtually amounts to an acquittal and the Court of revision would not be justified in ordering further enquiry in such cases.⁴ See Notes under S. 436.

The section contemplates that the charge is subsisting at the time the order of acquittal is passed. If, therefore, by operation of law the charge is cancelled, as when a *de novo* trial is ordered under S. 350, the Magistrate is in the same position as if it had never been framed and, hence, cannot pass an order of acquittal.⁵

3. "The Magistrate finds the accused not guilty." — An order of acquittal can be recorded under this section only when the Magistrate finds the accused not guilty.¹ Thus, he cannot acquit the accused merely because the complainant or his witnesses are absent on the date of hearing² (see S. 259 and Notes thereunder) or because the complainant offers to withdraw his complaint.³ Similarly, where the Court finds that it has no jurisdiction to try the case, the proper order to pass is one of discharge and not of acquittal.^{3a} See Ss. 248 and 345 and Notes thereunder.

4. ('89) 2 C P L R 82 (83, 84), *Empress v. Bhagwan Malec*.

('83) 1883 Pun Re No. 29 Cr, p. 76 (77), *Taba v. Hira Singh*.

5. ('36) AIR 1936 Nag 153 (156); ILR (1936) Nag 92: 37 Cr. L. J. 983, *Tukaram Janba v. Emperor*.

Note 3

1. ('13) 14 Cr. L. J. 77 (77): 37 Bom 369 : 18 Ind Cas 413, *Emperor v. Ranchhod*. ('25) AIR 1925 Oudh 314 (314) : 26 Cri L Jour 400, *Emperor v. Godhan*.

2. ('37) AIR 1937 All 127 (129) : 38 Cri L Jour 361, *Har Kishan v. Emperor*. (Absence on the date fixed for cross-examination.)

('33) AIR 1933 Cal 358 (358): 34 Cr. L. J. 498, *Nutbehari Sarkar v. Saroda Prosad*.

('90) 1890 Rat 524 (524), *Queen v. Nanaji*.

('25) AIR 1925 Oudh 306 (306): 27 Oudh Cas 316: 26 Cri L Jour 264, *Ram Baksh v. Jairam Das*.

('21) 22 Cri L Jour 312 (312) : 60 Ind Cas 1000 (1000) (Lah), *Narain Das v. Mewa Singh*.

[See ('25) AIR 1925 Oudh 314 (314) : 26 Cri L Jour 400, *Emperor v. Godhan*. (Parties absent after the charge is framed—Order of discharge is not proper.)]

[See also ('81) 1881 All W N 38 (38), *Empress v. Dhan Kishan*. (Accused citing complainant as his principal witness—Magistrate finding it difficult to procure the attendance of the complainant—He cannot acquit the accused merely on this ground.)]

[But see ('30) AIR 1930 All 795 (796) : 53 All 39 : 32 Cri L Jour 366, *Emperor v. Nazir Husain*. (Complainant and his witnesses absent on the day fixed for their cross-examination without sufficient reason—Order of acquittal and not order of discharge is the proper order to pass in such a case.)]

3. ('13) 14 Cri L Jour 77 (77): 37 Bom 369 : 18 I. C. 413, *Emperor v. Ranchhod*.

3a. ('10) 11 Cr. L. J. 253 (254): 5 I. C. 830 : 1910 Pun Re No. 7 Cr, *Gokul Chand v. Phulchand*.

Section 258
Notes 3-5

Under S. 254 a charge is to be framed only when the Magistrate finds that the prosecution has made out a *prima facie* case against the accused. But this does not mean that where a charge is framed, the Magistrate is bound to convict the accused merely because he fails to produce any evidence of rebuttal. Thus, he is bound to acquit if at the time of giving judgment he has reasonable doubt of the guilt of the accused.⁴ As to appreciation of evidence in criminal cases, see the undermentioned cases.⁵

4. "He shall record an order of acquittal."—Once a charge is framed in a warrant-case the Magistrate has no power to *discharge the accused*.¹ He must either acquit the accused or convict him unless he decides to proceed under S. 349 or S. 562.

The proper order to pass under the section, if the Magistrate finds the accused not guilty, is to acquit the accused. An order dismissing the complaint or discharging the accused is not a proper order. But where such an order is passed and the meaning of the Magistrate is clear, the effect of the order is only that of acquittal.²

Under this section the Magistrate is *bound* to acquit the accused if he finds him not guilty. He cannot refer his case under S. 349 merely because there are other accused tried along with him who are, in the opinion of the Magistrate, guilty and whose case he decides to refer under section 349.³

5. Sub-section (2) — Procedure under section 349. — Under S. 349 the Magistrate who decides to proceed under that section has

4. ('96) 1896 Rat 854 (854), *Queen v. Chanbasappa Madiappa*.

See also S. 254 Note 4 and S. 256 Note 10.

5. ('40) AIR 1940 Mad 1 (4) : 41 Cri L Jour 369, *In re Kanakasabai Pillai*. (Evidence entirely circumstantial — Reasonable interpretation favourable to accused possible—It should not be rejected even if unfavourable interpretation is equally or even a little more reasonable.)

('40) AIR 1940 Mad 196 (200) : ILR (1940) Mad 158 : 41 Cri L Jour 437 (FB), *In re Guruswami Tevar*. (Conviction can be based on uncorroborated dying declaration if found true.)

('34) AIR 1934 Sind 6 (7) : 35 Cri L Jour 736, *Emperor v. Mahomed Khabar*. (Absence of ascertainable motives comes to nothing if crime is proved to have been committed by a sane person.)

('34) AIR 1934 Oudh 124 (129) : 35 Cri L Jour 804 : 9 Luck 517, *Gaya Din v. Emperor*. (Where major portion of prosecution evidence is found to be false it is impossible to build up a case of an offence.)

('34) AIR 1934 Sind 22 (26) : 28 S. L. R. 84 : 36 Cr. L. J. 818, *Bhikchand Gangaram v. Emperor*. (Presumption of innocence in favour of accused is not lost or rebutted merely because accused makes a false defence or makes use of false testimony.)

('21) AIR 1921 Lah 89 (90) : 22 Cr. L. J. 595, *Hari Ram v. Emperor*. (No inference of guilt can be drawn from a false statement of accused.)

Note 4

1. ('91) 1891 All W N 80 (81), *Empress v. Kallu*.

('03) 1903 Pun Re No. 14 Cr, p. 38 (39) : 1903 Pun L R No. 175, *Crown v. Nathu*.

('30) AIR 1930 All 795 (796) : 53 All 39 : 32 Cri L Jour 366, *Emperor v. Nazir Husain*. (Charge framed — Complainant absent on date of hearing — Accused cannot be discharged.)

2. ('80) 5 Cal L R 359 (360), *In the matter of Jadubar Mookerjee*.

('75) 24 Suth W R Cr 62 (63), *Sreenath Mundle v. Sreenath Rajput*.

[See also ('35) AIR 1935 All 834 (835) : 36 Cr. L. J. 912, *Raza Hussain v. Emperor*. (Magistrate finding accused not guilty but inadvertently referring to S. 253 instead of S. 258 — Order is one of acquittal and not of discharge.)]

3. ('26) AIR 1926 All 176 (176) : 26 Cr. L. J. 1630, *Sultan Md. Khan v. Emperor*.

merely to record his opinion that the accused is guilty but cannot convict him. Sub-s.(2) of this section, as now worded, can, however, be read as not necessarily prohibiting the Magistrate from finding the accused guilty, i. e., convicting him. The conviction will not, however, have any legality.¹

See also Note 9 to section 349.

6. Sentence. — The provisions of sub-s.(2) are mandatory. The Magistrate is *bound* to pass some sentence on the accused when he records a verdict of guilty, however light the sentence may be¹ unless he proceeds under section 562.

Section 258
Notes 5-6

259.* When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Section 259

Synopsis

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|--|---|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and applicability of the section. 3. "Instituted upon complaint." 4. "Complainant is absent." See Notes under S. 247. 5. Death of complainant. See Note 6 to S. 247. 6. Withdrawal of complaint. See Notes under S. 248. | <ol style="list-style-type: none"> 7. "The offence may be lawfully compounded, or is not a cognizable offence." 8. "May in his discretion." 9. "At any time before the charge is framed." 10. Discharge the accused. 11. Revival of case after discharge. See Note 13 to S. 403. See also S. 436 and Notes thereunder. 12. Revision. See Note 14 to S. 439. |
|--|---|

Other Topics (miscellaneous)

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|--|---|
| <p>Absence after framing of charge. See Note 9.</p> <p>Adjournment of trial. See Note 9.</p> <p>Comparison with Ss. 203, 204 and 209. See Note 10.</p> <p>Comparison with S. 247. See Note 2.</p> <p>Comparison with S. 253. See Notes 2 and 10.</p> | <p>Issue of summons in warrant-cases. See Note 1 and S. 251 Note 2.</p> <p>Joint trial of summons and warrant cases. See Note 2.</p> <p>Non-applicability to cases on police-report. See Note 3.</p> <p>"Striking of." See Notes 10 and 7.</p> <p>Sufficient cause for absence. See Note 8.</p> |
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* 1882 : S. 259; 1872 : S. 215, Expln.; 1861—Nil.

Note 5

1. ('28) AIR 1928 Bom 240 (240) : 52 Bom 456 : 29 Cri L Jour 904, *Emperor v. Narayan Dhaku*. (Thus conviction in such a case will not prevent further trial under S. 403, Cr. P. C.)

Note 6

1. ('72-92) 1872-1892 Low Bur Rul 409 (409), *Queen v. Mi Bauk*. ('69) 4 Mad H C R App lxvi (lxvii). (1865) 3 Suth W R Cr L 15 (15). ('84) 1884 All W N 219 (219), *Empress v. Kalua*. ('34) AIR 1934 Rang 338 (339) : 12 Rang 419 : 36 Cr.L.J. 460, *Emperor v. Mi Hlwa*. [But see ('28) AIR 1928 Nag 188 (189) : 24 Nag L R 110 : 29 Cr. L. J. 506, *Sitaram Kunbi v. Emperor*. (Submitted not correct.)]
- See also S. 367 Note 10.

Section 259
Notes 1-2

1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

There was no corresponding provision in the Code of 1861.¹

But in practice it was held that if owing to the absence of the complainant the Magistrate was satisfied that no evidence was forthcoming against the accused, he might discharge him.²

The following explanation was added to S.215 of the Code of 1872 :

“Explanation I.—The absence of the complainant, except where the offence may be lawfully compounded, shall not be deemed sufficient ground for a discharge, if there appears other evidence sufficient to substantiate the offence.”

Changes made in 1882 —

Instead of the Explanation I to S.215 of the Code of 1872 a separate substantive section, viz., S. 259 was inserted in the Code. This section was in the same terms as that in the present Code.

Changes made in 1923 — The words “or is not a cognizable offence” were added, after the word “compounded” by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

2. Scope and applicability of the section. — This section is analogous to S.247. Both sections provide for the procedure to be followed in case of the absence of the complainant on the date of hearing. Section 247 applies to *summons-cases* while this section applies to *warrant-cases*. The points of distinction between the two sections are as follows :

- (1) Section 247 provides for the *acquittal* of the accused, while this section provides only for the *discharge* of the accused.¹
- (2) Section 247 makes it *obligatory* on the Magistrate to acquit the accused unless for some reason he thinks proper to adjourn the hearing to some other day, while this section leaves it to the *discretion* of the Magistrate to decide whether the accused should be discharged.

Section 259 — Note 1

1. (1864) 1 Suth W R Cr 25 (25), *Queen v. Jodoo Paharce*.
(‘69) 1869 Rat 16 (16), *Reg. v. Goolabchand*.
(‘69) 12 Suth W R Cr 27 (28); 7 Beng L R 9n, *Queen v. Bedoor Ghose*.
(‘71) 3 N W P H C R 341 (341), *Queen v. Jugroop*.
[See (‘68) 10 Suth W R Cr 31 (31), *Nund Lall v. Bhagirutty*. (There is no provision for dismissal of complaint for non-attendance of complainant as in summons-cases—Mere fact that summons is issued in the first instance does not make a warrant-case a summons-case.)]
2. (‘67) 8 Suth W R Cr L 12. (Accused may be discharged if the Magistrate considers it unnecessary to carry on the enquiry in the absence of the complainant.)
(‘69) 11 Suth W R Cr 39 (40), *Queen v. Dassoo Manjee*.
(‘70) 6 Mad H C R App viii (viii). (Complainant absent—Magistrate may dismiss the complaint.)
(1865) 3 Suth W R Cr 36 (36), *Queen v. Chundrai Sikdar*.
(‘69) 4 Mad H C Rul App xli (xlii).
(‘70) 13 Suth W R Cr 35 (36), *Santoo Mundle v. Abdool Biswas*.
(‘69) 11 Suth W R Cr 47 (47, 48), *Queen v. Pooran Jolaha*.
(‘71) 15 Suth W R Cr 53 (53); 7 Beng L R 7, *Taki Mahomed v. Krishna Nath Rai*.

Note 2

1. (‘34) AIR 1934 All 340 (341); 56 All 750; 36 Cr. L. J. 65, *Suraj Bali v. Emperor*.

- (3) Section 247 applies to *all* offences triable as summons-cases, while this section applies only to such warrant-case offences as are *either compoundable or non-cognizable*.

Section 259
Notes 2-7

As said already, S. 247 applies to summons-cases, while this section applies to warrant-cases. The question arises as to what section applies to cases of a composite character involving both summons-case and warrant-case offences. In such cases, as has already been seen in Notes under S. 241, the procedure prescribed for warrant-cases should be followed and hence, it is this section and not S. 247 that will apply. Hence, in such cases the Magistrate cannot acquit the accused on the ground of the absence of the complainant on the date of hearing but must only discharge the accused under this section if the conditions laid down therein are present. See also notes under S. 247.

Section 253 also provides for the discharge of the accused in warrant-cases. But the grounds of discharge under that section are confined to cases where the Magistrate finds that the evidence for the prosecution does not make out a *prima facie* case against the accused or that the charge against the accused is groundless. There is no power under that section to discharge an accused on the ground that the complainant is absent on the date of hearing. An accused can be discharged on this ground only under this section, provided the other conditions for its applicability are fulfilled.²

The scope of the section has been enlarged by the insertion of the words "or is not a cognizable offence" by the amendments of 1923. The section as it stands applies not only to compoundable offences but also to offences which though not compoundable are non-cognizable.

3. "Instituted upon complaint."—The section applies only to cases where the proceedings have been instituted upon *complaint*. Hence, where the proceedings have not been instituted upon *complaint*, the Magistrate cannot invoke the provisions of this section for discharging the accused on the ground of the absence of the prosecuting officer on the date of hearing.¹

4. "Complainant is absent." — See Notes under Section 247.

5. Death of complainant. — See Note 6 to Section 247.

6. Withdrawal of complaint. — See Notes under Section 248.

7. "The offence may be lawfully compounded, or is not a cognizable offence." — As the section stood prior to the amendment of 1923, it applied only to cases where the offence charged was a *compoundable* one.¹ The scope of the section has now been enlarged

2. ('17) AIR 1917 Cal 525 (525): 17 Cr. L. J. 193, *V. R. Alexander v. R. W. Connor*. ('84) 10 Cal 67 (67, 68): 13 C L R 408, *Govinda Das v. Dulall Das*. (Non-compoundable warrant-case dismissed for default—*Held* S. 259 was inapplicable.)

('91) 1891 All W N 116 (116), *Empress v. Kura*.

(1900) 4 Cal W N 26 (27), *Ram Coomar v. Ramjee*.

[See also ('23) AIR 1923 Cal 403 (404), *Hrishikesh Sen v. Parash Nath*.]

Note 3

1. ('27) AIR 1927 Oudh 352 (352) : 28 Cr. L. J. 816, *Emperor v. Mannu Singh*.

Note 7

1. ('17) AIR 1917 Cal 525 (525): 17 Cr. L. J. 193, *V. R. Alexander v. R. W. Connor*.

Section 259
Notes 7-8

by the addition of the words "or is not a cognizable offence" after the words "the offence may be lawfully compounded" in the section. The section therefore applies not only to cases where the offence is a compoundable one but also where though it is not compoundable, it is *non-cognizable*. Where the offence is neither compoundable nor non-cognizable, the section does not apply.² Where several offences are charged against the accused, it is necessary that *all* of them should be compoundable or non-cognizable in order that the section may apply.³

For the meaning of "cognizable," see S. 4 (1) clauses (f) and (n).

8. "May in his discretion."—Under this section the Magistrate is not *bound* to discharge the accused on the absence of the complainant on the date of hearing.¹ It only confers a *discretion* on the Magistrate to discharge the accused in the circumstances specified in it² and Magistrate should exercise such discretion only sparingly and discharge the accused.³ Where the presence of the complainant is not at all necessary for proceeding with the case, the Magistrate ought not to discharge the accused merely because of his absence.⁴ The Magistrate is bound to consider whether there is a *prima facie* case against the accused; and where there is no *prima facie* case, he will be justified in discharging the accused if the complainant absents himself on the date of hearing. But at the same time it must be remembered that the primary reason for a discharge under this section is the absence of the complainant which raises a presumption of his wish not to proceed with the case. Hence, where, despite the absence of the complainant, the circumstances are such as do not give rise to the inference that he did not wish to proceed with the case, the Magistrate ought not to

(184) 10 Cal 67 (68) : 13 Cal L R 408, *Govinda Das v. Dulall Das*.

(1903-04) 2 Low Bur Rul 165 (165), *King-Emperor v. Nga Aung Nyang*.

(1920) AIR 1920 Low Bur 137 (137) : 10 Low Bur Rul 375 : 22 Cr.L.J. 753, *Emperor v. A. Yankaya*. (Case under S. 384, Penal Code, non-cognizable but not compoundable—Order of discharge was held to be wrong.)

(1914) AIR 1914 Oudh 264 (264) : 17 O C 18 : 15 Cr. L. J. 230, *Ramphal v. Emperor*. (In such a case the case cannot also be struck off as the Code does not provide for such a course.)

(1900) 4 Cal W N 26 (27), *Ram Coomarr v. Ramjee*.

2. (1924) AIR 1924 Lah 627 (627) : 25 Cri L Jour 87, *Nabi Baksh v. Emperor*.

(1935) AIR 1935 Bom 76 (78) : 59 Bom 171 : 36 Cr. L. J. 483, *Emperor v. Morarji*.

3. (1939) AIR 1939 Bom 89 (89) : 40 Cr. L. J. 346, *Alimahomed Joosab v. Kasturchand Balabhai*. (Complaint in respect of offences, one of which was cognizable and non-compoundable — Section does not apply.)

[See (1927) AIR 1927 Oudh 352 (352) : 28 Cr.L.J. 816, *Emperor v. Mannu Singh*.]

[See also (1911) 1891 All W N 116 (116), *Empress v. Kura*.]

Note 8

1. (1926) AIR 1926 Bom 178 (179) : 27 Cr. L. J. 491, *Mahomed Azam v. Emperor*. (Death of complainant in a non-cognizable case — Magistrate allowed complaint to be continued by a fit complainant.)

2. (1929) AIR 1929 Rang 14 (15) : 6 Rang 664 : 30 Cri L Jour 345, *U Mo Gaung v. U Po Sin*. (Discretion not to be lightly interfered with by High Court.)

3. See (1911) 6 Cal 523 (528) : 8 Cal L R 106, *Empress v. Thompson*. (Case under S. 124 of the Presidency Magistrates Act, IV of 1877.)

4. (1906) 1896 Rat 847 (848), *Queen v. Mhatarji*. (Case ripe for charge being framed — Accused ought not to be discharged merely because of complainant's absence.)

(1909) 12 Suth W R Cr 27 (28) : 7 Beng L R 9n, *Queen v. Bedoor*.

[See (1911) 6 Cal 523 (528) : 8 Cal L R 106, *Empress v. Thompson*. (Dismissal of case under S. 124, Presidency Magistrates Act, IV of 1877.)]

discharge the accused under this section.⁵ Thus, where the absence of the complainant is due to a reasonable cause, the Magistrate ought not to discharge the accused under this section.⁶

Section 259
Notes 8-12

9. "At any time before the charge is framed." — This section only applies to cases where the complainant is absent on a day fixed for the hearing *before the charge is framed*. If the complainant absents himself *after* the charge is framed, the Magistrate has no power to discharge the accused on the ground of the absence of the complainant.¹ Nor can the accused be acquitted under S. 258 in such a case as an order of acquittal under that section can only be based on a finding of "not guilty" (see Notes under S. 258). The only course open to the Magistrate in such circumstances is to proceed with the case in the absence of the complainant² unless he decides to adjourn the case.³

10. Discharge the accused. — The procedure laid down in this section is to *discharge* the accused. Similarly there are other provisions in the Code under which the accused may be discharged. (See Ss. 209 and 253.) Under Ss. 203 and 204 the Magistrate can *dismiss a complaint*. But the Code nowhere provides for the passing of an order *striking off* a case, though such an order may, in suitable circumstances, be construed and treated as an order of discharge.¹

11. Revival of case after discharge. — See Note 13 to Section 403. See also Section 436 and Notes thereunder.

12. Revision. — See Note 14 to Section 439.

5. ('11) 12 Cri L Jour 184 (184) : 9 Ind Cas 1007 (Sind), *Harun v. Abdul Satar*.

6. ('23) AIR 1923 Cal 403 (404), *Hrishi Kesh v. Paresh Nath*. (Complainant absent as he had to attend as a witness in another Court but his pleader present and applying for adjournment — Accused not to be discharged.)

('11) 12 Cri L Jour 184 (184) : 9 Ind Cas 1007 (Sind), *Harun v. Abdul Satar*. (Prevented from attending by floods.)

[See also ('71) 1871 Rat 59 (59), *Reg v. Virabhadra*. (Incarceration of complainant in jail, after he had preferred his complaint is a sufficient cause and complaint may be revived — Case under the Code of 1861, S. 259 (now S. 247).)]

Note 9

1. ('25) AIR 1925 Oudh 306(306) : 27 Oudh Cas 316 : 26 Cr.L.J. 264, *Ram v. Jairam*.

('25) AIR 1925 Oudh 314 (314) : 26 Cri L Jour 400, *Emperor v. Godhan*.

('33) AIR 1933 Pesh 78 (78) : 35 Cr. L. J. 170, *Abdul Hakim v. Haji Abdul Aziz*.

(Change in the constitution of Bench after framing charge—Accused claiming *de novo* trial — Accused discharged on complainant's absence — *Held*, the order of discharge did not amount to acquittal but was an order of discharge under S. 259.)

('90) 1890 Rat 524 (524), *Queen-Empress v. Nanaji*.

('18) AIR 1918 Nag 76 (76) : 20 Cri L Jour 763, *Rai Singh v. Patia*.

[But see ('30) AIR 1930 All 795 (796) : 53 All 39 : 32 Cri L Jour 366, *Emperor v. Nazir Husain*.]

2. ('37) AIR 1937 All 127 (129) : 38 Cri L Jour 361, *Har Kishan v. Emperor*.

('33) AIR 1933 Cal 358(358) : 34 Cr. L. J. 498, *Nutbehari v. Saroda Prosad Chowdhury*. (Magistrate cannot acquit the accused because of complainant's absence.)

('24) AIR 1924 Lah 627 (627) : 25 Cri L Jour 87, *Nabi Baksh v. Emperor*. (After charge, complainant's position is reduced to that of a witness — He cannot be ordered to pay costs of adjournment.)

3. See ('37) AIR 1937 All 127 (129) : 38 Cri L Jour 361, *Har Kishan v. Emperor*. (Complainant and his witnesses absent — Afterwards complainant appearing and asking for adjournment of fifteen minutes — Court acts irregularly in refusing to grant adjournment.)

Note 10

1. ('14) AIR 1914 Oudh 264 (264) : 17 Oudh Cas 18 : 15 Cr L J 230, *Ramphal v. Emperor*. (In this case the offence charged being not compoundable it was held that the order striking off the complaint was not tantamount to order of discharge.)

ction 260

Power to try
summarily.**260.*** (1) Notwithstanding any-
thing contained in this Code,—

- (a) the District Magistrate,
- (b) any Magistrate of the first class specially empowered in this behalf by the *Provincial Government*,^a and
- (c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the *Provincial Government*,^a

may, if he or they think fit, try in a summary way all or any of the following offences:—

- (a) offences not punishable with death, transportation or imprisonment for a term exceeding six months;
- (b) offences relating to weights and measures under sections 264, 265 and 266 of the Indian Penal Code;
- (c) hurt, under section 323 of the same Code;
- (d) theft, under sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees;
- (e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees;
- (f) receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed fifty rupees;
- (g) assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees;
- (h) mischief, under section 427 of the same Code;
- (i) house-trespass, under section 448, and offences under sections 451, 453, 454, 456 and 457 of the same Code;

* 1882 : S. 260; 1872 : Ss. 222, 223, 224; 1861 — Nil.

- (j) insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, of the same Code;
- (k) abetment of any of the foregoing offences;
- (l) an attempt to commit any of the foregoing offences, when such attempt is an offence;
- (m) offences under section 20 of the Cattle-trespass Act, 1871:

Section 260
Note 1

Provided that no case in which a Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall re-call any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code.

a. Substituted by A. O. for "Local Government."

Synopsis

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| 1. Legislative changes. | 4. "May, if he or they think fit." |
| 2. Scope and object of the section. | 5. Offences to which the section applies. |
| 3. Magistrates empowered to try cases summarily. | 6. Sub-section (2). |

Other Topics (miscellaneous)

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|--|--|
| Allegations in complaint and sworn statement to decide summary trials. See Note 5. | Municipal cases. See Note 4. |
| Allegations of informant to police. See Note 5. | Offences under Workman's Breach of Contract Act, XIII of 1859. See Note 5. |
| Cattle-trespass Act, clause (m). See Note 5. | Police-report. See Note 5. |
| Clause (a) independent of clauses (b) to (k). See Note 5. | Presidency Magistrates. See Notes 2 and 3. |
| Compensation. See S. 262 Note 2. | Previous conviction. See Note 5. |
| Complicated questions. See Note 4. | Question of title. See Note 4. |
| Consent of accused — No value. See Note 5. | Record—To show summary trials. See S. 263 Note 5. |
| Deaf and dumb accused. See Note 4. | Section 195. See Note 4. |
| Forest Act of 1927, S. 67. See Note 5. | Security proceedings. See Note 5. |
| Government servants — Cases against. See Note 4. | Serious offence. See Note 4. |
| Ignoring facts alleged. See Note 5. | Several offences — All summary. See Note 5. |
| Joint trial of summary with other offences. See Note 5. | Short and long trials. See Note 4. |
| Magistrate at Bangalore cantonment. See Note 3. | Subsequent change of procedure. See Notes 5 and 6 and S. 251 Note 4. |
| Magistrate taking cognizance himself. See Note 4. | Summary procedure—When appropriate and when not. See Note 4. |
| | Summary powers — Careful exercise. See S. 262 Note 2. |
| | Summary trial — Meaning and effect. See Note 2. |

1. Legislative changes.

Difference between Codes of 1861 and 1872 —

There was no section corresponding to this in the Code of 1861.

Section 260
Notes 1-2

The corresponding sections in the Code of 1872 were Ss. 222, 223 and 224.

Changes made in 1882 —

- (1) The offence referred to in clause (g) of the present section was added to the list of offences triable summarily under the section.
- (2) The proviso to sub-s.(1) of the present section was added, giving legislative effect to the undermentioned decision.¹
- (3) The words "and on conviction of the offender, may pass such sentence as may be lawfully inflicted under S. 20 (corresponding to S. 32 of the present Code) of this Code" which occurred in S. 222 of the prior Code were omitted and the second paragraph of S. 262 providing that in summary trials no sentence of imprisonment for a term exceeding three months can be passed was added.

Changes made in 1898 —

The following additions were made :

- (1) The words "if he or they think fit."
- (2) Clause (e).
- (3) Clause (m). This gave legislative effect to the undermentioned decision² and rendered obsolete decision noted below.³
- (4) The words and figures "and offences under Ss. 451, 456 and 457 of the same Code" in clause (i).
- (5) Sub-section (2).

Changes made after 1898 —

By the Amending Act I of 1903 the offences under Ss. 453 and 454 of the Penal Code were added to the offences enumerated in clause (i) of sub-s.(1) thus rendering obsolete the undermentioned decision.⁴

2. Scope and object of the section.—This section and the next lay down the offences that can be tried summarily and the Magistrates by whom they can be so tried. While this section lays down the offences that can be tried in a summary way by District Magistrates, Magistrates of the first class and Benches of Magistrates with *first class* powers, the next section lays down the offences that can be tried summarily by Benches of Magistrates with *second or third class* powers. The procedure to be followed in summary trials is laid down in Ss. 262 to 265.

Under S. 262, sub-s.(2), it is provided that in case of conviction in summary trials the Magistrate cannot pass any sentence of imprisonment for a term exceeding three months. Under section 414 a person convicted at a summary trial by a Magistrate empowered to try cases summarily has no right of appeal in any case where the sentence is one of fine not exceeding two hundred rupees only.

These sections apply to trials before Magistrates and Benches of Magistrates other than Presidency Magistrates. As regards summary

Section 260 — Note 1

1. ('79) 1879 Pun Re No. 25 Cr, p. 75 (76), *Fazlu v. Empress*.
2. ('96) 1896 All W N 136 (136), *Queen-Empress v. Jawahir*.
3. ('96) 23 Cal 248 (248), *Nedaram Thakur v. Joonab*.
4. ('01) 14 C P L R Cr 158 (158), *Emperor v. Ratan Singh*.

procedure in trials before the latter, see S. 362 sub-s.(4), S. 370 and S. 441.

The object of this section and the sections following it in this chapter is to shorten the record and the work of the Magistrate in making the record; it is not intended to deprive the accused person of any of the rights under chapter XX or chapter XXI.¹

3. Magistrates empowered to try cases summarily. — The power to try cases summarily is confined to the Magistrates and Benches of Magistrates mentioned in this section and the next section. While the offences mentioned in this section can be tried by District Magistrates, Magistrates of the first class specially empowered in this behalf by the Provincial Government and Benches of Magistrates with first class powers specially empowered in this behalf by the Provincial Government, the offences mentioned in S. 261 can be tried by Benches of Magistrates with second or third class powers, specially empowered in this behalf by the Provincial Government.

As to the power of the District Magistrate of the Civil and Military Station of Bangalore to try European British subjects summarily, see the undermentioned case.¹

4. "May, if he or they think fit." — Under this section the Magistrate is not *bound* to adopt the summary procedure in the case of the offences mentioned in it. The section only confers a *discretion* to try such offences in a summary way if the *Magistrate thinks fit* to do so. In each case he ought to consider whether the summary procedure would be appropriate to the case. As a rule, such procedure should be confined to cases of a simple nature where not much evidence is needed.¹ The procedure is inappropriate to cases of a complicated or serious nature.² Thus, it would not be proper to try in a summary way cases which are hotly contested,³ cases involving intricate questions of title and possession⁴ and cases necessitating the

Note 2

1. ('39) AIR 1939 Nag 87 (88) : ILR (1939) Nag 457 : 40 Cr. L. J. 846, *Munna v. Emperor*.

Note 3

1. ('16) AIR 1916 Mad 589 (589) : 39 Mad 942 : 16 Cri L Jour 773 (774), *In re G. G. Jeremiah*. (No power.)

Note 4

1. ('76) 25 Suth W R Cr 65 (66), *Issur Chunder v. Rohim Sheikh*. (Bona fide claim of right deprives Magistrate of jurisdiction to deal with criminal charge in summary way.)
2. ('21) AIR 1921 Bom 370 (371) : 23 Cr. L. J. 21, *Emperor v. Rustomji*. (Accused charged under S. 290, Penal Code, for working flour mill in residential neighbourhood — Trial should not be summary.)
3. ('13) 14 Cri L Jour 105 (107) : 18 I. C. 665 : 35 All 173, *Dinanath v. Emperor*. (Great deal of correspondence having to be gone through.)
3. ('31) AIR 1931 Mad 233 (233) : 32 Cr. L. J. 689, *Subramania v. Nachiar Ammal*. [See ('39) AIR 1939 Lah 467 (468) : ILR (1939) Lah 221 : 41 Cr. L. J. 19, *M. A. Khan v. Emperor*. (Contest on point whether trespass was committed on railway land or land of P. W. D. does not make case one not triable summarily.)]
4. ('76) 25 Suth W R Cr 65 (66), *Issur Chunder v. Rohim Sheikh*. (1900) 4 Cal W N 247 (249), *Sri Ramchandra v. Dinanath*. (Cases under Bengal Private Fisheries Protection Act, II of 1889, should not be tried in summary way.)
- ('12) 13 Cr. L. J. 771 (771) : 17 I. C. 403 : 6 Sind L R 120, *Emperor v. Tirth Das*.
- ('22) AIR 1922 Pat 265 (265, 267) : 21 Cri L Jour 374, *Bhim Bahadur v. Emperor*.

Section 260
Note 4

taking of lengthy evidence⁵ or requiring a local inquiry to be made.⁶ Similarly, the summary procedure is inappropriate in warrant-cases in which the prosecution includes evidence given on commission in other presidencies, as the evidence so recorded militates in its very nature against the object of a trial by summary procedure.⁷ Where owing to the bulk of evidence or the complication of the matters or owing to the difficult nature of the points at issue, it is not possible for the Magistrate to keep in his mind, without taking exhaustive notes, the evidence of important facts, then, even though the offence may be technical and be punishable only with a light sentence, the Magistrate will not be acting properly if he applies the summary procedure.⁸ Similarly, serious cases, where a heavy sentence would be deserved in case of conviction, cannot appropriately be tried summarily.⁹ So also, cases where the result of the trial would have further consequences of a serious nature ought not to be tried in a summary way.¹⁰ For instance, cases against public servants in which the whole career of the accused would depend on the result of the trial should not be tried summarily.¹¹ Similarly, where the owner of a flour

(22) AIR 1922 Pat 296 (297) : 23 Cri L Jour 440, *Parmeshwar Lal v. Emperor*.

(23) AIR 1923 Rang 157 (157) : 24 Cri L Jour 929, *Maung Shwe Ku v. Emperor*.

[See also (23) AIR 1923 Pat 157 (157) : 23 Cr. L. J. 120, *Md. Ishag v. Emperor*.]

[But see (26) AIR 1926 Oudh 63 (63) : 26 Cr. L. J. 1452, *Sukhpai v. Emperor*.]

(Question of title involved—Case need not necessarily be tried in regular manner.)]

5. (39) AIR 1939 Lah 467 (468) : I L R (1939) Lah 221 : 41 Cri L Jour 19, *M. A. Khan v. Emperor*.

(21) AIR 1921 Lah 236 (236) : 22 Cr. L. J. 145, *Ghasita Mal v. Emperor*. (Number of accused large and number of witnesses even greater—Case should not be tried summarily.)

(91) 1891 All W N 183 (183), *In the matter of Sheo Sahai*. (Trial taking ten hearings, summary trial not proper.)

(34) AIR 1934 Lah 243 (245) : 15 Lah 610 : 35 Cr. L. J. 1094, *Md. Abdulla v. Emperor*. (Case complicated and extending over months—Elaborate judgment necessary—Case should not be tried summarily.)

[But see (27) AIR 1927 All 136 (137) : 28 Cri L Jour 140, *Naubat v. Emperor*. (Mere fact that number of accused is large is not conclusive reason against summary trial.)]

(92) 1892 All W N 30 (30), *In the matter of Mansa*. (Summary jurisdiction is not affected by length of proceedings.)]

6. (91) 1891 All W N 183 (183), *In the matter of Sheo Sahai*.

7. (39) AIR 1939 Nag 87 (88) : I L R (1939) Nag 457 : 40 Cr. L. J. 846, *Munna v. Emperor*.

8. (25) AIR 1925 Sind 284 (284) : 19 S L R 136 : 26 Cr. L. J. 1026, *Rahimtullah v. Emperor*.

9. (16) AIR 1916 All 53 (54) : 17 Cr. L. J. 413 : 38 All 506, *Aijag Hussain v. Emperor*.

(93) 7 C P L R App Cr 6 (8), *Emperess v. Gangaram*.

(93-1900) 1893-1900 Low Bur Rul 198 (198), *Queen-Empress v. Nga San*. (Boat thefts and cattle thefts call ordinarily for a severe sentence.)

(12) 13 Cri L J 780 (781) : 17 I. C. 412 : 6 Sind L R 101, *Emperor v. Allahrakho*. (Cattle-lifting is serious offence and should not be tried summarily.)

(27) AIR 1927 Sind 257 (257) : 28 Cri L Jour 959, *Amir Bux v. Emperor*. (Do.)

10. (29) AIR 1929 All 267 (268) : 30 Cri L Jour 505, *Emperor v. Bashir*.

(21) AIR 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor v. Rustomji*.

11. (83) 6 Mad 396 (399) : 2 Weir 328, *Subramanya Iyer v. Queen*.

(11) 12 Cri L Jour 143 (144) : 9 Ind Cas 831 (Lah), *Sohan Singh v. Emperor*. (No matter what their rank.)

(32) AIR 1932 Lah 188 (189) : 33 Cri L Jour 108, *Robert John Bradley v. Emperor*. (Station Superintendent appointed by Municipality is public servant.)

(32) 1932 Mad W N 478 (480), *D'Souza v. Annappa*. (Obiter.)

mill is prosecuted for public nuisance for starting the mill in a residential locality, he should not be tried summarily if the result of the trial would have the effect, in case of conviction, of compelling him to permanently close down his business.¹²

But the mere fact that there are a number of accused persons is not a conclusive reason against trying a case summarily.¹³

A summary trial is undesirable when a Magistrate takes cognizance of a case upon his own knowledge, as in such a case he is himself in the position of a prosecutor and it would not be proper for him to deal with the case in a summary way in such case.¹⁴

Where the accused is deaf and dumb, it has been held that the summary mode of trial is not suitable.¹⁵

5. Offences to which the section applies. — This section empowers certain Magistrates to try summarily the offences specified therein.¹ These offences are classified in clauses (a) to (m) of sub-s.(1) of the section. Clause (m) refers to offences under the Cattle Trespass Act. All the offences mentioned in clauses (b) to (l) are offences under the Penal Code. Clause (a) is general and applies to all offences whether under the Penal Code or other Acts. Hence, the section applies to offences under other Acts also, provided they are not offences punishable with death, transportation or imprisonment for a term exceeding six months.² The fact that several offences are charged against the

(‘95) 1895 Rat 778 (779), *Empress v. Hari Gopal*. (Accused a watandar Kulkarni.)
(‘95) 1895 Rat 784 (785), *Queen-Empress v. Waman*. (Do.)

[But see (‘39) AIR 1939 Lah 467 (468) : I L R (1939) Lah 221 : 41 Cri L Jour 19, *M. A. Khan v. Emperor*. (It cannot be laid down as a broad proposition that a Government servant should not be tried summarily or that generally the summary procedure is inappropriate in cases in which Government servants are accused—It is a question on the facts of each case whether one mode of trial or the other should be employed.)]

(‘26) AIR 1926 Oudh 63 (63) : 26 Cri L Jour 1452, *Sukhpat Lal v. Emperor*.

(‘29) AIR 1929 Pat 716 (717) : 30 Cri L Jour 869, *Jagdish Prasad v. Emperor*.
(Petty theft by railway watchman — Summary trial appropriate though accused liable to be dismissed from service on his conviction.)]

12. (‘21) AIR 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor v. Rustomji*.

13. (‘27) AIR 1927 All 136 (137) : 28 Cri L Jour 140, *Naubat v. Emperor*.

[But see (‘21) AIR 1921 Lah 236 (236) : 22 Cr. L. J. 145, *Ghasita Mal v. Emperor*.
(Number of accused large and number of witnesses even greater — Case should not be tried summarily.)]

14. (‘76) 25 Suth W R Cr 69 (71), *In re Romanath Bannerjee*.

(‘99) 3 Cal C W N cccxxx, *Empress v. Hamed Hossein*.

15. (‘06) 4 Cri L Jour 444 (445) : 8 Bom L R 849, *In re A Deaf and Dumb Man*.
See also S. 341 Note 2.

Note 5

1. (‘23) AIR 1923 All 432 (433), *Emperor v. Bulaki*. (Theft under S. 379 in which the value of property stolen does not exceed Rs. 50.)

(‘19) AIR 1919 All 64 (64) : 21 Cr. L. J. 28, *Udit Narain v. Emperor*. (In case of theft, etc., the value of the property stolen should be found to be less than Rs. 50.)

2. (‘94) 1 Weir 906 (907), *In re Navoo Routhen*. (Offence under S. 65A, Stamp Act, I of 1879.)

(‘28) AIR 1928 All 719 (720) : 50 All 718 : 30 Cr. L. J. 214, *Emperor v. Bihari Bhar.* (Offence under S. 22, cl. (2), sub-cl. (a); Criminal Tribes Act, VI of 1924.)

(‘02) 1902 All W N 24 (24), *King-Emperor v. Bindesari Prasad*. (Offence under S. 121, Railways Act, 1890.)

(‘19) AIR 1919 Bom 173 (174) : 43 Bom 888 : 20 Cri L Jour 699, *Emperor v. Dhondya*. (S. 130 read with S. 126 (a), Railways Act.)

ction 260
Note 5

accused does not make the section inapplicable where all the offences are triable summarily.³ But the summary procedure cannot be extended to offences not mentioned in the section.⁴ Thus, offences for which the maximum punishment awardable under the law exceeds the limits mentioned in clause (a) and which are not covered by any of the other clauses in sub-s.(1), cannot be tried summarily.⁵ Even the consent of the accused will not enable a Magistrate to try summarily an offence not covered by the section.⁶ Where there are several accused persons, the fact that the offence of which one of them is accused is not triable summarily, will make the summary procedure inapplicable to *all* the accused persons.⁷ Similarly, where a number of offences are charged against the accused person, he cannot be tried summarily unless *all* the offences are capable of being tried in a summary way.⁸

Where a number of offences of receiving or retaining stolen property are charged against the accused under the provisions of

(34) AIR 1934 All 331 (332) : 35 Cri L Jour 677, *Jwala Prasad v. Emperor*. (Offence under Child Marriage Restraint Act of 1929.)

3. ('84) 10 Cal 408 (409), *Gamirullah Sarkar v. Abdul Sheikh*. (Summary trial for criminal trespass and mischief.)

('76) 25 Suth W R Cr 5 (6), *Empress v. Ramaotar*. (Summary trial for mischief and theft.)

4. ('74) 21 Suth W R Cr 12 (13), *Queen v. Bebhaki Pathak*.

('75) 24 Suth W R Cr 71 (72), *Kopil Dolai v. Kanhaijenna*.

('22) AIR 1922 Pat 227 (228) : 25 Cr. L. J. 545, *Brij Nandan v. Emperor*. (Before the Magistrate can assume jurisdiction to try offence of theft in a summary way, he has to satisfy himself that the property in respect of which offence was committed is less than Rs. 50 in value.)

5. ('39) AIR 1939 All 693 (693) : 1 L R (1939) All 931 : 41 Cr. L. J. 91, *Balwant Singh v. Emperor*. (Magistrate trying summarily case under Ss. 147, 452, Penal Code, after issuing summons under S. 448—Trial is void.)

('24) AIR 1924 All 675 (675) : 46 All 446 : 25 Cri L Jour 806, *Emperor v. Ram Narain*. (Offence under S. 6, U. P. Excise Act.)

('72-92) 1 Low Bur Rul 63 (63), *Sooba Reddy v. Crown*. (Offence under S. 354, Penal Code.)

('81) 1881 Pun Re No. 26 Cr, p. 56, *Nawab v. Empress*. (Offence under Ss. 304, 147 and 325, Penal Code.)

('91) 1891 Rat 539 (540), *Empress v. Abdul*. (Offence under S. 497, Penal Code.)

('94) 1894 All W N 176 (176), *Queen-Empress v. Hassan Ali*. (Offence under S. 224, Penal Code.)

('28) AIR 1928 Bom 142 (143) : 52 Bom 254 : 29 Cri L Jour 492, *Ganu Sadu v. Emperor*. (Offence under S. 147, Penal Code.)

('74) 21 Suth W R Cr 12 (13), *Queen v. Bebhaki Pathak*. (Do.)

('30) AIR 1930 Cal 711 (712) : 32 Cr. L. J. 110, *Topzal Hossain v. H. C. Hunt*. (Do.)

('32) 1932 Mad W N 478 (480), *D'Souza v. Annappa*. (Offence under S. 342, Penal Code.)

('16) AIR 1916 Pat 197 (198) : 1 Pat L Jour 230 : 17 Cr. L. J. 473 (474), *Haboo v. Kariman*. (Theft of property exceeding Rs. 50 in value.)

('12) 13 Cr. L. J. 58 (58) : 13 I. C. 394 (U.B.) *Emperor v. Nga Sit Cho*. (Offence under S. 9, Opium Act, 1878.)

('79) 1 Weir 654 (654), *In re Gangama*. (Offence under S. 19, Arms Act.)

('25) AIR 1925 Oudh 627 (627) : 28 Oudh Cas 123 : 26 Cr. L. J. 800, *Bhikha v. Emperor*. (Offence under U. P. Excise Act, IV of 1910, S. 60.)

6. ('72-92) 1 Low Bur Rul 63 (63), *Sooba Reddy v. Crown*. (Charge under S. 354, Penal Code.)

7. ('25) 25 Cri L Jour 528 (528) : 77 Ind Cas 992 (Cal), *Chandra Mohan Das v. Emperor*. (One of the accused punishable under S. 144.)

8. ('28) AIR 1928 Bom 142 (142) : 52 Bom 254 : 29 Cri L Jour 492, *Ganu Sadu v. Emperor*. (Charge under Ss. 147, 323 and 506, Penal Code—Summary trial is void even though conviction is under S. 323.)

Section 260.
Note 5

S. 231 in determining whether the accused can be tried summarily, the value of the property to be taken into account under clause (f) of sub-s.(1) is the value of the property in respect of each offence separately and not the aggregate value of the property which is the subject-matter of all the offences.^{8a}

Clause (a) of the section does not control the other clauses of the sub-section. Hence, the offences mentioned in the other clauses can be tried summarily though they do not fall within the purview of clause (a).⁹

In determining whether a case relates to an offence triable summarily, a Magistrate should have regard primarily to the allegations with which his help is sought.¹⁰ Thus, in a large measure, where there is a complaint, the allegations in the complaint and the sworn statement of the complainant will determine the question of the applicability of the summary procedure. But the Magistrate is not absolutely confined to the complaint and the complainant's allegations. If there are good reasons for holding that the allegations are exaggerated, it is open to a Magistrate to go behind them and to try the accused for the offence which he holds that the circumstances of the case indicate to have been committed.¹¹ But where there are no good reasons for such a view, the Magistrate will not be justified in ignoring the aggravating features of a case so as to enable himself to adopt the summary procedure.¹²

8a. ('34) AIR 1934 Sind 185 (186) : 28 Sind L R 336 : 36 Cr.L.J. 608, *Chetumal Rekumal v. Emperor*.

9. ('92) 1892 Rat 600 (600), *Queen-Empress v. Bhavdya*.

10. ('02) 29 Cal 409 (410) : 6 C W N 713, *Bishu Shaik v. Saber Mollah*. (Complaint disclosing offence not triable summarily—Summary trial is without jurisdiction.)

('01) 5 Cal W N 252 (253), *Kailash Chunder Pal v. Joynuddi*.

('07) 11 Cal W N cciv (cciv), *Kedarnath v. Khosal Mondal*.

('25) AIR 1925 All 290 (291):47 All 64:26 Cr.L.J. 586, *Raghunandan v. Emperor*.

('26) AIR 1926 Cal 1202 (1203) : 53 Cal 738 : 27 Cr. L. J. 1295, *Madhab Chandra v. Emperor*. (Complaint disclosing only offence triable summarily — Magistrate not bound to assume facts which would make summary procedure inapplicable.)

11. ('88) 10 All 55 (58) : 1887 A W N 280, *Queen-Empress v. Jagjivan*.

('87) 1887 All W N 103 (103), *Empress v. Lachmi Narain*. (Complaint including offence not triable summarily—Charge of such offence not seriously prosecuted—Magistrate is not incompetent to try case summarily.)

('99) 1 Bom L R 683 (684), *Queen-Empress v. Vallabh Gopal*. (Complaint disclosing offence under S. 453, Penal Code—Other evidence disclosing offence only under S. 448—Magistrate can try the case summarily.)

('89) 16 Cal 715 (724), *Golap Pandey v. Boddam*.

('33) AIR 1933 Oudh 50 (51) : 34 Cri L Jour 547, *Gudar v. Emperor*. (Complaint showing case of rioting — Magistrate trying accused for offence under S. 379, Penal Code—Case of petty character—Discretion held properly exercised.)

('75) 23 Suth W R Cr 19 (19), *Queen v. Aboo Sheikh*. (High Court refused to interfere with discretion of trying Magistrate.)

[See also ('27) AIR 1927 Cal 505 (509) : 28 Cr. L. J. 697, *Government of Assam v. Kantila Chutia*. (Case based on police-report.)

[But see ('76) 25 Suth W R Cr 19 (20), *Ramchunder Chatterjee v. Kanye Laha*.

('78) 2 Cal L R 374 (375), *Bepuloolla v. Nazim Sheikh*.]

12. ('74) 6 N W P H C R 254 (256), *In the matter of Mewa*.

('93) 1893 Rat 670 (670), *Queen-Empress v. Lakshman*. (Offence under S. 211 tried summarily by treating it as offence under S. 182 — Magistrate acts without jurisdiction.)

Section 260
Note 5

Where the Magistrate takes cognizance of an offence on a police-report, he may ignore the allegations in the first information given in the police-station which point to aggravating circumstances and try the accused for the offence of which he is charged in the police-report, and if such offence is triable summarily, the Magistrate can adopt the summary procedure notwithstanding the allegations in the first information.¹³

But where the police-report points to an offence not triable summarily and the evidence also discloses such an offence, it is not open to the Magistrate to ignore the aggravating circumstances and proceed in regard to an offence triable summarily.¹⁴

{ '98 } 1898 Rat 988 (989), *Queen-Empress v. Husain Sahib*. (Offence under S. 325 reduced to one under S. 323 and tried summarily without discrediting any of the allegations in complaint — Procedure is illegal.)

{ '87 } 1887 Pun Re No. 5 Cr, p. 9 (9), *Sardar Khan v. Empress*.

{ '97-01 } 1 Upp Bur Rul 75 (75), *Empress v. Bustien*. (Accused charged of theft of property valued at less than Rs. 50 tried summarily and convicted under S. 381 and S. 408, Penal Code—Conviction under S. 408 held void.)

{ '77 } 1 Cal L R 434 (435), *Chunder Seekor v. Dhurm Nath*.

{ '79 } 4 Cal 18 (20) : 3 C L R 44, *Empress v. Golam Mahomed*. (Magistrate is not entitled to split up offence into its component parts for purpose of giving himself summary jurisdiction.)

{ '29 } AIR 1929 All 349 (350): 51 All 540: 30 Cr. L J. 686, *Mewalal v. Emperor*.

{ '32 } 1932 Mad W N 478 (480), *D'Souza v. Annappa Sheregara*. (Complaint clearly setting out offence under S. 342, Penal Code — Magistrate trying case summarily by charging for lesser offence under S. 341, acts without jurisdiction.)

{ '74 } 22 Suth W R Cr 29 (29), *Chunder Sheekh v. Nitaloo*. (For trying case summarily the charge should be clearly and plainly one of those specified in section 222.)

{ '75 } 23 Suth W R Cr 3 (4), *Queen v. Bance Madhub*. (Accused convicted under Ss. 352, 341, Penal Code, in summary trial—From facts they should have been convicted under S. 353 or S. 342—Fresh trial was directed.)

{ '75 } 24 Suth W R Cr 21 (22), *Haran Sheikh v. Ramdhun Biswas*. (Magistrate treating case as one of unlawful assembly though case of wrongful confinement was substantiated—Held, Magistrate was not justified.)

{ '75 } 24 Suth W R Cr 46 (47), *In re Fakeer Mahomed*.

{ '75 } 24 Suth W R Cr 48 (48), *Emaral Sheikh v. Mohammadi Sheikh*.

{ '75 } 24 Suth W R Cr 71 (72), *Kopil Dolai v. Kanhai Jenna*.

{ 1900 } 27 Cal 983 (985): 4 C W N 795, *Sheo Bhajan v. Mosawi*.

{ '97 } 4 Cal 18 (19): 3 C L R 44, *Empress v. Golam Mahomed*.

{ '07 } 5 Cri L Jour 21 (22) (Lah), *Barkat Khan v. Emperor*.

{ '08 } 8 Cri L Jour 227 (229) : 36 Cal 67: 1 I. C. 519, *Phanindranath v. Emperor*.

{ '13 } 14 Cr. L J. 462 (463): 20 Ind Cas 622 (LB), *R. S. Sharma Iyer v. Emperor*.

{ '02 } 29 Cal 409 (410): 6 C W N 713, *Bishu Shaik v. Saber Mollah*.

{ '74 } 22 Suth W R Cr 65 (66), *Queen v. Buzleh Ali*. (When the accused is charged with theft of a box containing Rs. 50, the Magistrate will not be justified in striking out value of the box and trying case summarily.)

[See also { '39 } AIR 1939 All 693 (693): 1 L R (1939) All 931: 41 Cri L Jour 91, *Balwant Singh v. Emperor*. (Complaint alleging facts showing offences under Ss. 147 and 452, Penal Code — Magistrate issuing summons for offence under S. 448 and convicting accused under S. 452—Trial is void.)

{ '18 } AIR 1918 Nag 150 (151): 14 Nag L R 190: 19 Cr. L J. 1003, *Dipchand v. Emperor*. (Case under S. 457, Penal Code—First information giving list of stolen property exceeding Rs. 50 in value—Magistrate cannot try summarily.)]

13. { '31 } AIR 1931 All 51 (52): 32 Cr. L J. 556: 53 All 218, *Sundar Teli v. Emperor*. [But see { '18 } AIR 1918 Nag 150 (151): 14 Nag L R 190: 19 Cri L Jour 1003, *Dipchand v. Emperor*. (Case under S. 457, Penal Code—First information giving list of stolen property of value exceeding Rs. 50 — Case cannot be tried summarily.)]

14. { '34 } AIR 1934 Lah 243 (244): 15 Lah 610: 35 Cr. L J. 1094, *Mohd. Abdullah v. Emperor*. (Challan under S. 147/332 — Prosecution evidence also disclosing same offence—Summary trial is illegal.)

Section 260
Note 5

As to the procedure to be adopted in cases where in the course of a trial or inquiry commenced in the regular way it is found that the offence committed is triable as a summary case, see S. 251 Note 4.

As to whether the trial of an accused in a summary way for an offence which is not triable summarily is void under S. 530, clause (q), see Note 6 to S. 530.

The section applies only to trials for offences. It does not apply to proceedings which are not trials for offences. Thus, proceedings under chapter XXXVI (maintenance of wives and children) cannot be conducted in a summary way.¹⁵ Similarly, the inquiry made by a Magistrate under the first part of S. 2 of the Workman's Breach of Contract Act, XIII of 1859, is not a trial for an offence and such inquiry cannot be held in a summary manner.¹⁶ A contrary view, however, has been held by the Allahabad High Court.¹⁷

The section applies only to cases where the charge is exclusively for any of the offences mentioned in the section. Hence, where the accused, in case of conviction, would be liable to an enhanced punishment under S. 75 of the Penal Code by reason of a previous conviction and such conviction is set out in the charge as provided for in S. 221, the accused cannot be tried summarily although the trial may be for an offence mentioned in the section.¹⁸

The High Court as a superior Court of Record has a *special jurisdiction* to punish *summarily* contempts of its authority, and this jurisdiction is independent of, and unaffected by, the provisions of the Code.¹⁹

Under section 67 of the Forest Act of 1927 it is provided that the Magistrates of the classes mentioned therein can try summarily offences of the kind specified in the section.²⁰

15. ('75) 24 Suth W R Cr 61 (62), *Harikishore v. Bharoti*.

('93) 20 Cal 351 (352), *Kali Dassi v. Durga Charan*.

See also S. 488 Note 25.

16. ('82) 1 Weir 696 (696), *In re Govinthan*.

('03-04) 2 Low Bur Rul 163 (164), *King-Emperor v. Peraisamy Achari*.

('82) 4 Mad 234 (234) : 1 Weir 695, *Pollard v. Mothial*. (Because it is enquiry of special character sometimes requiring much care and patience.)

('04) 1 Cri L Jour 263 (264) : 33 Bom 22 : 1 I. C. 378, *Emperor v. Dhondur Krishna*.

('08) 8 Cr. L. J. 409 (410) : 33 Bom 25 : 1 I. C. 387, *Emperor v. Balu Salaji*.

('12) 13 Cr. L. J. 194 (195) : 1912 Pun Re No. 5 Cr : 14 I. C. 194, *Emperor v. Harlal*.

('13) 14 Cr. L. J. 256 (256) : 6 Sind L R 165 : 19 I. C. 512, *Emperor v. Sohrale*.

[But see ('79) 1 Weir 694 (694), *In re Higgins*.]

17. ('89) 11 All 262 (265) : 1889 All W N 85, *Queen-Empress v. Indrajit*.

('21) AIR 1921 All 285 (285) : 43 All 281 : 22 Cr. L. J. 165, *Abdus Samat v. Yusuf*.

18. ('78) 2 Weir 324 (324). (Theft in building and theft by servant are not triable summarily when previous conviction is charged.)

('72-92) 1872-92 Low Bur Rul 386 (387), *Queen-Empress v. Ka Lu*.

19. ('26) AIR 1926 Lah 1 (2) : 6 Lah 528 : 26 Cr. L. J. 1409 (FB), *In the matter of Habib*.

('27) AIR 1927 Lah 610 (611) : 28 Cri L Jour 727 (SB), *In re Muslim Outlook, Lahore*. (Attributing improper motives to Judge or Court is serious contempt.)

('26) AIR 1926 Rang 188 (189) : 4 Rang 257 : 27 Cri L Jour 1241, *Ebrahim Mammoji v. Emperor*.

See also S. 1 Note 6.

20. See ('02) 1902 Pun L R No. 128, p. 537, *Narain Singh v. Emperor*.

Section 260
Note 6

6. Sub-section (2).— This sub-section provides for the procedure to be followed in cases in which in the course of a summary trial the Magistrate comes to the conclusion that the case ought not to be tried in a summary way. The Code does not contain any express provision for the procedure to be followed in cases in which in the course of a regular trial the Magistrate finds that the case may be tried summarily. The question arises whether in such circumstances the Magistrate is at liberty to change his procedure to that of a summary trial. As to this, see S. 251 Note 4.

Section 261

261.* The *Provincial Government*^a may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences:—

Power to invest
Bench of Magis-
trates invested
with less power.

- (a) offences against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504;
- (b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month with or without fine;
- (c) abetment of any of the foregoing offences;
- (d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

a. Substituted by A. O. for "Local Government."

1. Legislative changes (omitted)

2. Offences triable summarily.—A Bench of Magistrates with second or third class powers cannot try *summarily* any offences except those mentioned in this section.¹

3. Conservancy clauses of Police Acts.—It has been held by the Madras High Court that s. 48 of the General Police Act, XXIV of 1859 (corresponding to s. 34 of the General Police Act, v of 1861), which relates to obstructions and nuisances in roads within the limits of towns, is a conservancy clause within the meaning of this section.¹

* 1882 : S. 261; 1872 : S. 225; 1861 — Nil.

Section 261 — Note 2

1. ('11) 12 Cr. L. J. 383 (384) : 1 U. B. R. 70 : 11 I. C. 247, *Nga San Hmi v. Emperor*. ('74) 21 Suth W R Cr 12 (13), *Queen v. Bebhcki Pathal*.

Note 3

1. ('90) 13 Mad 142 (143) : 1 Weir 910, *Queen-Empress v. Oolaganadan*.

262.* (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

Section 262

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

Synopsis

1. Legislative changes.
2. Procedure to be followed in summary trials.
3. Sentence that can be passed in summary trials—Sub-s. (2).

Other Topics (miscellaneous)

Appeal. See S. 260 Note 2.	Security proceedings. See Note 3.
Offences requiring severe punishment. See Note 3 and S. 260 Note 4.	Sentences of fines. See Note 3.
	Solitary confinement. See Note 3.

1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

There was no corresponding section in the Code of 1861. The corresponding section in the Code of 1872 was S. 226.

Changes made in 1882 —

The second paragraph was added. At the same time the provision in S. 222 of the prior Code authorizing the infliction in summary trials of any sentence that might be lawfully passed under S. 20 of the Code (corresponding to S. 32 of the present Code) was omitted.

2. Procedure to be followed in summary trials. — This section and the following three sections provide for the procedure to be followed in summary trials. Offences that can be tried summarily comprise both summons-cases and warrant-cases. This section provides that in the summary trial of summons-cases the procedure to be followed is that of summons-cases and in the summary trial of warrant-cases the procedure to be followed is that of warrant-cases, except as otherwise provided in the chapter. In other words, the procedure to be followed in summary trials is the same as that provided for ordinary trials except as otherwise prescribed. Such exceptions are provided in sub-s. (2) of this section and in Ss. 263 and 264.

Where there is no provision for the departure from the ordinary procedure, such procedure should be followed in summary trials as strictly as in ordinary trials. Thus, proceedings in summary trials as in ordinary trials should commence with the issue of a summons or warrant for the appearance of the accused.¹ Similarly, the following

* 1882 : S. 262; 1872 : S. 226; 1861—Nil.

Section 262 — Note 2

1. ('92) 15 Mad 83 (87) : 2 Weir 326, *Queen-Empress v. Erugadu*.

**Section 262
Notes 2-3**

provisions apply to summary trials equally with ordinary trials : S. 191,^{1a} S. 243,² S. 257,³ S. 342⁴ and S. 250.⁵

As to the applicability of S. 256 to warrant-cases, see S. 256 Note 2.

Even in cases where a departure from the ordinary procedure is provided for, Magistrates should be careful not to exceed the limits upto which such departure is allowed and they should follow strictly any special procedure that may be provided for summary trials in such cases. Thus, S. 263 dispenses with the recording of evidence and the drawing up of a formal charge, but requires the Magistrate to draw up a statement giving the particulars mentioned in the section. Magistrates should be careful to prepare this statement as required by the section.⁶ Similarly, in appealable cases, it is provided that a judgment containing the particulars mentioned in S. 264 should be drawn up. An omission to comply with this requirement will be an irregularity in the trial.⁷

3. Sentence that can be passed in summary trials — Sub-section (2). — This sub-section prohibits the infliction in summary trials of a sentence of imprisonment for any term exceeding three months.¹ The object of the section is to restrict the passing of sentences of imprisonment of considerable length in a summary trial from a conviction in which the right of appeal is greatly restricted.²

1a. ('05) 2 Cri L Jour 187 (188) (Lah), *Kanhaya Lal v. Emperor*.

2. ('92) 15 Mad 83 (87, 88) : 2 Weir 326, *Queen-Empress v. Erugadu*.

3. ('09) 9 Cr. L. J. 583 (584) : 2 I. C. 365 : 5 Low Bur Rul 20, *Ameer Batcha v. Emperor*. (Adjournment to accused for calling their witnesses refused.) ('95) 1895 Rat 768 (769), *Empress v. Keru*.

4. ('40) AIR 1940 Bom 314 (314), *Emperor v. Kondiba Balaji*.

('36) AIR 1936 Oudh 16 (17) : 36 Cr.L.J. 1303 : 11 Luck 461, *Emperor v. Karuna Shankar*.

('35) AIR 1935 All 217 (219) : 57 All 666 : 36 Cr.L.J. 1290, *Sia Ram v. Emperor*.

('26) AIR 1926 Nag 300 (301) : 27 Cr.L.J. 632 : 22 N L.R. 65, *Bhagwan v. Emperor*.

('26) AIR 1926 Sind 1 (2) : 20 S L R 34 : 26 Cr.L.J. 1554 (FB), *Emperor v. Nabu*. (Failure to comply with S. 342 in summons case tried summarily vitiates trial.)

('22) AIR 1922 Pat 5 (6) : 23 Cri L Jour 114, *Balkesar Singh v. Emperor*.

('27) AIR 1927 Cal 250 (252) : 54 Cal 286 : 28 Cri L Jour 297, *Bechu Lal Kayastha v. Injured Lady*.

[But see ('24) AIR 1924 Mad 30 (30) : 46 Mad 766 : 24 Cr.L.J. 847 (FB), *Dharamsingh v. Emperor*. (S. 342 does not apply to summons-cases whether tried in the regular way or summarily.)]

See also S. 263 Note 6.

5. ('30) AIR 1930 Mad 929 (929) : 32 Cr.L.J. 207, *Palani Goundan v. Krishnappa Goundan*. (Reasons for ordering compensation must be recorded.)

('88) 11 Mad 142 (144) : 2 Weir 314, *Queen-Empress v. Basava*.

6. ('74) 22 Suth W R Cr 28 (28), *Queen v. Johrie Singh*.

('92) 15 Mad 83 (87) : 2 Weir 326, *Queen-Empress v. Erugadu*.

('23) AIR 1923 Pat 56 (56) : 23 Cr. L. J. 94, *Damodar Das v. Emperor*. (Reasons for conviction must be given as required by S. 263, cl. (h).)

See also S. 263 Note 4.

7. ('94) 1894 Rat 725 (725), *Queen-Empress v. Hussain*.

See also S. 264 Note 1 and S. 537 Note 12.

Note 3

1. ('24) 25 Cr.L.J. 240 (240) : 76 Ind Cas 704 (704) (Rang), *Nga San Ba v. Emperor*. ('09) 9 Cri L Jour 23 (23) : 4 Low Bur Rul 338, *Po Ka v. Emperor*.

2. ('34) AIR 1934 Rang 116 (117) : 12 Rang 122 : 35 Cr. L. J. 1413, *Emperor v. Nga Po Tay*.

**Section 262
Note 3**

Where an accused is convicted of a number of offences in a summary trial, a separate sentence must be passed in respect of each offence³ (as in any other mode of trial). But it has been held that where in such a case the accused is sentenced to imprisonment for a term of three months in respect of each offence, the sentences must be ordered to run *concurrently* and not consecutively, as otherwise the object of the section will be defeated.⁴

Where a case is tried summarily and referred to a superior Magistrate under S.349, the mere fact of such a reference being made does not make the trial other than a summary one and the Magistrate to whom the case is referred, if he does not try the case anew in any way as he is authorized to do under S.349, cannot pass any sentence of imprisonment for a term exceeding the three months' period mentioned in this section.⁵

But the prohibition applies only to *substantive* sentences of imprisonment.⁶ Hence, where imprisonment is ordered in default of the payment of fine, the term for which such imprisonment is ordered may exceed the limits imposed by this section.⁷ So also, this section will not render illegal a sentence of imprisonment in default of payment of fine merely by reason of the fact that the aggregate of the terms of substantive sentence of imprisonment and of the sentence of imprisonment in default of payment of fine exceeds three months or by reason of the Magistrate having passed a substantive sentence of imprisonment for the maximum term allowed by the section.⁸ Similarly, the jurisdiction of a Magistrate to order security for keeping the peace in cases coming under S.106 is not affected by this section⁹ and where such security is ordered, the power to commit to prison in default of furnishing the security under S.123 is again unaffected by this section.¹⁰

The section only restricts the term, for which a sentence of *imprisonment* can be passed; it does not set any limits to the amount

3. ('34) AIR 1934 Sind 185 (186, 187) : 28 Sind L R 336 : 36 Cri L Jour 608 *Chetumal Rekumal v. Emperor*.

4. ('34) AIR 1934 Rang 116 (117) : 12 Rang 122 : 35 Cri L Jour 1413, *Emperor v. Nga Po Tay*.

5. ('32) AIR 1932 All 507 (507, 508) : 33 Cri L Jour 472, *Gopal v. Emperor*.
See also S. 349 Note 12.

6. ('40) AIR 1940 Rang 171 (172) : 1940 Rang L R 223 : 41 Cri L Jour 768, *The King v. Po Htwa*.

7. ('83) 6 All 61 (61) : 1883 A W N 207, *Empress v. Asghar Ali*.

[But see ('21) AIR 1921 Lah 236 (236) : 22 Cr.L.J. 145, *Ghasita Mal v. Emperor*.]

8. ('40) AIR 1940 Rang 171 (172) : 1940 Rang L R 223 (225) : 41 Cri L Jour 768, *The King v. Po Htwa*.

See also S. 33 Note 8.

9. ('86) 1886 All W N 181 (181), *Empress v. Lachman*.

See also S. 106 Note 13.

('04) 1 Cri L Jour 1054 (1055) : 7 Oudh Cas 338, *Meghu v. Emperor*. (1886 All W N 181, followed.)

10. ('86) 1886 All W N 181 (181), *Empress v. Lachman*.

('04) 1 Cr.L.J. 1054 (1055) : 7 Oudh Cas 338, *Meghu v. Emperor*. (Imprisonment to be undergone in default of furnishing security is not a part of substantive sentence.)

See also S. 123 Note 8.

Section 262
Note 3

of *fine* that can be imposed on the convicted person.¹¹ Nor is the power of the Magistrate to sentence the convicted person to solitary confinement under S. 73 of the Penal Code in any way affected by the section.¹²

Section 263

263.* In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the *Provincial Government*^a may direct the following particulars:—

Record in cases where there is no appeal.

- (a) the serial number;
- (b) the date of the commission of the offence;
- (c) the date of the report or complaint;
- (d) the name of the complainant (if any);
- (e) the name, parentage and residence of the accused;
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f) or clause (g) of sub-section (1) of section 260 the value of the property in respect of which the offence has been committed;
- (g) the plea of the accused and his examination (if any);
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor;
- (i) the sentence or other final order; and
- (j) the date on which the proceedings terminated.

a. Substituted by A. O. for "Local Government."

Synopsis

- | | |
|--|---|
| 1. Legislative changes. | 5. Clause (f) — Particulars of offence charged and proved. |
| 2. Scope and applicability of the section. | 6. Clause (g)—Plea of accused and his examination (if any). |
| 3. "The Magistrate or Bench of Magistrates need not record the evidence of the witnesses." | 7. Clause (h)— Finding and in case of conviction brief statement of reasons therefor. |
| 4. "He or they shall enter . . . particulars." | |

* 1882 : S. 263; 1872 : S. 227; 1861—Nil.

11. ('13) 14 Cr. L. J. 105 (106) : 35 All 173 : 18 I. C. 665, *Dinanath v. Emperor*.

12. ('83) 6 All 83 (83) : 1883 A W N 224, *Empress v. Annu Khan*.

Other Topics (miscellaneous)

Accused to know the charges against him. See Note 5.	Non-compliance — Effect. See Notes 2 and 7.
Appeal — Summary cases. See S. 260 Note 2.	Notes of evidence. See Note 3.
Delegation to clerk of preparation of record. See S. 265 Note 2.	Record to show the nature of offences. See Note 5.
Entries by whom to be made. See Note 4.	Revision. See Note 7.
Hearing of evidence — Essential. See Note 2.	Strict compliance—Essential. See Notes 4 and 2.

**Section 263
Notes 1-2**

1. Legislative changes. — The words “nor the reasons for passing the judgment” occurring in the Code of 1872 after the words “need not record the evidence of the witnesses” have been omitted in the subsequent Codes.

The following words were for the first time introduced in the Code of 1892 —

- (a) “and in cases coming under clause (d), clause (e) or clause (f) of S. 260 has been committed” in clause (f);
- (b) “and his examination if any” in clause (g);
- (c) “or other final order” in clause (i).

Code of 1898 — The words “or clause (g) of sub-s.(1)” were added.

2. Scope and applicability of the section. — It has been seen under S. 262 that the procedure to be followed in summary trials is the same as that in ordinary trials except as otherwise provided. This section provides for some of the matters in respect of which the ordinary procedure may be departed from in summary trials. It provides that in such trials the evidence of witnesses need not be recorded and that no formal charge is necessary; but that the Magistrate or Bench of Magistrates, as the case may be, should enter in the prescribed form the particulars mentioned in the section. But the form prescribed under the section will not be the only record of the case for all purposes.¹

The section applies only to cases in which no appeal lies.² The procedure applicable to cases in which an appeal lies is provided for in section 264.

That section provides that in appealable cases in summary trials a judgment should be prepared containing the particulars mentioned in this section and the substance of the evidence and that such judgment shall be the only record in cases coming under that section. The question has arisen whether the exemption from recording the evidence of witnesses for which express provision is made in this section applies in cases coming under S. 264 also. As to this, see Notes under section 264.

It has been seen in the Notes under S. 262 that, except in regard to matters for which a different procedure is prescribed or permitted for summary trials, it is the duty of the Magistrate in such trials to

Section 263 — Note 2

1. ('40) AIR 1940 Pat 272 (274) : 41 Cri L Jour 283, *Mohsin Sheikh v. Emperor*. (First information lodged with police may be referred to.)
2. ('78) 2 Cal L R 511 (514), *In the matter of Sher Mohomed*.

Section 263
Notes 2-3

follow the rules of ordinary procedure as strictly as in ordinary trials. Thus, though this section dispenses with the *recording* of evidence, it does not dispense with the *hearing* of evidence and a finding in a summary trial which is based on a refusal or failure to hear evidence is as much liable to be upset as a finding in an ordinary trial which is assailable on a similar ground.³

This section and the other sections in this chapter refer only to the summary procedure in trials before Magistrates and Benches of Magistrates *other than* Presidency Magistrates. As to summary procedure in trials before Presidency Magistrates, see S. 362, sub-s.(4), section 370 and section 441.

There being so little to be recorded under this section and consequently there being so little protection from without to the accused against the risk of error, haste or inaccuracy, the scanty provisions of this section must be strictly complied with and the record must be sufficiently exact and full to enable the revisional Court to say whether the law has been complied with or not on the points to be recorded.⁴

See also Notes under S.262.

3. "The Magistrate or Bench of Magistrates need not record the evidence of the witnesses." — This section exempts the Magistrate or Bench of Magistrates holding a summary trial from recording the evidence of witnesses as in ordinary trials.¹ The contrary view² is against the express provisions of this section and S. 354 and cannot be supported.

3. ('38) AIR 1938 Sind 70 (71) : 32 S L R 684 : 39 Cri L Jour 474, *Choithram Menghraj v. Emperor*.

('12) 13 Cr. L. J. 759 (760) : 39 Cal 931 : 17 IC 71, *Jabbar Sheikh v. Tomiz Sheikh*. ('05) 2 Cri L Jour 187 (188) (Lah), *Kanhaya Lal v. Emperor*.

('13) 14 Cri L Jour 122 (123) : 35 All 136 : 18 IC 682, *Rama v. Emperor*. (Record shows that no evidence was taken on a certain essential point.)

('05) 9 Cal W N cexxxvii (cexxxvii, cexxxviii), *Birbal Sardar v. Emperor*. (Refusal to allow time to accused to adduce evidence in charge of theft.)

4. ('34) AIR 1934 Lah 596 (597) : 15 Lah 277 : 35 Cr.L.J. 1464, *Abdul v. Emperor*. ('06) 10 Cal W N 79 (81) : 3 Cr. L. J. 178 : 2 C. L. J. 565, *Khosh Md. v. Empress*.

[See also ('38) AIR 1938 Sind 70 (71) : 32 S. L. R. 684 : 39 Cri L Jour 474, *Choithram Menghraj v. Emperor*.]

Note 3

1. ('40) AIR 1940 Pat 272 (274) : 41 Cri L Jour 283, *Mohsin Sheikh v. Emperor*. (S. 263 must be read as an exception to the general provision contained in S. 355(1).)

('38) AIR 1938 Sind 70 (71) : 32 Sind L R 684 : 39 Cri L Jour 474, *Choithram Menghraj v. Emperor*.

('36) AIR 1936 All 319 (319) : 37 Cr.L.J. 710, *Hafiz Md. Rafiq Ahmad v. Emperor*. ('06) 10 Cal W N celxxxix (celxxxix), *Mahomed Hossein v. Keshab Chandra*.

('27) AIR 1927 All 124 (124, 125) : 49 All 261 : 28 Cr. L. J. 97, *Mantoo Tewari v. Emperor*. (Notes if any taken for own use by Magistrates form no part of record.)

('05) 2 Cri L Jour 336 (337, 338) : 1905 All W N 143, *Emperor v. Someshwar Das*.

('13) 14 Cri L Jour 122 (123) : 35 All 136 : 18 Ind Cas 682, *Rama v. Emperor*.

('32) AIR 1932 Oudh 98 (98) : 7 Luck 498 : 33 Cri L Jour 342, *Ahmad Jan v. Emperor*. (But Magistrate is bound to record his reasons for the conviction.)

(1900) 22 All 340 (341) : 1900 All W N 110, *Empress v. Narain Singh*.

(34) AIR 1934 Bom 157 (158) : 58 Bom 298 : 35 Cri L Jour 841, *In re Tippanna Koutya*. (A I R 1927 All 124, approved.)

('35) AIR 1935 Rang 106 (107) : 13 Rang 225 : 36 Cri L Jour 892, *Emperor v. Maung Po Saw*. (S. 355 does not apply to summary trials.)

('27) AIR 1927 Oudh 42 (43) : 28 Cri L Jour 76, *Bhawani Bhik v. Emperor*.

2. ('36) 37 Cri L Jour 292 (292) : 160 Ind Cas 413 (Nag), *Emperor v. Baujbal*.

Although the Magistrate or Bench of Magistrates trying a case summarily is not *bound* to record the evidence of witnesses, such recording of evidence is not prohibited and in cases of importance, it has been held that Magistrates would do well to record the evidence.³ The Sind Judicial Commissioner's Court has held that evidence so recorded will not form part of the record.^{3a}

Section 263
Note 3 .

Moreover, Magistrates in such cases may take *notes* of the evidence for their own information and use and it has been laid down that where a case is likely to be adjourned to a long date, the Magistrate ought to take such notes.⁴ The question arises as to whether such notes of evidence, where they are taken, form part of the record or are the private property of the Magistrate which he can destroy at his option. On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Allahabad,⁵ Bombay⁶ and Rangoon,⁷ the Chief Court of Oudh⁸ and the Judicial Commissioner's Court of Sind,⁹ that such notes do not form part of the record and can be destroyed by the Magistrate at his option. But on the other hand, it has been held by the High Court of Calcutta¹⁰ and the Judicial Commissioner's Court of Nagpur¹¹ that such notes form part of the record and cannot be destroyed by the Magistrate. In the undermentioned case¹² it has been held that the failure of the Magistrate to sign the memorandum of evidence, assuming that the Magistrate is bound to make such memorandum, is not by itself sufficient to vitiate the trial and conviction. See also the under-mentioned cases.¹³

(22) AIR 1922 Pat 5 (6, 7) : 23 Cri L Jour 114, *Balkesar Singh v. Emperor*.

(28) AIR 1928 Mad 928 (928) : 29 Cri L Jour 584, *Kappal Nadar v. Emperor*.
(Court trying case summarily is not relieved of the duty of making a precise record of the evidence adduced before it.)

3. ('36) AIR 1936 Sind 40(40) : 37 Cr. L. J. 455, *Emperor v. Hemandas Devansingh*.
(91) 14 Mad 223 (224) : 1 Weir 848, *Empress v. Sukha Singh*.

3a. ('36) AIR 1936 Sind 40 (40) : 37 Cr. L. J. 455, *Emperor v. Hemandas Devansingh*. (Succeeding Magistrate cannot act on such evidence under S. 350.)

4. ('31) AIR 1931 Bom 142 (143) : 32 Cr. L. J. 276, *Hanifabai v. Mahomed Yakub*.

5. ('27) AIR 1927 All 124 (124, 125) : 49 All 261 : 28 Cr. L. J. 97, *Mantoo v. Emperor*.
(27) AIR 1927 All 480 (481) : 49 All 562 : 28 Cr. L. J. 442, *Ismail v. Emperor*.

[But see ('27) AIR 1927 All 157 (157) : 49 All 131 : 28 Cr. L. J. 88, *Atma Ram v. Emperor*. (Submitted not good law in view of A I R 1927 All 124 which was decided later and was a Bench decision.)]

6. ('34) AIR 1934 Bom 157 (158) : 58 Bom 298 : 35 Cr. L. J. 841, *In re Tippanna Koutya*.

7. ('35) AIR 1935 Rang 106 (107) : 13 Rang 225 : 36 Cri L Jour 892, *Emperor v. Maung Po Saw*.

8. ('27) AIR 1927 Oudh 42 (43) : 28 Cri L Jour 76, *Bhawani Bhik v. Emperor*.

9. ('25) AIR 1925 Sind 284 (284) : 19 S. L. R. 136 : 26 Cr. L. J. 1026, *Rahimtullah Ibrahim v. Emperor*.

10. ('21) AIR 1921 Cal 165 (165, 166) : 48 Cal 280 : 22 Cri L Jour 462, *Satish Chandra v. Manmatha Nath*.

11. ('26) AIR 1926 Nag 79 (79) : 26 Cri L Jour 1454, *Lal Chand v. Emperor*.

12. ('40) AIR 1940 Pat 272 (274) : 41 Cr. L. J. 283, *Mohsin Sheikh v. Emperor*.

13. ('20) AIR 1920 Pat 654 (654) : 21 Cr. L. J. 229, *Jagdish Prasad v. Emperor*.
(The Court will insist upon the production of the original record of statements made by witnesses on which the accused were convicted.)

Section 263
Notes 3-4

This section applies only to cases where no appeal lies. As to the question whether in cases in which an appeal lies the Magistrate is bound to record the evidence as in ordinary trials, see Notes under section 264.

4. "He or they shall enter . . . particulars." — This section requires the Court in a summary trial to prepare a record in the form that may be prescribed by the Provincial Government containing the various particulars mentioned in clauses (a) to (j) of the section. By implication this dispenses with the recording of a judgment in the form laid down by S. 867.¹ But the record prescribed by this section must be prepared scrupulously and carefully and must be complete in all the particulars specified in the section.² The particulars must be recorded in separate columns; lumping together in the same column all the particulars is not proper.³ The record must be prepared at the time of the trial; its preparation after the close of the trial is not sufficient.⁴ Further, the record must be prepared by the presiding officer of the Court itself. Except in cases where he is authorized to use the services of an officer appointed for the purpose under S. 265, sub-s.(2), he cannot depute a clerk to prepare the record.⁵

But the failure of the Magistrate to prepare the record as required by this section will not by itself justify the quashing of the conviction unless it has caused prejudice or occasioned failure of justice. Thus, where a Magistrate failed to enter the date of the commission of the offence, it was held that the conviction could not be set aside unless it was shown that the defect had led or could possibly have led to any prejudice or failure of justice.⁶

The register prepared under this section forms part of the record and under S. 548 the accused is entitled to copies of it if he applies for them.⁷

(1920) AIR 1920 Pat 492 (493) : 21 Cri L Jour 630, *Tittu Sahu v. Emperor*. (Held that Magistrate would have exercised a better discretion if he had given accused copies of his notes of evidence.)

(1975) 24 Suth W R Cr 66 (66), *Queen v. Doma Ram*. (A trial must be considered to be summary if the procedure is summary, notwithstanding that the record is made at great length and the decision is come to with great care.)

Note 4

1. (1920) AIR 1920 All 79 (80) : 21 Cr. L. J. 442, *Bhola Nath v. Emperor*. (Section requires only a finding accompanied by statement of reasons therefor.)

2. (1974) 22 Suth W R Cr 28 (28), *Queen v. Johire Singh*.

(1906) 4 Cri L Jour 40 (41) : 12 Bur L R 151, *Saminathan Chetty v. Rangoon Municipality*.

(1909) 21 All 189 (192) : 1899 A W N 34, *Queen-Empress v. Mukundi Lal*.

(1982) 1882 All W N 59 (59), *Empress v. Madho*. (No compliance of provisions in clauses (f) and (h) — Illegal.)

See also S. 262 Note 2.

3. (1922) 23 Cri L Jour 161 (162) : 65 Ind Cas 625 (Lah), *Ghulam Md. v. Emperor*.

4. (1992) 15 Mad 83 (87) : 2 Weir 326, *Queen-Empress v. Erugadu*. (Record prepared after close of trial from memory or rough notes — Illegal.)

5. (1983) 6 Mad 396 (399) : 2 Weir 328, *Subramanya Iyer v. Queen*.

6. (1940) AIR 1940 Pat 272 (273) : 41 Cri L Jour 283, *Mohsin Sheikh v. Emperor*. See also S. 265 Note 2.

7. (1910) 11 Cr. L. J. 17 (18) : 4 I. C. 611 : 1909 Pan Re No. 9 Cr, *Mangai Ram v. Emperor*.

5. Clause (f)—Particulars of offence charged and proved.

— Though this section dispenses with the framing of a formal charge in cases coming under it, the record prepared under the section must specify both the offence complained of and proved.¹ The accused is entitled to know clearly the offence with which he is charged to the same extent as in ordinary trials.² The record must show that the accused was not in any way prejudiced in this respect. The specification of the offence in the record should be sufficiently full and clear to give the accused sufficient notice of what he is charged with and what he has to meet.³ The principles in conformity with which charges must be framed in warrant-cases apply to the particulars to be recorded under this section.⁴ The mere mention of the section under which the accused is charged is not enough.⁵ Similarly, the prohibition of misjoinder of charges applies to summary trials as well as to ordinary trials and the record must show that there was no misjoinder.⁶ Where there are several accused the offences charged against each should be distinctly stated.⁷

Where the offence complained of is an offence of theft or other offence falling under clauses (d) to (g) of sub-s.(1) of S. 260, the value of the property in respect of which the offence was committed must also be specified in the record in order to make it clear that the offence was one which could be tried in a summary way.⁸ But the mere failure to do so is not sufficient to raise any question of possible or probable prejudice or failure of justice, so as to warrant the setting aside of the conviction unless it is shown that there was a real defect of jurisdiction by reason of the property exceeding Rs. 50 in value.⁹

6. Clause (g) — Plea of accused and his examination (if any). — The record should contain the plea of the accused and

Note 5

1. ('06) 4 Cri L Jour 40 (41) : 12 Bur L R 151, *Saminathan Chetty v. Rangoon Municipality*.
2. ('82) 1882 All W N 242 (242), *Empress v. Chotey Lal*.
3. ('82) 1882 All W N 59 (59), *Empress v. Madho*.
4. ('82) 1882 All W N 59 (59), *Empress v. Madho*.
5. [See ('89) AIR 1939 Nag 87 (88) : ILR (1939) Nag 457 : 40 Cr. L. J. 846, *Munna v. Emperor*. (The circumstances of the offences complained of should be explained to the accused whether in a warrant-case or summons-case tried summarily.)
6. ('82) 1882 All W N 59 (59), *Empress v. Madho*.
7. ('12) 13 Cri L Jour 224 (224) : 14 Ind Cas 320 (Cal), *Jharu Sheikh v. Emperor*.
8. ('12) 13 Cr L J 224 (224) : 14 Ind Cas 320 (Cal), *Jharu Sheikh v. Emperor*.
9. ('03-04) 2 Low Bur Rul 43 (44), *Emperor v. Maung Cho*.
10. ('06) 4 Cri L Jour 40 (41) : 12 Bur L R 151, *Saminathan Chetty v. Rangoon Municipality*.
11. ('12) 13 Cri L Jour 224 (224) : 14 Ind Cas 320 (Cal), *Jharu Sheikh v. Emperor*.
12. ('03-04) 2 Low Bur Rul 43 (44), *Emperor v. Maung Cho*.
13. ('91) 1891 All W N 183 (183), *In the matter of Sheo Sahai Bhagat*.
14. ('19) AIR 1919 All 64 (64) : 21 Cri L Jour 28, *Udit Narain v. Emperor*.
15. ('73) 20 Suth W R Cr 17 (17), *Empress v. Abheon Parida*.
16. ('06) 10 Cal W N cexxxiii (cexxxiv), *Chaitan Charan Maity v. Kala Chand Shamanta*.
17. ('22) AIR 1922 Pat 227 (228) : 25 Cri L Jour 545, *Brij Nandan v. Emperor*.
18. ('40) AIR 1940 Pat 272 (274) : 41 Cri L Jour 283, *Mohsin Sheikh v. Emperor*.

Section 263
Note 6

particulars as to his examination by the Court.¹ The accused must be asked to state his plea as in ordinary trials.² Further, the accused must be examined under S. 342 with a view to enable him to explain any circumstances appearing against him after the case for the prosecution has been closed and before the accused is called on to enter upon his defence.³ The general view is that the Court is bound to examine the accused under section 342 in summary trials, whether of summons-cases or of warrant-cases.⁴ The use of the words "if any" in this clause does not make it optional with the Court to apply the provisions of S. 342 to summary trials.⁵ The words cover only cases where the accused pleads guilty or owing to the weakness of the

Note 6

1. ('35) AIR 1935 Sind 193 (193) : 36 Cr. L. J. 1484, *Devjimal v. Emperor*. (It is not a compliance with this obligation to state merely the plea of the accused. The prisoner's own plea and examination should be recorded in the form provided for that purpose by the Local Government.)
- ('28) AIR 1928 All 266 (266) : 29 Cri L Jour 265, *Murat Singh v. Emperor*.
- ('05) 9 Cal W N lxxvi (lxxvi), *Shib Chandra Ray v. Nanda Rani Dasi*.
2. ('05) 9 Cal W N lxxvi (lxxvi), *Shib Chandra Ray v. Nanda Rani Dasi*.
3. ('38) AIR 1938 Sind 70 (71) : 32 Sind L R 684 : 39 Cri L Jour 474, *Choithram Menghraj v. Emperor*.
- ('37) AIR 1937 Sind 304 (304) : 32 S.L.R. 30 : 39 Cr. L. J. 59, *Emperor v. Shivalomal*.
- ('36) AIR 1936 Oudh 16 (17) : 11 Luck 461 : 36 Cr. L. J. 1303, *Emperor v. Karunashankar*. (Prejudice may be presumed where S. 342 has not been complied with.)
- ('22) AIR 1922 Pat 5 (6) : 23 Cri L Jour 114, *Balkeshar Singh v. Emperor*.
- ('26) AIR 1926 Nag 300 (300, 301) : 22 Nag L R 65 : 27 Cr. L. J. 632, *Bhagwan v. Emperor*.
- ('22) AIR 1922 Pat 296 (297) : 23 Cr. L. J. 440, *Parmeshwar Lal Mittar v. Emperor*.
- ('21) AIR 1921 Pat 11 (12) : 6 Pat L Jour 174 : 22 Cri L Jour 427, *Gulam Rasul v. Emperor*. (Offence under S. 218, Bengal Municipal Act, 1884.)
- ('26) AIR 1926 Sind 1 (2) : 20 Sind L R 34 : 26 Cr. L. J. 1554 (F B), *Emperor v. Nabu*.
- ('14) AIR 1914 Cal 663 (663) : 41 Cal 743 : 15 Cr. L. J. 190, *Mad. Hossein v. Emperor*.
- ('22) AIR 1922 Lah 45 (47) : 23 Cr. L. J. 154, *Haji Muhammad Baksh v. Emperor*.
4. ('40) AIR 1940 Bom 314 (314, 315), *Emperor v. Kondiba Balaji*.
- ('36) AIR 1936 Oudh 16 (17) : 36 Cr. L. J. 1303 : 11 Luck 461, *Emperor v. Karunashankar*. (Summons-case.)
- ('35) AIR 1935 All 217 (218) : 36 Cr. L. J. 1290 : 57 All 666, *Siam v. Emperor*. (Do.)
- ('35) AIR 1935 Sind 193 (193) : 36 Cri L Jour 1484, *Devjimal v. Emperor*. (Warrant-case.)
- ('34) AIR 1934 Lah 96 (96) : 15 Lah 60 : 35 Cr. L. J. 1394, *Karam Din v. Emperor*. (Summons-case.)
- ('31) AIR 1931 Lah 153 (154) : 32 Cr. L. J. 708, *Bhimsen Sacnar v. Emperor*. (Do.)
- ('30) 31 Cri L Jour 613 (614) : 124 I. C. 70 (Cal), *Moyzuddin Mean v. Emperor*. (Do.)
- ('27) AIR 1927 Pat 369 (370) : 6 Pat 504 : 28 Cri L Jour 1037, *Parsotim Das v. Emperor*. (Do.)
- ('22) AIR 1922 Pat 296 (297) : 23 Cr. L. J. 440, *Parmeshwar Lal v. Emperor*. (Do.)
- ('14) AIR 1914 Cal 663 (663) : 41 Cal 743 : 15 Cri L Jour 190, *Mahomed Hossein v. Emperor*. (Warrant-case.)
- [But see ('24) AIR 1924 Mad 30 (31) : 46 Mad 766 : 24 Cr. L. J. 847 (F B), *Dharam Singh v. Emperor*. (Summons-case.)
- ('93-1900) 1893-1900 Low Bur Rul 638, *Nga Po Way v. Queen-Empress*.]
- See also S. 342 Note 3 which shows a conflict of decisions as to applicability of S. 342 to summons-cases.]
- See also S. 262 Note 2.
5. ('37) AIR 1937 Nag 67 (67) : ILR (1937) Nag 228 : 38 Cr. L. J. 354, *Budhulal v. Emperor*.
- ('26) AIR 1926 Nag 300 (300) : 22 Nag L R 65 : 27 Cr. L. J. 632, *Bhagwan v. Emperor*.
- ('26) AIR 1926 Sind 1 (2) : 20 Sind L R 34 : 26 Cr. L. J. 1554 (F B), *Emperor v. Nabu*.
- ('35) AIR 1935 All 217 (219) : 57 All 666 : 36 Cr. L. J. 1290, *Sia Ram v. Emperor*.
- ('35) AIR 1935 Sind 193 (193) : 36 Cri L Jour 1484, *Devjimal v. Emperor*. (Examination under S. 342 need not be taken with all formalities under S. 364, Cr. Pro. Code.)

prosecution evidence the accused can be acquitted without his being examined under S. 342.⁶ But the examination of the accused need not be recorded in the manner laid down in S. 364.⁷ (See S. 364, clause (4).) It has been held that even the failure to record the particulars of the examination as required by this section is only an irregularity covered by S. 537 and does not vitiate the trial where the accused has not been prejudiced.⁸

Section 263 Notes 6-7

7. Clause (h) — Finding and, in case of conviction, brief statement of reasons therefor. — Where the finding is one of conviction, the record must contain a brief statement of the *reasons* for conviction.¹ The statement of reasons may be brief;² but the brevity must not tend to obscurity.³ The statement must be sufficient

6. ('37) AIR 1937 Nag 67 (67) : ILR (1937) Nag 228 : 38 Cr. L. J. 354, *Budhulal v. Emperor*.
(126) AIR 1926 Sind 1 (2) : 20 Sind L R 34 : 26 Cr.L.J. 1554 (F B), *Emperor v. Nabu*.
(126) AIR 1926 Nag 300 (300) : 22 Nag L R 65 : 27 Cr.L.J. 632, *Bhagwan v. Emperor*.
[See ('40) AIR 1940 Bom 314 (315), *Emperor v. Kondiba Balaji*. (The words 'if any' merely indicate that if the accused makes no statement there is nothing to record.)]
7. ('36) AIR 1936 Oudh 16 (17) : 11 Luck 461 : 36 Cri L Jour 1303, *Emperor v. Karunashankar*. (But some notes must be made of the examination of the accused.)
(127) AIR 1927 Pat 369 (370) : 6 Pat 501 : 28 Cri L Jour 1037, *Parshotim Das v. Emperor*. (Section 364 itself says that it is not necessary for the Magistrate in a summary trial to record the examination in detail.)
(135) AIR 1935 Sind 193 (193) : 36 Cri L Jour 1484, *Devjimal v. Emperor*.
8. ('35) AIR 1935 All 217 (219) : 36 Cr.L.J. 1290 : 57 All 666, *Sia Ram v. Emperor*.

Note 7

1. ('40) AIR 1940 All 195 (195) : 41 Cri L Jour 498, *Dal Chand v. Emperor*. (A judgment which merely states that the accused 'is fined Rs. 25 or two months rigorous imprisonment in default' is no judgment at all according to law.)
(139) AIR 1939 Oudh 37 (38) : 40 Cr. L. J. 141 : 14 Luck 325, *Baijoo v. Emperor*.
(137) AIR 1937 Mad 480 (480) : 38 Cri L Jour 581, *Kannayya v. Venkatesam*.
(127) AIR 1927 Nag 250 (251) : 28 Cri L Jour 495, *Nisarali v. Secretary, Municipal Committee, Nagpur*.
(121) AIR 1921 Oudh 240 (240) : 24 Oudh Cas 293 : 23 Cri L Jour 427, *Emperor v. Mian Jan*.
(132) AIR 1932 Oudh 98 (98) : 7 Luck 498 : 33 Cr.L.J. 342, *Ahmad Jan v. Emperor*.
(119) AIR 1919 Pat 253 (253) : 20 Cri L Jour 431, *Jankey Rai v. Emperor*.
(120) AIR 1920 Pat 138 (138) : 21 Cri L Jour 656, *Magsood Alam v. Emperor*.
(123) AIR 1923 Pat 56 (56) : 23 Cri L Jour 94, *Damodar Das v. Emperor*.
(128) AIR 1928 Mad 197 (197) : 51 Mad 338 : 29 Cri L Jour 207, *Lalamma v. Emperor*. (It is not clear whether trial in this case was a summary one—Offence not mentioned.)
(183) 1883 All W N 114 (114), *Empress v. Girwar Dial*.
(180) 6 Cal L R 273 (275), *In the matter of Dowlat Singh*.
(179) 1879 Pun Re No 6 Cr, p. 11 (11, 12), *Jaggat Ram v. Empress*.
(105) 9 Cal W N lxxv (lxxvi), *Emperor v. Haladhar Maiti*.
(102) 6 Cal W N 40 (40), *Dinanath Talukdar v. Jogendra Narain*.
(182) 8 Cal 195 (197, 198), *Empress v. Radoi Nath Shaha*.
(133) 1933 Mad W N 736 (737), *Mabub Sahib v. Kesavalu Chetty*.
(174) 22 Suth W R Cr 28 (28), *Empress v. Johrie Singh*. (Other irregularities also.)
(182) 1882 All W N 242 (242), *Empress v. Chotey Lal*.
(182) 1882 All W N 59 (59), *Empress v. Madho*. (No compliance with cl. (f) also of this section — Illegal.)
2. ('39) AIR 1939 Oudh 37 (38) : 40 Cr.L.J. 141 : 14 Luck 325, *Baijoo v. Emperor*.
(120) AIR 1920 All 79 (80) : 21 Cri L Jour 442, *Bholanath v. Emperor*.
(199) 21 All 189 (192) : 1899 All W N 34, *Queen-Empress v. Mukundi Lal*.
3. ('39) AIR 1939 Oudh 37 (38) : 40 Cr.L.J. 141 : 14 Luck 325, *Baijoo v. Emperor*.
(199) 21 All 189 (192) : 1899 All W N 34, *Queen-Empress v. Mukundi Lal*.

Section 263
Note 7

to enable a Court of revision to judge whether the lower Court had sufficient material before it for convicting the accused.⁴ The reasons must refer briefly to the evidence in support of the conclusions of the Court.⁵ Merely saying "I believe the prosecution" is not enough as this is only a conclusion and not a reason.^{5a} Where the reasons for conviction are not properly recorded with the result that, when the matter goes before a Court of revision, the latter feels a doubt as to the guilt of the accused, the benefit of the doubt must go to the

4. (1900-02) 1 Low Bur Rul 208 (209), *Me Da Li v. Crown*.
- ('85) 1885 All W N 213 (213), *Empress v. Mohan*.
- ('24) AIR 1924 Oudh 297 (299) : 24 Cr. L. J. 916, *Emperor v. Jagmohan Das*.
- ('05) 2 Cr. L. J. 375 (376) : 3 Low Bur Rul 3, *Kuchi v. Emperor*. (Record must show necessary ingredients of offences charged.)
- ('11) 12 Cr. L. J. 280 (280) : 10 I. C. 921 (L D), *Ket Foon v. Emperor*. (Offence under S. 30, Rangoon Police Act, 1899).
- ('09) 10 Cr. L. J. 216 (216) : 2 Sind L R 3, *Imperator v. Dino*.
- ('15) AIR 1915 Sind 53 (53) : 16 Cr. L. J. 713 : 9 S L R 89, *Ram Harakh v. Emperor*.
- ('12) 13 Cr. L. J. 708 (709) : 16 I. C. 516 (All), *Brij Basi Lal v. Emperor*.
- ('06) 3 Cr. L. J. 178 (180) : 2 C. L. J. 565 : 10 C W N 79, *Khosh Md. v. Empress*.
- ('29) AIR 1929 Lah 378 (379) : 10 Lah 231 : 29 Cr. L. J. 877, *Din Md. v. Emperor*.
- ('30) AIR 1930 Lah 481 (482) : 32 Cr. L. J. 50, *Atam Parkash v. Emperor*.
- ('31) AIR 1931 Lah 33 (38) : 32 Cr. L. Jour 532, *Baliram v. Emperor*. (Offence under S. 32, Police Act, 1861.)
- ('23) AIR 1923 Mad 185 (186) : 46 Mad 253 : 24 Cr. L. J. 84, *In re Dervish Hussain*.
- ('87) 1887 Pun Re No. 7 Cr, p. 10 (11), *Mehrab v. Empress*.
- ('13) 14 Cr. L. J. 594 (594) : 21 I. C. 466 : 16 Oudh Cas 357, *Jagannath v. Emperor*.
- ('95) 1895 Rat 778 (779), *Queen-Empress v. Harigopal*.
- ('18) AIR 1918 Pat 484 (485) : 19 Cr. L. J. 719, *Jankider v. Raghunath Lal*.
- ('81) 6 Cal 579 (580, 581), *Empress v. Punjab Singh*.
- ('94) 18 Bom 97 (98), *Empress v. Shidgauda*. (Simply stating "witnesses called by complainant support the complainant; witnesses for accused do not say that accused has not committed the offence", is not sufficient.)
- ('99) 1899 All W N 81 (82), *Empress v. Muhammad Haniff*.
- ('89) 1889 Pun Re No. 5 Cr, p. 37 (40), *Sher Singh v. Empress*.
- (1900) 27 Cal 450 (451), *Ainuddi Sheikh v. Empress*. (Offence under S. 25, Indian Forest Act, 1878 now S. 26 of Indian Forest Act, 1927.)
- ('99) 3 Cal W N 281 (282), *Lalit Mohan v. Chunder Mohan*.
- ('86) 1886 All W N 181 (181), *Empress v. Lachman*.
- ('99) 13 C P L R 17 (18), *Empress v. Bhikha Marar*.
- (1900-02) 1 Low Bur Rul 95 (95), *Vadivaloo Swamy v. Crown*.
- ('28) AIR 1928 All 266 (267) : 29 Cr. L. Jour 265, *Murat Singh v. Emperor*. (No compliance with cl. (g) also.)
- ('32) AIR 1932 Oudh 98 (98) : 7 Luck 498 : 33 Cr. L. J. 342, *Ahmadjan v. Emperor*.
- ('74) 22 Suth W R Cr 28 (28), *Queen v. Johrie Singh*.
- ('34) AIR 1934 Lah 596 (597) : 15 Lah 277 : 35 Cr. L. Jour 1464, *Abdul Rahman v. Emperor*. (Bare reference to section of statute is not enough.)
- [See also ('40) AIR 1940 All 195 (195) : 41 Cr. L. J. 498, *Dal Chand v. Emperor*. (Statement must show on the face of it that the cases of both parties have been carefully and properly considered.)]
5. ('06) 10 Cal W N cclxxix (cclxxix), *Mahomed Hossien v. Keshab Chandra*.
- ('99) 21 All 189 (190) : 1899 A W N 34, *Empress v. Mukundi*.
- ('30) AIR 1930 Lah 481 (482) : 32 Cr. L. Jour 50, *Atam Parkash v. Emperor*.
- (1900-02) 1 Low Bur Rul 45 (46), *Empress v. Bashin*. (S. 336, Penal Code—Where offence is not one which is defined in the way in which, for example, the offence of theft is defined, these reasons must include a statement of facts sufficient prima facie to constitute the offence—*Held* facts proved no offence.)
- ('35) AIR 1935 Sind 144 (144) : 37 Cr. L. Jour 715, *Dayaram Satoomal v. Emperor*. (Record should contain a clear statement of facts constituting offence and must show that each of the ingredients necessary for conviction has been considered and *held* proved by the Magistrate.)
- [See ('31) AIR 1931 Bom 142 (143) : 32 Cr. L. J. 276, *Hanifabai v. Mahomed Yakub*.]
- 5a. ('34) AIR 1934 Lah 596 (598) : 15 Lah 277 : 35 Cr. L. J. 1464, *Abdul Rahman v. Emperor*.

accused.⁶ But where, despite the defectiveness of the record in this particular the Court of revision is satisfied, from the other material on the record, that the conviction was right, it will not be upset merely because of the non-compliance with this section, such non-compliance being merely an irregularity within S. 537.⁷

Section 263.
Note 7

Section 441 provides that when the record of the proceeding of any Presidency Magistrate is called for by the High Court under section 435, he may submit a written statement of the grounds of his decision and that the High Court should consider such statement before upsetting his decision. There is no such provision in the case of other Magistrates and so, when the reasons for conviction are not recorded as required by this section and the matter goes up before a Court of revision, the lower Court cannot send any written statement of reasons for its decision for the consideration of the Court of revision.⁸

The section requires reasons to be recorded only in case of *conviction*; no reasons need be recorded for an *acquittal*⁹ or a sentence.¹⁰

264.* (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

Section 264.

Record in appeal-
able cases.

(2) Such judgment shall be the only record in cases coming within this section.

1. "Judgment embodying the substance of the evidence."—The language of the section is imperative. In a case coming within the section, the judgment ought to embody the substance of the evidence adduced on both sides.¹ The substance of every separate

* 1882 : S. 264; 1872 : S. 228; 1861 — Nil.

6. ('31) AIR 1931 Lah 33 (38): 32 Cri L Jour 532, *Bali Ram v. Emperor*. (Offence under S. 31, Police Act.)

7. ('25) AIR 1925 Bom 138 (139): 26 Cr. L. J. 466, *Emperor v. Namdeo Lakman*.

8. ('05) 9 Cal W N lxxv (lxxvi), *Emperor v. Haladar Maiti*.

9. ('06) 3 Cr. L. J. 433 (436): 12 Bur L R 59, *Narayanadaswamy v. A. Blake*.

10. ('40) AIR 1940 Nag 264 (265) : 41 Cri L Jour 544, *Provincial Govt. C.P. and Berar v. Bhivram*.

Section 264 — Note 1

1. ('24) AIR 1924 Oudh 167 (167) : 24 Cri L Jour 484, *Salim v. Emperor*.

('09) 9 Cri L Jour 23 (23) : 4 Low Bur Rul 338, *Po Ka v. Emperor*.

('74) 1874 Pun Re No. 2 Cr, p. 3; *Bakkhu v. Crown*. (Mere reference to character of evidence is not sufficient.)

('28) AIR 1928 Bom 433 (433) : 29 Cri L Jour 1005, *Nurudin v. Emperor*. (Substance to be plainly stated and not to be left for inference by High Court.)

('94) 1894 Rat 725 (725), *Queen-Empress v. Husein*.

('34) AIR 1934 Oudh 177 (178) : 35 Cr. L. J. 677, *Emperor v. Akbar Ali*. (Where the Magistrate merely wrote in one sentence that the accused were entitled to the benefit of the doubt and acquitted them, held that there was no judgment in the eye of law and that the acquittal should be set aside.)

[See ('36) 37 Cri L Jour 292 (292) : 160 Ind Cas 413 (Nag), *Emperor v. Bhujbal*.] See also S. 262 Note 2.

Section 264
Notes 1-2

deposition need not be recorded, but only the substance of the evidence as a whole need be given.² But, it is not sufficient compliance with the law to state that "the witnesses for the prosecution support the statement of the complainant" and "the statement of the witnesses examined by the accused is very conflicting."³ Further, it must be remembered that the substance of the evidence is a matter quite distinct from the facts which may be considered as proved by the evidence. Hence, a mere statement of the facts which the evidence of certain witnesses is considered to have proved is not sufficient.^{3a} The substance must be stated plainly and must not be left to be deduced by inference.^{3b} The substance of the evidence should be so recorded as to enable the appellate Court to judge if there are sufficient materials for the decision.⁴

The failure to set forth the substance of the evidence is fatal to the case⁵ because it prejudices the accused in that it prevents the proper disposal of the appeal that he is enabled to make.⁶

2. Sub-section (2)—"Such judgment shall be the only record in cases coming within this section."—Section 263 expressly provides that in cases coming under that section it is not necessary to record the evidence of witnesses or frame a formal charge. There is no such express provision in this section. But the effect of the provision in sub-section (2), that the judgment prepared in accordance with sub-section (1) should be the only record in the case, is to dispense with the

2. ('76) 25 Suth W R Cr 6 (7), *Kristodhone Dutt v. Chairman, Municipal Commissioners of Calcutta*.

('29) AIR 1929 Oudh 151 (152) : 30 Cri L Jour 557, *Jamna Prasad v. Emperor*.

[But see ('09) 9 Cr. L. J. 23 (23) : 4 L. B. R. 338, *Po Ka v. Emperor*. (Personality of each witness and the circumstances in which he was in a position to observe relevant facts should appear briefly but clearly on the record.)]

3. ('24) AIR 1924 Oudh 167 (167) : 24 Cr. L. J. 484, *Salim v. Emperor*. (Record ought to show how the witnesses came to be on the spot and how much of the affair they saw.)

3a. ('09) 9 Cri L Jour 23 (23) : 4 Low Bur Rul 338, *Po Ka v. Emperor*.

3b. ('28) AIR 1928 Bom 433 (433) : 29 Cr. L. J. 1005, *Nuruddin Sheikh Adam v. Emperor*.

4. ('09) 9 Cri L Jour 23 (23) : 4 Low Bur Rul 338, *Po Ka v. Emperor*.

('29) AIR 1929 Oudh 151 (152) : 30 Cri L Jour 557, *Jamna Prasad v. Emperor*.

('78) 1 All 680 (682), *Empress of India v. Kanran Singh*. (The prisoner's right of appeal must not be defeated in consequence of an imperfect statement of the substance of evidence.)

[See ('97) 1897 Rat 934 (934, 935), *Queen-Empress v. Nawajbai*.]

[But see ('31) AIR 1931 Mad 233 (233) : 32 Cri L Jour 689, *Subramania Maistry v. Nachiar Ammal*. (Whether the Magistrate is to give such complete summary of evidence as to afford material for appeal or merely a statement of evidence which he thinks substantial rests with the Magistrate.)]

5. ('28) AIR 1928 Bom 433 (433) : 29 Cr. L. J. 1005, *Nuruddin Sheikh v. Emperor*.

('74) 1874 Pun Re No. 2 Cr, p. 3, *Baklu v. Crown*.

('94) 1894 Rat 725 (725), *Queen-Empress v. Husein*.

('82) 1882 All W N 178 (179), *Empress v. Lalji*.

[But see ('78) 1 All 680 (682), *Empress of India v. Kanran Singh*. (Appellate Court need not quash conviction, but may remand case directing trial Court to remedy defect, if necessary, by re-examining witnesses.)]

6. ('28) AIR 1928 Bom 433 (433) : 29 Cr. L. J. 1005, *Nuruddin Sheikh v. Emperor*. See also S. 262 Note 2 and S. 537 Note 12.

recording of the evidence of witnesses¹ and the framing of a formal charge² even in cases coming under this section. Even if the evidence of witnesses is actually recorded or the Court takes rough notes of the evidence, such evidence or notes cannot form part of the record in view of the express provision of sub-section (2);³ and the appellate Court cannot travel beyond the judgment to any other material in order to test the substance of the evidence forming part of the judgment.⁴

Section 264
Note 2.

265.* (1) Records made under section 263
Language of record and judgments recorded under
and judgment. section 264 shall be written by the
presiding officer, either in English or in the language
of the Court, or, if the Court to which such presiding
officer is immediately subordinate so directs, in such
officer's mother-tongue.

Section 265

(2) The *Provincial Government*^a may authorize
Bench may be any Bench of Magistrates empowered to
authorized to try offences summarily to prepare the
employ clerk.

* 1882 : S. 265; 1872 : Ss. 229, 230; 1861 — Nil.

Note 2

1. ('27) AIR 1927 All 124 (124, 125) : 49 All 261 : 28 Cr. L. J. 97, *Mantoo Tewari v. Emperor*. (S. 264 is not controlled by S. 355, Cr. P. C.)
- (27) AIR 1927 Bom 426 (428) : 28 Cri L Jour 537, *Chimanlal v. Emperor*. (Rough notes of evidence do not form part of the record.)
- ('05) 2 Cr. L. J. 375 (376) : 3 Low Bur Rul 3, *Kuchi v. Emperor*. (S. 355, Cr. P. C., merely prescribes a briefer record in summons cases and other cases which may be tried summarily when they are as a matter of fact tried regularly.)
- ('25) AIR 1925 Sind 284 (284) : 19 Sind LR 136 : 26 Cri L Jour 1026, *Rahimtullah v. Emperor*. (Rough notes should not be attached to the record — An attempt to increase the record by so doing is illegal.)
- ('31) AIR 1931 Mad 233 (233) : 32 Cri L J. 689, *Subramania v. Nachiar Ammal*.
- ('34) AIR 1934 Bom 157 (158) : 58 Bom 298 : 35 Cri L Jour 841, *In re Tippanna Koutya Mannavaddar*. (S. 355, Cr. P. C., has no application whatever to summary trials.)
- [But see ('21) AIR 1921 Cal 165 (165) : 48 Cal 280 : 22 Cri L Jour 462, *Satish Chandra v. Manmatha Nath*. (Submitted not correct.)]
2. ('26) AIR 1926 Lah 301 (301, 302) : 7 Lah 303 : 27 Cri L Jour 639, *Emperor v. Salig Ram*.
- ('25) AIR 1925 Oudh 722 (722) : 26 Cri L Jour 1334, *Kallu Bari v. Emperor*. (AIR 1924 Cal 63 criticised as defective.)
- [See ('26) AIR 1926 Cal 1202 (1203) : 53 Cal 738 : 27 Cri L Jour 1295, *Maadab Chandra v. Emperor*. (In any case failure to frame charge is not fatal in view of Section 535 (2).)]
- [But see ('24) AIR 1924 Cal 63 (64) : 25 Cr. L. J. 1270, *Natabar Khan v. Emperor*. (Submitted not correct.)]
3. ('36) AIR 1936 Sind 40 (40) : 37 Cr. L. J. 455, *Emperor v. Hemandas Devansingh*. (Evidence so recorded does not come within the meaning S. 350.)
- ('25) AIR 1925 Sind 284 (284) : 19 Sind LR 136 : 26 Cr. L. J. 1026, *Rahimtullah v. Emperor*. (The rough notes taken by the Magistrate should not be attached to the record.)
4. ('28) AIR 1928 Mad 597 (597, 598) : 29 Cri L Jour 625, *Cholkalingapandaram v. Emperor*.
- ('26) 1926 Mad W N xc (xc).
- ('27) AIR 1927 Mad 298 (299) : 28 Cri L Jour 138, *Nagoor Kannu Nadura v. Sithu Naick*. (Rough notes of evidence cannot be called for or consulted.)

Section 265
Notes 1-3

aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

(3) If no such authorization be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record.

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment.

a. Substituted by A. O. for "Local Government."

1. Legislative changes. — Sub-sections (3) and (4) were newly added in the Code of 1898.

2. "Shall be written by the presiding officer." — This section provides that the record or the judgment in summary trials should be written by the presiding officer. The preparation of such record is thus the duty of the Magistrate himself and he cannot depute a clerk to do it.¹ But in cases falling under sub-s.(2) the record or judgment may be prepared by the officer appointed for the purpose under it, and the members of the Bench trying the case may sign the record or judgment so prepared. Where a case is tried by a Bench of Magistrates, it has been held that the record or judgment ought to be prepared in the presence of all the Magistrates forming the Bench and they must all be aware of their contents and approve of them, even though the formal pronouncement of the same may be left to be made by the Chairman of the Bench in their absence. Therefore, a record or judgment prepared by the Chairman in the absence of the other Magistrates is not valid in law, even though the others may have concurred in the *decision*.²

3. Signature on judgment or record. — The requirements of public policy necessitate the writing of the full name of the Magistrate who signs the judgment and the mere putting in of the initials is not a sufficient compliance with the law. Therefore, where one of the three members of a Bench trying a case summarily merely initials the judgment instead of signing his full name in it, he cannot be held to have 'signed' the judgment as required by the section.¹ As to whether

Section 265 — Note 2

1. ('83) 6 Mad 396 (399) : 2 Weir 328, *Subramania Iyer v. Queen*. (Preparation of record deputed to clerk — Irregularity is grave.)
See also S. 263 Note 4.

2. ('28) AIR 1928 Mad 1172 (1173) : 52 Mad 237 : 29 Cr.L.J. 973, *Ramakotiah v. Subba Rao*. (Preparation of judgment after the other members had left the Court is not a proper judgment.)
See also S. 366 Note 3.

Note 3

1. ('30) AIR 1930 Mad 867 (868) : 54 Mad 252 : 32 Cr.L.J. 430, *Brahmaiah v. Emperor*.
See also S. 367 Note 11.

such initialling instead of signing the full name amounts to an illegality or a mere irregularity within the meaning of S. 537, see Notes to S. 537. The signature should be made with a pen and not with a stamp.³

Section 265
Note 3

Section 367 provides that a judgment should be signed by the presiding officer of the Court. Where a case is tried summarily by a Bench of Magistrates, it is provided by sub-s.(3) of this section that the judgment or record prepared by a member of the Bench should be signed by every member of the Bench. Where the judgment or record is prepared by the Chairman of the Bench, will the signature of the Chairman alone be sufficient as that of the "presiding officer" under S. 367 or is it necessary that the record or judgment should be signed by each of the other members of the Bench also? On this question it has been held by the High Court of Madras that the words "the presiding officer of the Court" in S. 367 are no more than a compendious description of all classes of judicial officers, Magistrates and Judges who have to pronounce judgments, that they do not afford any assistance in the construction of this section and that the intention of this section is that by whomsoever the record or judgment is written, it should be signed by all the members present. Hence, the fact that the record or judgment has been written and signed by the Chairman of a Bench does not dispense with the signatures of the other members of the Bench.³ See also Note 3 to S. 367.

Where copies are furnished to the parties of the judgment or record, the copy should contain a copy of the signature of all the members of the Bench who signed the original. A copy, wherein is given the signature of only the Chairman of the Bench, is incorrect and defective.⁴

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A. — Preliminary.

266.* In this Chapter, except in sections 276 and 307, and in Chapter XVIII, the expression "High Court" means a High Court within the meaning † of the Government of India Act, 1935, and includes such other Courts as the

Section 266

* 1882 : S. 266 ; 1872 and 1861 — Nil.

† See Section 219 of the Government of India Act, 1935.

2. ('83) 6 Mad 396 (398) : 2 Weir 328, *Subramanya Iyer v. Queen*. (Signature with stamp — It is no more than an irregularity.)

3. ('30) AIR 1930 Mad 187 (187, 188) : 53 Mad 165 : 31 Cr. L. J. 715, *Nathan v. Emperor*. (Dissenting from A I R 1928 Mad 1172.)

4. ('30) AIR 1930 Mad 867 (868) : 54 Mad 252 : 32 Cr. L. J. 430, *Brahmaiah v. Emperor*. See also S. 367 Note 11.

Section 266
Notes 1-4

Provincial Government may by notification in the Official Gazette,^a declare to be High Courts for the purposes of this Chapter and of Chapter XVIII.

a. Substituted by A. O. for "means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes the Chief Court of Oudh, the Court of Judicial Commissioner of Sind, and such other Courts as the Governor-General in Council may, by notification in the Gazette of India."

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. "High Court."
4. Judicial Commissioner.

1. Legislative changes (*omitted*)

2. Scope and applicability of the section. — This chapter deals with the procedure to be adopted by a Court of Session or a High Court in the trial of cases committed to it under chapter XVIII of the Code. The language of Ss. 193 and 194 implies that this chapter has reference only to cases committed to a Court of Session. It would appear, therefore, that the procedure laid down in this chapter was not intended to be applicable to the trial of such exceptional cases as a Court of Session or a High Court may take cognizance of, otherwise than on commitment as provided for in Ss. 193 and 194.

The material distinction between a trial held by a Magistrate and a trial under this chapter is that while in the former the right and duty to decide a case rests solely in the Magistrate, in trials under this chapter the Judge is bound by the verdict of a jury or to consider the opinion of assessors, as the case may be.

Section 14 of the Indian Criminal Law Amendment Act, XIV of 1908, makes the provisions of the chapter applicable, subject to certain prescribed conditions, to trials before the special tribunals constituted under the said Act.

3. "High Court." — The expression "High Court" is defined in S. 4 (1) (j) of the Code. But that definition is subject to the provision in S. 266 giving the expression a different meaning for certain purposes.

A High Court exercising original criminal jurisdiction is not a Sessions Court within the meaning of the Code.¹

4. Judicial Commissioner. — The effect of the definition of "High Court" in this section is not to confer the status of a High Court on Courts which are not statutory High Courts, but is only to extend to such Courts the procedure applicable to statutory High Courts, in the trial of sessions cases. The Judicial Commissioner's Court of Sind, for example, is in its constitution a Sessions Court

Section 266 — Note 3

1. (1932) AIR 1932 Cal 867 (868): 59 Cal 1248: 34 Cr.L.J. 107, *Sukumar Majumdar v. Emperor*.

See also S. 6 Note 3, S. 9 Note 3 and S. 528A Note 5.

under S.1A of the Sind Courts Act, XII of 1866. But in the trial of sessions cases it is deemed to be a High Court to the extent prescribed in this section.¹ As such, when a Judicial Commissioner of that Court in a sessions trial disagrees with the verdict of the jury, the procedure to be adopted is that of a High Court as provided in S.305 of this chapter and the Judge has no power of reference under S.307.² The Court of a Judicial Commissioner, as for example of Sind, is a High Court only for the purposes of chapter XXIII (and of chapter XVIII) and remains a Sessions Court for other purposes notwithstanding S.266, and an appeal lies under S.418 of the Code from the decision of a Judge of that Court in a sessions trial.³ Under Bombay Act, VII of 1926, which came into force from the 15th April of 1940,⁴ the Sind Judicial Commissioner's Court has become the Chief Court of Sind. The Sind Courts Act, XII of 1866 has been repealed by the above Act, but under S.8 thereof, the Chief Court of Sind continues to be a Court of Session. So, the above principles will apply also in the case of the Chief Court of Sind.

Section 266
Note 4 ;

Trials before High Court to be by jury.

267.* All trials under this Chapter before a High Court shall be by jury,

Section 267

and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or the *Government of India Act, 1935*,^a the trial may, if the High Court so directs, be by jury.

The words "or the Government of India Act, 1915," were inserted by the Amending Act XIII of 1916.

^a. Inserted by A. O.

1. Trial by jury. — The word "jury" means a company of men sworn to deliver a verdict upon evidence delivered to them touching

* 1882 : S. 267; 1872 and 1861 — Nil.

Note 4

1. ('39) AIR 1939 Sind 209 (218) : 41 Cr.L.J. 28 : I.L.R. (1940) Kar 249, *Shewaram Jethanand v. Emperor*.

('25) AIR 1925 Sind 249 (249) : 19 Sind L.R. 309 : 26 Cr.L.J. 562 (FB), *Khudabux v. Emperor*.

2. ('28) AIR 1928 Sind 149 (152, 157, 161) : 22 Sind L.R. 349 : 29 Cri L Jour 945 (FB), *Emperor v. Jianand*.

('25) AIR 1925 Sind 34 (35) : 25 Cri L Jour 428, *Emperor v. Mittoo*.
See also S. 307 Note 2.

3. ('39) AIR 1939 Sind 209 (211) : I.L.R. (1940) Kar 249 : 41 Cr. L. J. 28, *Shewaram Jethanand v. Emperor*.

('25) AIR 1925 Sind 249 (250 to 252) : 19 Sind L.R. 309 : 26 Cri L Jour 562 (FB), *Khudabux v. Emperor*.

4. See Government of Sind Notification No. 1499-H./39 of 27.3.1940.

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Notes 1-3

the issue.¹ The system of trial by jury in England is based on the common law and on the constitutional principle that every person is entitled to demand that he be not restrained of his liberty except *per legale iudicium parium suorum vel per legem terræ*, so that trial by jury is the rule except in particular cases. In this country, there is no such inalienable right to be tried by jury.² It is only a creation of statute³ and is simply a mode of trial prescribed by the legislature in certain cases.⁴ The verdict of the jury in India has, therefore, not got the same sacrosanct character as it has in England, and repugnancy in the verdict is not in itself sufficient to justify the quashing of a conviction based on such verdict.⁵

2. Criminal cases transferred to the High Court under this Code.—Where a criminal case is transferred to the High Court, and there is no order under the section that it should be tried by jury, the trial will be by assessors if that is the mode of trial prescribed in the Court from which the case is transferred.

See sections 449 and 526. ^e

3. Transfer under Letters Patent.—See Clause 29 of the Letters Patent (Madras, Bombay and Calcutta) and the corresponding clause of the Letters Patent for the other High Courts.

Section 268

Trials before Court of Session to be by jury, or with assessors.

268.* All trials before a Court of Session shall be either by jury, or with the aid of assessors.

Synopsis

1. Scope of the section.
2. "With the aid of assessors."
3. Position of the jury and of the assessors.
4. Recording evidence in the absence of jurors or assessors.

Other Topics (miscellaneous)

Effect of trial of jury case with assessors and <i>vice versa</i> . See Note 1 and S. 269 Note 3.	Sessions Court — Trial when by jury and when with aid of assessors. See Note 1.
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1. Scope of the section.—The ordinary rule is that a trial before a Court of Session, is to be with the aid of assessors. A trial by jury is an exception and is provided for by S. 269. In the absence of a notification under S. 269, trials before Sessions Courts *must* be with the aid of assessors.¹

* 1882 : S. 268 ; 1872 : S. 232 ; 1861 : S. 324.

Section 267 — Note 1

1. Whartons Law Lexicon.
2. ('69) 11 Suth W R Cr 29 (29, 30) (FB), *In re Gorachand Ghose*.
3. ('95) 19 Bom 749 (762), *Queen-Empress v. Ramachandra Govind*.
4. ('69) 11 Suth W R Cr 29 (30) (FB), *In re Gorachand Ghose*.
5. ('14) AIR 1914 Cal 886 (887) : 41 Cal 754 : 15 Cri L Jour 402, *Manindra Chandra v. Emperor*. See also S. 308 Note 1.

Section 268 — Note 1

1. ('36) AIR 1936 Cal 527 (528) : 38 Cr.L.J. 212:ILR (1937)1 Cal 306, *Jogneswar Ghosh v. Emperor*.

As to the effect of a jury trying a case triable with the aid of assessors and *vice versa*, see S. 536 and Note 3 to S. 267.

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See also the undermentioned case.²

2. "With the aid of assessors." — In cases triable with the aid of assessors it is mandatory that the trial should commence with the requisite number of competent assessors under S. 284, but where in the course of the trial some of them are unable to attend, the trial may proceed with the aid of the other assessors: see S. 285.

The jurisdiction of the Sessions Judge to commence his trial and his jurisdiction to continue the trial are dependent upon his choosing the requisite number of competent assessors to aid him and on the continuation of at least one of them throughout the trial. Any finding or sentence passed by a Sessions Judge in contravention of these requisites will not be one passed by a Court of competent jurisdiction.¹ The defect is not one which can be cured by S. 537.²

The scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury.³

('88) 1888 Pun Re No. 18 Cr, p. 32 (33), *J. Skilling v. Empress*.

('96) 1896 Pun Re No. 11 Cr, p. 29 (32), *Mullineaux v. Empress*.

2. ('37) AIR 1937 PC 119 (120): 38 Cr.L.J. 498: 64 I.A. 148: ILR (1937) Bom 711 (PC), *Fakira v. Emperor*. (This section as applicable to the cantonment of Secunderabad has been modified by Notification No. 260-1, dated 24th April 1929, in exercise of powers conferred by the Indian (Foreign Jurisdiction) Order in Council and gives a Sessions Judge the discretion of dispensing with jury or assessors — An Additional Sessions Judge can also exercise such discretion.)

Note 2

1. ('01) 24 Mad 523 (535): 2 Weir 340: 11 M L J 241, *King-Emperor v. Thirumalai Reddi*.

('99) 21 All 106 (107): 1898 A W N 229 (FB), *Queen-Empress v. Babu Lal*. (Out of three assessors one was discovered to be deaf before the trial commenced—Out of the remaining two, one was found to be so deaf as to be incapable of understanding the case when it was closed by the Public Prosecutor —Held that the trial was void.)

('94) 1894 All W N 207 (207), *Queen-Empress v. Badri*. (Trial begun with only one competent assessor.)

('69) Weir 3rd Edn. 927. (Do.)

('91) 15 Bom 514 (515), *Queen-Empress v. Bastiano*. (Do.)

('01) 25 Bom 694 (696): 3 Bom L R 274, *King-Emperor v. Jayram*. (Do.)

('12) 13 Cr. L. J. 473 (473, 474): 15 I. C. 313 (Mad), *Sessions Judge of Tanjore v. Thiyagaraja Thevan*. (Do.)

('02) 6 Cal W N 715 (716), *King-Emperor v. Messeruddin Shikdar*.

('91) 13 All 337 (338, 339): 1891 A W N 93, *Queen-Empress v. Md. Mahmud Khan*. (Continuous attendance of at least one assessor essential.)

('10) 11 Cri L Jour 724 (725): 8 Ind Cas 874: 13 Oudh Cas 337, *Khub Singh v. Emperor*. (Only one competent assessor.)

('24) AIR 1924 Nag 287 (287): 20 Nag L R 129: 25 Cr. L. J. 459, *Jairam Kunbi v. Emperor*. (Trial begun with less than the number of assessors required by law.) See also S. 285 Note 2.

2. ('01) 25 Bom 694 (696): 3 Bom L R 274, *King-Emperor v. Jayram*. (15 Bom 514 and 21 All 106, followed.)

('24) AIR 1924 Nag 287 (287): 20 Nag L R 129: 25 Cr. L. J. 459, *Jairam Kunbi v. Emperor*.

('01) 24 Mad 523 (535): 2 Weir 340: 11 M L J 241, *King-Emperor v. Thirumalai Reddi*.

('10) 11 Cr. L. J. 724 (725): 13 Oudh Cas 337: 8 I. C. 874, *Khub Singh v. Emperor*.

3. ('31) AIR 1931 Bom 313 (318): 55 Bom 576: 32 Cr.L.J. 1147 (SB), *Lakshman Ohavji v. Emperor*.

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otes 3-4

3. Position of the jury and of the assessors.—The jury form a tribunal or body with a foreman and their verdict is the verdict of the body, or where there is no unanimity, of the majority (S.301). In cases tried by jury, the jury is the real tribunal but is aided by the Judge and in certain matters directed by the Judge.¹ They are invested with a special status and given special powers and the ultimate responsibility for all decisions within their sphere is meant to be theirs and theirs alone.²

The assessors, on the other hand, do not form a body, but each acts and expresses his opinion *individually*. They are only to assist the Judge and take no part in the judgment. The Judge is the sole judge of law and fact and the responsibility for the decision rests only with him.³ Thus an assessor does not form an essential part of the Sessions Court.⁴

As a juror stands on a higher footing, speaks with greater authority and takes a larger share in the decision of a criminal case than does an assessor, it may be taken as axiomatic that in the absence of a specific prohibition, an objection that could not be upheld regarding a juror would be ruled out in the case of an assessor.⁵

In trials by jury the judge is bound to sum up the whole case to the jury and record their verdict (S. 297), while in trials with the aid of assessors, the judge *may* sum up the case and should record their opinion (S. 309).⁶

An appeal in a case tried by jury will lie on a matter of *law* only while, an appeal in a case tried with the aid of assessors will lie on a matter of fact as well as on a matter of law (S. 418).

4. Recording evidence in the absence of jurors or assessors.
— A Court of Session is authorized to record evidence in the absence of the jury or assessors only when *additional evidence* is called for by the appellate Court under S.428, sub-s.(3) or by the High Court under S.375, sub-s.(2). Hence, a Court has no jurisdiction to record material evidence after the discharge of the assessors.¹ This view has been

Note 3

1. ('01) 24 Mad 523 (536, 538) : 2 Weir 340 : 11 M L J 241, *King-Emperor v. Thirumalai Reddi*.
2. ('40) AIR 1940 Nag 17 (19) : 41 Cri L Jour 289 : ILR (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (Per Niyogi and Bose JJ., in Order of Reference.)
3. ('40) AIR 1940 Nag 17 (19) : 41 Cri L Jour 289 : ILR (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (The Judge is not bound to conform to the opinion of the assessors.)
- (12) 13 Cri L Jour 677 (678) : 16 I. C. 325 (Bom), *Emperor v. Shankar Balwant*.
- (01) 24 Mad 523 (537, 538) : 2 Weir 340:11 M L J 241, *King-Emperor v. Thirumalai Reddi*.
- (71) 15 Suth W R Cr 25 (26) : 7 Beng L R 63, *Queen-Empress v. Amceruddin*.
4. ('39) AIR 1939 Lah 475 (477):ILR (1939) Lah 243:41 Cr. L. J. 55, *Emperor v. Pahl*.
- (01) 24 Mad 523 (538):2 Weir 340, *King-Emperor v. Thirumalai Reddy*. (Assessors do not form members of the Sessions Court.)
5. ('39) AIR 1939 Lah 475 (476, 477) : ILR (1939) Lah 243 : 41 Cri L Jour 55, *Emperor v. Pahl*. (Per Ram Lall, J., in Order of Reference.)
6. ('71) 15 Suth W R Cr 25 (26):7 Beng L R 63, *Queen-Empress v. Amceruddin*.

Note 4

1. ('93) 15 All 136 (136, 137) : 1893 A W N 50, *Queen-Empress v. Ram Lall*.

supported on the ground that the assessors form part of the Court.² But this does not seem to be correct in view of the fact that the *decision* in cases tried with the aid of assessors is solely that of the Judge and the assessors merely *assist* the Judge with their opinions. See Note 2 above.

See also section 285 Note 5.

Section 268.
Note 4

269.* (1) The *Provincial Government*^a may, by order in the Official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, revoke or alter such order.

(2) The *Provincial Government*,^a by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

a. Substituted by A. O. for "Local Government."

Synopsis

- | | |
|---|---|
| 1. Legislative changes. | 6. Special jury list — Sub-section (2). See S. 325. |
| 2. Scope of the section. | 7. Charge for offences, some triable by jury and others with assessors — Sub-section (3). |
| 3. "Trial of . . . shall be by jury in any district." | 8. "Same trial." |
| 4. Trial for substantive offence read with section 149 of the Penal Code. | 9. Judgment in cases tried under sub-section (3). |
| 5. "Or of any particular class of offences." | 10. "With the aid of the jurors as assessors." |

* 1882 : S. 269; 1872 : S. 233; 1861 : S. 322.

2. ('21) AIR 1921 All 284 (285); 43 All 125 : 22 Cr.L.J. 127, *Jaisukh v. Emperor*.
(93) 15 All 136 (136, 137) : 1893 A W N 50, *Queen-Empress v. Ram Lall*.
(06) 3 Cr. L. J. 42 (43); 7 Bom L R 979, *Emperor v. Ningappa Sayadappa*. (Jury case—Evidence recorded in absence of jury, accused or his pleader.)
(73) 5 N W P H C R 110 (111, 112), *Queen v. Cheit Ram*.
[See also ('93) 21 Cal 642 (664), *Queen-Empress v. Sagal Samba Sajao*.]

Section 269
Notes 1-2

Other Topics (miscellaneous)

- | | |
|---|--|
| <p>Appeal. See Note 8.
Code interfering with right of trial by jury <i>intra vires</i>. See Note 2.
Conviction for minor offence not charged. See Note 3.
Failure to object at proper stage—Effect of. See Note 3.
Independent and not joint opinion of assessors. See Note 7 ; See also S. 268 Note 3.</p> | <p>Notification as to certain persons in respect of offences triable by jury valid. See Note 5.
Offences triable by jury. See Note 2.
Offences triable with assessors. See Note 3.
Trial of jury case with assessors and <i>vice versa</i>. See Note 3; See also S. 536.</p> |
|---|--|

1. Legislative changes. — There is no material difference between S.322 of the Code of 1861 and S.233 of the Code of 1872.

Difference between the Codes of 1872 and 1882 —

A new paragraph was added in S.269 of the Code of 1882 to the effect that where the accused was charged with several offences some of which were and some were not triable by jury, he should be tried by jury for *all such offences*.¹

Difference between the Codes of 1882 and 1898 —

- (1) Sub-section (2) of the present section is new.
- (2) The words "he shall be tried jury" in sub-s.(3) have been substituted for the words "he shall be tried by jury for all such offences" which occurred in the old Code.

Changes made in the Code of 1898 —

- (1) The words "with the previous sanction of the Governor-General in Council" occurring after the words "Local Government may" were repealed by the Devolution Act, XXXVIII of 1920.
- (2) The words "with the like sanction" occurring between the words "may" and "revoke" in sub-s.(1) were repealed by the Repealing and Amending Act, X of 1927.

2. Scope of the section.—This section empowers the Provincial Government to direct by order in the Official Gazette that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury. As has been seen in the Notes to S.267 there is no such inalienable right to be tried by jury as exists under the common law of England. This section, therefore, limiting the right of trial by jury to the cases notified by the Provincial Government under this section and impliedly negating such a right in other criminal cases is *intra vires* of the Indian Legislature and does not offend against S.22 of the Indian Council's Act, 1861.¹

The power of the Provincial Government under this section is not limited to merely adding a jury to the Court of Session. The plain wording of the section implies that the offences must be triable before the Court of Session and does not derogate from the power otherwise given to the Provincial Government to prescribe which offences should not come before the Court of Session. Thus, the section cannot be

Section 269 — Note 1

1. See ('86) 9 Mad 42 (43), *Queen-Empress v. Lekshmana*.

Note 2

1. ('10) 11 Cr. L. J. 453 (456) : 37 Cal 467 : 7 I. C. 359, *Barindra v. Emperor*.

interpreted in such a way as to invest the Provincial Government with the power to direct that all or any class of offences not punishable with death shall be tried by jury before the Sessions Court, and not by Magistrates invested with power under S. 30.²

See also the undermentioned case.³

3. "Trial of shall be by jury in any district."—Where any district in a division in which the Provincial Government has directed that the trial of certain offences shall be by jury, ceases to belong to such division, the right of trial by jury for such offences also ceases in that district.¹

The words "trial of in any district" mean that the trial shall be by jury in any district *when so ordered by a notification* and not that the trial shall be by jury of offences *committed* in any district. There is not only no prohibition against the trial being otherwise than by jury in a district not affected by a notification under this section,² but in view of S. 268, a trial in a Court of Session *must*, in the absence of a notification under this section, be with the aid of assessors.³ But a trial by jury in a case which is triable by the judge with the aid of assessors is not invalid merely on that ground. Nor is a trial with assessors in a case triable by jury invalid unless objection is taken for such trial before the Court records its finding. See section 536.

When a person is charged with an offence triable by the Judge with the aid of assessors and is tried accordingly but the assessors express the opinion that he is not guilty of the offence charged but guilty in respect of a minor offence with which he was not charged, a conviction on the opinion of the assessors for such minor offence is not invalid, even though such minor offence is triable by jury.⁴

Conversely, where an accused is charged with an offence triable by a jury and is accordingly tried by a jury, the latter has power under S. 238 to find the accused guilty of a minor offence not included in the

2. ('38) AIR 1938 Nag 56 (58); ILR (1938) Nag 248: 39 Cr. L. J. 660, *In re Prithvinath*.

3. ('39) AIR 1939 Cal 335 (336, 337) : I L R (1939) 1 Cal 511 : 40 Cr. L. J. 667, *Nural Amin v. Emperor*. (Notifications of Bengal Government under—Anomaly resulting from present Notifications pointed out.)

Note 3

1. ('67) 8 Suth W R Cr 39 (39), *Queen v. Khoodeeram*.

[See also ('67) 8 Suth W R Cr 53 (53), *Queen v. Bhagidhone Katchari*. (8 Suth W R Cr 39, followed—Trial with aid of assessors ordered.)]

2. ('17) AIR 1917 Sind 42 (43) : 18 Cr. L. J. 51 (51) : 10 Sind L R 154, *Emperor v. Jumo*. (Hence High Court can transfer sessions case from jury district to non-jury district under S. 526, Cr. P. C.)

3. ('36) AIR 1936 Cal 527 (528) : 38 Cr. L. J. 212 : ILR (1937) 1 Cal 306, *Jogueswar Ghose v. Emperor*.

('19) AIR 1919 Oudh 193 (194) : 22 Oudh Cas 130 : 20 Cr. L. J. 691, *Sripal Singh v. Emperor*. (Offence under S. 395, Penal Code, notified as triable by jury—Offence under S. 396 cannot be tried by jury though it includes offence under S. 395.)

See also S. 268 Note 1.

4. ('21) AIR 1921 Bom 59 (59, 60, 61) : 45 Bom 619 : 22 Cr. L. J. 51, *Changouda v. Emperor*. (Conviction in such cases is permissible by virtue of S. 238, Cr. P. C.)

Section 269
Notes 3-5

charge though such offence is not triable by a jury but is triable with the aid of assessors.⁵

Where an offence which is not triable by a jury is tried by a jury as a matter of fact, the trial does not become other than one by a jury for purposes of appeal and an appeal is competent under S. 418, only on a matter of law.⁶ In such a case, it is not also open to the Judge to treat the verdict of the jury as the opinion of the assessors.^{6a}

The powers of transfer conferred on the High Court under S. 526 are not in any way limited or controlled by this section. Hence, the trial of an offence which would in the ordinary course be by jury in a particular district, may be transferred to another district where it would be held with the aid of assessors only.⁷

4. Trial for substantive offence read with section 149 of the Penal Code. — Where the offence under S. 325 of the Penal Code was triable by jury, but all offences of rioting were excluded from jury trial and a person was charged under Ss. 325 and 149 by reason of his being a member of an unlawful assembly, it was held by the High Court of Allahabad that the essential part of the offence was rioting and not the offence under S. 325 and that, therefore, the offence charged should be tried by the Judge with the aid of assessors.¹ On the other hand, the High Court of Patna has held that, in all cases in which an accused is charged with an offence triable by jury read with S. 149 of the Penal Code, the Court must always *first* determine whether the particular offence has been committed by an individual and *next* whether S. 149 makes the accused responsible as a participator, and that, therefore, if the particular offence is triable by jury, such offence read with S. 149 must also be triable by jury.² It is submitted that the latter view is correct.

5. "Or of any particular class of offences." — The words "class of offences" are not restricted to any classification recognized by the Legislature such as is found in the Penal Code (*e. g.*, offences against the State or against the person), or in the Criminal Procedure Code (*e. g.*, bailable offences, cognizable offences). It may include a classification according to the *persons* who commit the offences, or in regard to the

5. ('26) AIR 1926 Bom 134 (135) : 27 Cri L Jour 650, *Emperor v. Gulab Chand*. See also S. 238 Note 1.

6. ('31) 1931 Mad W N 129 (129, 130), *Manikala Ramanna v. Emperor*. ('03) 26 Mad 243n (247n, 248n) : 6 M L J 14, *Muthusami Pillai v. Queen-Empress*. (Per Bhashyam Iyengar, J. — Benson, J., *contra*—In such a case decision must be deemed to be by Judge with the aid of assessors and appeal lies on facts also.) See also S. 418 Note 2.

6a. ('79) 4 Cal L R 405 (409, 410), *In re Bhootnath Dey*. (For, opinion of assessors must contain the grounds on which the opinion is based.)

('98) 25 Cal 555 (557), *Surja Kurmi v. Queen-Empress*. (The only course open to Judge in such a case is to pass a judgment in accordance with the verdict of jury or to refer the case to High Court if he disagrees with the verdict.)

See also S. 306 Note 3, S. 307 Note 15 and S. 309 Note 13.

7. ('35) AIR 1935 Sind 145(180) : 28 S L R 397 : 36 Cr. L. J. 1161, *Emperor v. Hari*. See also S. 526 Note 2.

Note 4

1. ('33) AIR 1933 All 128 (129) : 34 Cr. L. J. 441 : 55 All 68, *Dakhani v. Emperor*.

2. ('26) AIR 1926 Pat 253(254) : 5 Pat 238 : 27 Cr. L. J. 512, *Ramsundar v. Emperor*.

particular occasion in connection with which they were committed. Therefore, a notification withdrawing an order for trial by jury previously notified in respect of certain offenders whose case is pending before a Court is not incompetent.¹

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Notes 5-7

6. Special jury list — Sub-section (2). — See Section 325.

7. Charge for offences, some triable by jury and others with assessors — Sub-section (3). — There was no provision corresponding to this sub-section in the Codes of 1861 and 1872, but as a matter of practice, a procedure similar to that contemplated by this sub-section was followed, where at the same trial an accused was charged with offences some of which were triable by jury and others by the Judge with the aid of assessors.¹ In the Code of 1882 it was, however, enacted that, in such cases the accused should be tried for *all* the offences only by *jury*. The present sub-s.(3) directs that the jury should themselves act as assessors in respect of the offences triable with the aid of assessors² and has thus given effect to the view that had been held before the Code of 1882. But the system has often been found fault with as leading to unsatisfactory and anomalous results.³

A joint trial for different offences, some of which are and others are not triable by jury, is not illegal.⁴ In fact, the procedure, at the trial, for both classes of offences (i. e., those triable by jury and those with assessors) is the same, up to the point of summing up.⁵ Where the charge to the jury is combined with the summing up to the jurors as assessors, the Judge should clearly explain to the jurors the double capacity of jurors and assessors in which they are acting.⁶ The Judge should take the verdict of the jury in respect of the offences triable by jury and the opinion of the jurors as *assessors* in respect of the other offences charged. He should not take the verdict of the jury as jurors

Note 5

1. (1900) 23 Mad 632 (635) : 2 Weir 331, *Queen-Empress v. Ganapati Vannianar*. (The fact of offences having been committed by old offenders or members of criminal tribes, or having been committed against women or against public property, would afford reasonable ground for classification.)

Note 7

1. (1865) 5 Suth W R Cr Letters 7 (7), *In re Smith*.
2. ('28) AIR 1928 Mad 275 (276) : 29 Cri L Jour 351, *Arunuga Kone v. Emperor*.
3. ('37) AIR 1937 Pat 662 (664) : 39 Cri L Jour 156, *Emperor v. Haria Dhobi*.
4. ('36) 40 Cal W N 1374 (1376), *Cheru Sheikh v. Emperor*. (Charge of same person for different charges on same facts — Same set of persons acting as jury in respect of some and as assessors in respect of others—Verdict of not guilty in all—Acquittal by Judge in former and conviction in latter in disregard of opinion of assessors — The combined system or practice of trial of having the same set of men acting as a jury at one moment in respect of certain charges and assessors at another moment in respect of certain other charges, though legal under the Criminal Procedure Code is a most undesirable one.)
5. [See ('37) AIR 1937 Nag 50 (51) : 38 Cri L Jour 330, *Sakhawat v. Emperor*. (The cumbrous device of a mixed trial with the help of jurors and assessors is apt to lead to unsatisfactory and illogical results.)]
6. ('15) AIR 1915 Mad 1036 (1037) : 16 Cri L Jour 717 (718), *In re Sennimalai Goundan*. (As a matter of fact such a trial is justified by S. 269 (3), Cr. P. C.)
5. ('09) 10 Cr.L.J. 30 (31) : 33 Bom 423 : 2 I. C. 480, *Nav Singh Bechar v. Emperor*.
6. ('02) 2 Weir 334 (334), *In re Siraga*.

Section 269
Note 7

in respect of the latter offences.⁷ In *Mavsing Bechar v. Emperor*,⁸ Chandavarkar, J., observed as follows :

"The law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain."

Where a verdict is given by the jury in respect of the offences triable by jury and an opinion is given by them as assessors in respect of the other offences, the Judge should in respect of the verdict follow the procedure laid down in Ss. 306 and 307, and in respect of the opinions, the procedure laid down in S. 309.⁹ Where the jury gave a verdict of not guilty in respect of the offences triable by jury and expressed a similar opinion as assessors in respect of the other offences charged, whereupon the Judge disagreeing with the opinion of the assessors convicted the accused in respect of the latter charges, and in the interests of justice made also a reference under S. 307 in respect of the verdict, it was held that the procedure followed by the Judge was correct and that he was not bound to wait before convicting on the latter charges, till the reference to the High Court was answered.¹⁰ Where the conviction for the offences triable by jury is set aside owing to certain defect in the verdict, it does not follow as a necessary consequence that the conviction for the other offences for which the accused

7. ('08) 7 Cri L Jour 236 (238) : 9 Bom L R 1057, *Emperor v. Vyankat Singh*.

8. ('09) 10 Cri L Jour 30 (31) : 33 Bom 423 : 2 Ind Cas 480.

[See also ('26) AIR 1926 Bom 134 (135) : 27 Cri L Jour 650, *Emperor v. Gulabchand Dosji*.]

See also S. 536 Note 1.

9. ('36) AIR 1936 Cal 527 (528) : 38 Cri L Jour 212 : 1 L R (1937) 1 Cal 306, *Jogneswar Ghose v. Emperor*. (Judge, while accepting verdict of jury can at the same time disregard their opinions as assessors and take a contrary view if proper reasons are given.)

('32) AIR 1932 Bom 61 (62) : 33 Cri L Jour 172, *Emperor v. Chanbasappa*.

('35) AIR 1935 Bom 165 (166) : 37 Cri L Jour 26, *Mhasku Malu v. Emperor*. (Judge may accept verdict of jury and at the same time disregard their opinions as assessors.)

('34) AIR 1934 All 61 (67) : 35 Cri L Jour 1349, *Ram Das v. Emperor*. (So far as the case relating to the charge triable by Judge with the aid of assessors is concerned he is the sole judge of facts and the opinion of the jury does not count.)

('98) 8 Bom L R 599 (600), *Emperor v. Kalidas Bhudar*. (Reference to High Court with regard to offence not triable by jury is illegal.)

[See also ('90) 13 Mad 426 (428) : 1 Weir 290, *Queen-Empress v. Sami*. (In an appeal against the decision of the Judge with regard to the offence tried with the aid of assessors, the High Court dismissed from their minds the verdict of the jury with reference to the offence tried by the jury.)]

[See however ('36) 40 C W N 1374 (1376), *Cheru Sheikh v. Emperor*. (Where the jury acquits the accused of one set of charges and the verdict is accepted, and acting as assessors they hold in favour of the accused in respect of the other charges, the Judge acts in an unfair manner in rejecting the opinions of the assessors and convicting the accused on the second set of charges, where having regard to the nature of the charges, the Judge thereby practically sets aside the verdict of the jury on the first set of charges.)]

10. ('32) AIR 1932 Bom 61 (62) : 33 Cri L Jour 172, *Emperor v. Chanbasappa*. See also S. 307 Note 15.

has been tried with the aid of jurors as assessors must also be set aside.¹¹

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Notes 7-8

Where an accused is charged with a number of offences some of which are triable by a jury and some by the Judge with the aid of assessors, but the Judge fails to follow the procedure laid down in sub-s.(3) and all the offences are tried by the jury, the irregularity in the procedure does not make the trial illegal or other than a trial by jury.¹² Conversely, where an accused is charged with a number of offences which are all triable by jury but the Judge thinking that some of the offences are triable with the aid of assessors, follows the procedure laid down in this sub-section and no objection is taken to such a procedure, the legality of the trial is saved by S. 536 (2).¹³

The sub-section only applies to cases where a person is charged with offences triable by a jury as well as those triable with the aid of assessors. It does not apply to a case where the accused is only charged with an offence triable by a jury but subsequently it is found on the evidence that he has committed a different offence which is triable with the aid of assessors.¹⁴ Nor does it apply to a case where none of the accused persons is charged with more than one offence. Thus, where one of the accused is charged with murder, an offence triable by jury, and the other is charged with conspiracy to murder, an offence triable with the aid of assessors, the section does not apply and a joint trial of the two accused is bad.¹⁵

The provisions of this sub-section may be followed where the accused is charged with an offence triable by a jury and in the alternative with an offence triable with the aid of assessors.¹⁶

But the sub-section does not apply merely because an offence triable by a jury is *included* in an offence triable with the aid of assessors or *vice versa*, where only one of the offences is actually charged.¹⁷

8. "Same trial." — Where, in the same trial a person is tried by a jury and there is also another charge tried by the Judge with the jurors as assessors, there is a right of appeal from the conviction on the latter charge under S. 410 of the Code. The words "same trial" in

11. ('36) AIR 1936 Oudh 164 (165, 166): 37 Cr. L. J. 182: 11 Luck 687, *Satdeo v. Emperor*.

12. ('99) 23 Bom 696 (697): 1 Bom L R 114, *Queen-Empress v. Jayram Haribhai*. (Case can be submitted to High Court under S. 307.)

('01) 25 Bom 680 (688, 689): 3 Bom L R 278 (FB), *King-Emperor v. Parbhushankar*. (Offence triable with aid of assessors tried by jury — No appeal lies on a matter of fact — S. 418, Cr. P. C.)

13. ('37) AIR 1937 Nag 50 (51): 38 Cri L Jour 330, *Sakhawat v. Emperor*.

14. ('26) AIR 1926 Bom 134 (135): 27 Cr. L. J. 650, *Emperor v. Gulab Chand Dosoji*.

15. ('38) AIR 1938 Cal 364 (365): 39 Cri L Jour 625, *Ram Gobinda v. Emperor*.

16. See ('98) 22 Mad 15 (18): 2 Weir 705, *Queen-Empress v. Anga Valayan*.

17. ('19) AIR 1919 Oudh 193 (194): 22 Oudh Cas 130: 20 Cri L Jour 691, *Sripal Singh v. Emperor*. (In this case offence under S. 396, Penal Code, was tried by jury though triable with aid of assessors, on the ground that S. 396, Penal Code, included offence under S. 395, Penal Code, which was triable by jury.)

[See also ('37) AIR 1937 Pat 662 (664): 39 Cri L Jour 156, *Emperor v. Haria Dhobi*. (Offence under Ss. 392 and 325, Penal Code — Entire offence triable by jury.)]

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Notes 8-10

sub-s.(3) must be read in a distributive sense and cannot be read as taking away the right of appeal.¹

9. Judgment in cases tried under sub-section (3). — Where the procedure laid down in sub-s.(3) of the section was followed and the Judge stated both cases for the benefit of the jury and his summing up covered both the charges, it was held that the failure to write a separate judgment in respect of the charges triable with the aid of assessors did not vitiate the trial.¹

10. "With the aid of the jurors as assessors." — A person charged with distinct offences some of which are triable by jury and others by the Judge with assessors, is entitled under sub-s.(3) to be tried for the latter offences, by the Judge with *all* the jurors as assessors. A trial with *some* of the jurors alone as assessors would be illegal.¹

Section 270

Trial before Court
of Session to be
conducted by Public
Prosecutor.

270.* In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

1. Legislative changes (omitted)

2. Scope of the section. — The Public Prosecutor appointed under S. 492 represents the Crown in all trials before the Court of Session¹ and it is only such Public Prosecutor that is entitled to conduct prosecutions in a Court of Session. A counsel instructed by a *private* person cannot do so without being specially empowered by the Magistrate of the District.² In fact a private prosecutor has no position at all in litigation.³ But a private complainant may under the provisions of S. 493 instruct a counsel to appear in the case who can watch the case and act under the directions of the Public Prosecutor.

3. "Shall be conducted." — Notwithstanding the use of the word "shall" in the section, it has been held that the section is only

* 1882 : S. 270; 1872 : S. 235; 1861 : S. 360.

Note 8

1. ('18) AIR 1918 Mad 821 (823,824):18 Cr.L.J.346, *Karuppa Goundan v. Emperor*.

Note 9

1. ('30) AIR 1930 Oudh 57 (57, 58) : 4 Luck 721 : 31 Cri L Jour 599, *Bisheshwar v. Emperor*.

('28) AIR 1928 Mad 275 (275) : 29 Cri L Jour 351, *Arumuga Kone v. Emperor*.

Note 10

1. ('03) 26 Mad 598 (599) : 2 Weir 333, *Ramkrishna Reddi v. Emperor*. (Failure to take the opinion of all is not an "omission" or irregularity within the meaning of S. 537 which can be cured.)

('11) 12 Cr. L. J. 239 (240) : 10 I. C. 281 (Mad), *Panjari Pakeerappa v. Emperor*.

('27) AIR 1927 Pat 13 (16) : 6 Pat 208 : 27 Cr. L. J. 1100, *Abdul Hamid v. Emperor*.

Section 270 — Note 2

1. ('93) 16 All 84 (86) : 1894 All W N 7 (FB), *Queen-Empress v. Durga*.

2. ('76) Oudh Sel Cas No. 31, p. 30, *Crown v. Chaitan Lal*.

3. ('24) AIR 1924 Pat 283 (284) : 2 Pat 708 : 25 Cr. L. J. 446, *Gulli Bhagat v. Narain Singh*. (Crown is the prosecutor and the custodian of the public peace and if it decides to let an offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance.)

directory and not mandatory, and the absence of a Public Prosecutor at the beginning of the trial by reason of the omission of the Government or of the District Magistrate to appoint a Public Prosecutor is only an irregularity curable by S. 537 of the Code.¹

Section 270
Note 3.

B. — Commencement of Proceedings.

271.* (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Section 271

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

Synopsis

- | | |
|--|---|
| 1. Scope of the section. | 8. Partial plea of guilty. |
| 2. "Commencement of proceedings." | 9. "Claims to be tried." |
| 3. "The accused shall appear or be brought." | 10. Plea must be by the accused himself. |
| 4. "And the charge shall be read out in Court and explained to him." | 11. Record of the plea. |
| 5. "He shall be asked whether he is guilty." | 12. Plea of guilty — When may be accepted. |
| 6. Alternative charges. | 13. "Thereon" in sub-section (2). |
| 7. "If the accused pleads guilty." | 14. Procedure where plea of guilty is not accepted. |
| | 15. Plea of guilty by a co-accused. |
| | 16. Appeal. |

Other Topics (miscellaneous)

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|---|--|
| Conviction—Discretionary. See Note 12. | Plea to be considered as a whole. See Note 7. |
| Conviction on the plea. See Note 13. | Pleas — Held to be sufficient or otherwise. See Note 7. |
| Effect of not reading the charge. See Note 4. | Postponement of convictions. See Note 15. |
| Plea by the pleader. See Note 10. | Record should show the explaining of the charge. See Note 4. |
| Plea of "not guilty." See Note 9. | |
| Plea of not guilty—Conviction on a confession before Magistrate. See Note 13. | |

1. Scope of the section. — This section and the next contain all that is necessary as to pleading and there is no need to supplement their contents by a reference to any other system of jurisprudence. Under this section the accused can plead guilty or claim to be tried or he can refuse to plead which is taken to be the same as claiming to be tried.¹

* 1882 : S. 271; 1872 : S. 237; 1861 : S. 362.

Note 3

1. ('87) 1887 Pun Re No. 35 Cr, p. 77 (78, 79), *Ismail v. Empress*.

Section 271 — Note 1

1. ('14) AIR 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cr. L. J. 460, *Emperor v. Nirmal Kanta Roy*. See also Note 9 and S. 272 Note 2.

Section 271
Notes 2-4

2. "Commencement of proceedings." — As to when the trial before a High Court or Court of Session begins, see S. 4 (1) (k), Note 4 and the undermentioned case.¹

3. "The accused shall appear or be brought." — As a general rule a person should be relieved of his chains when brought before a Court for trial or as a witness. There can be no question that the display of fetters must have a prejudicial effect against him in the eyes of jurors or assessors. The exception to this rule should be when the superintendent or the keeper of the jail certifies that the use of the chain is necessary to guard against violence or an attempt to escape. But the Judge cannot refuse to try an accused brought in fetters though he can direct the removal of the same.¹

4. "And the charge shall be read out in Court and explained to him." — The actual charge sheet is an important document, and should be drawn up with care and caution so that the accused may have no doubt whatever as to the offences which he is called upon to answer. When a record is prepared for an appeal, it should be seen whether there is on the record a charge which has been read and explained to the accused and if it is absent the reason therefor should be ascertained.¹ A mere reading out of the charge is not enough; it should be *explained* to the accused² and the record should show that the charge has been read out and explained to the accused.³ Where a deaf and dumb person was convicted of an offence upon a trial without an attempt to communicate with him respecting the charge against

Note 2

1. ('38) AIR 1938 Sind 9 (11) : 39 Cr. L. J. 294, : 32 S L R 129, *Minho Mohan v. Emperor*. (Sind Frontier Regulation, III of 1892—Offence punishable with death or transportation for life—Trial only commences when case is proceeded with in Sessions Court.)

Note 3

1. ('69) 4 Mad H C R App lxix (lxix). See also S. 81 Note 4.

Note 4

1. ('20) AIR 1920 All 72 (72, 73) : 21 Cr. L. J. 410, *Jagdeo Prasad v. Emperor*. ('88) 1888 Rat 386 (386), *Empress v. Sarwel*.
[See also ('35) AIR 1935 Oudh 241 (243) : 36 Cri L Jour 477, *Munoo Lal v. Emperor*.]
2. ('01) 3 Bom L R 489 (496), *King-Emperor v. Trimbaka Dewji*. ('86) 9 Mad 61 (63) : 2 Weir 337, *Aiyaru v. Queen-Empress*. ('80) 5 Cal 826 (827), *Empress v. Vaimbilce*. ('Murder' has a special meaning under the Penal Code and it must be explained to the accused charged with it.) ('86) 1886 Rat 229 (236), *Queen-Empress v. Nepal*. ('06) 4 Cr. L. J. 346 (351, 352) : 30 Bom 611 : 8 Bom L R 740, *Emperor v. Kothia*. ('17) AIR 1917 Oudh 362 (366, 367) : 18 Cr. L. J. 742 : 20 Oudh Cas 136, *Kesho Singh v. Emperor*. ('23) AIR 1923 All 285 (286) : 25 Cr. L. J. 592, *Jodha Singh v. Emperor*. ('04) 1 Cr. L. J. 746 (748) : 6 Bom L R 578, *In re Sitaram Shivrambhat*. ('19) AIR 1919 U B 23 (23) : 3 U. B. R. 137 : 20 Cr. L. J. 540, *Nga Han v. Emperor*. ('84) 2 Weir 336 (336), *In re Gurrapu Marigadu*. ('86) 2 Weir 339 (339), *In re Singa*.
See also S. 255 Note 3.
3. ('81) 7 Cal 96 (97) : 8 C L R 471, *Empress v. Gopal Dhanuk*. ('93-1900) 1893-1900 Low Bur Rul 328 (328), *Nga Nge v. Queen-Empress*.
See also S. 255 Note 11.

him, the conviction was set aside.⁴ But where the accused is defended by a counsel and the charge is read out and the counsel does not object, the omission to explain is only an irregularity if it has not caused any prejudice to the accused, and is cured by S. 537.⁵

Before reading out the charge, the Judge should scrutinize the charge as to whether it requires any amendment before the accused is called on to plead thereto.⁶

5. "He shall be asked whether he is guilty."—The Court is bound to ask the accused whether he is guilty of the offence charged or claims to be tried. A conviction cannot be supported where the accused has not been asked whether he is guilty or claims to be tried.¹

An accused person should not, however, be encouraged to plead guilty in the hope of receiving a lenient punishment.²

If, *before* the commencement of the proceedings, the Judge considers that there is no evidence to warrant a commitment, he should refer the case to the High Court for getting the commitment quashed under S. 215.³

An objection as to jurisdiction of the Court to try the case should be taken before the plea is taken and the jury sworn.⁴

6. Alternative charges.—An accused should never be called on to plead in the alternative but only separately as to each of the heads of a charge.¹

7. "If the accused pleads guilty."—In order to see whether the accused has pleaded guilty or not, the *whole* and not merely a part of his statement should be considered.¹ There are no pleadings in a Criminal Court and an accused person cannot be judged in a criminal

4. ('70) 6 Mad H C R App vii (vii).

See also S. 341 Note 2.

5. ('84) 8 Bom 200 (212), *Queen-Empress v. Appa Subhana*.

('86) 1886 Rat 229 (236), *Queen-Empress v. Nepal*.

6. ('18) AIR 1918 Mad 821 (822) : 18 Cr. L. J. 346, *Karuppa Goundan v. Emperor*.

Note 5

1. ('05) 9 Cal W N lxxvi (lxxvi), *Shib Chandra v. Nanda Rani*.

2. ('16) AIR 1916 Upp Bur 1 (1) : 17 Cri L Jour 402 : 2 Upp Bur Rul 113, *Nga Kyaw Zan Hla v. Emperor*.

3. ('01) 5 Cal W N 411 (413), *Jogeshwar v. King-Emperor*.

4. ('71) 15 Suth W R Cr 71n (71n) : 1 Beng L R O Cr 15, *Queen v. Nabadwip Chandra*.

('68) 1 Beng L R O Cr 1 (7), *Queen v. Thompson*.

(1862-63) 1 Mad H C R 31 (36) : 1 Weir 471, *Queen v. Willans*.

Note 6

1. ('87) 1887 Rat 327 (327), *Queen-Empress v. Lakshman*.

Note 7

1. ('18) AIR 1918 All 353 (354) : 40 All 119 : 19 Cr. L. J. 174, *Ashbey Clarke Haris v. Emperor*.

('66) 5 Suth W R Cr 70 (70), *Queen v. Chokoo Khan*.

('67) 7 Suth W R Cr 39 (39), *Queen v. Greedhary Manjee*.

('94) 21 Cal 955 (976), *Wafadar Khan v. Queen-Empress*.

('85) 11 Cal 410 (412), *Netai Luskar v. Queen-Empress*.

('76) 25 Suth W R Cr 23 (24), *Queen v. Sonaoollah*.

('67) 8 Suth W R Cr 38 (38), *Queen v. Sheikh Boodhoo*.

('85) 9 Mad 61 (63) : 2 Weir 337, *Aiyavu v. Queen-Empress*.

('11) 12 Cri L Jour 142 (142) : 9 Ind Cas 790 (Mad), *Kamakka v. Emperor*.

('32) 33 Cr. L. J. 570 (571) : 138 Ind Cas 217 (218) (Lah), *Faqir Mohammad v. Emperor*.

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Note 7

case, by *how* he pleads or fails to plead in the proceeding.^{1a}

A plea of guilty on which the Court can act must be a plea of guilty of the offence charged *without any qualification*. The Judge should see whether or not the man understood what the charge was in order to ascertain what he meant by his plea of guilty.² Thus, where the accused instead of pleading guilty in the words of the section makes a rambling statement more or less admitting guilt, it would be much safer if the Judge records a plea of not guilty and proceeds to try the case in the ordinary way.³ A plea of guilty can only be made in response to a charge made by the Court, an informal admission as to the guilt does not amount to a formal plea of guilty and such an admission has not the same binding effect as a plea of guilty.^{3a} The plea of guilty must distinctly admit each and every fact necessary to constitute the offence. Thus, where the accused merely admits that he beat his wife and that she died but does not admit that he had any intention of causing such bodily injury as was likely to cause death, it is not a sufficient plea of guilty to the charge of murder.⁴ Similarly, where an accused, while admitting that he killed the deceased, states that he was not in his right mind at the time,⁵ or that he did it under grave and sudden provocation,⁶ or that he was put to instant fear of death by the co-accused,⁷ or that he did it while under epileptic fits,⁸ or in a struggle arising from the fact of the deceased having first attacked him,⁹ he cannot be said to have pleaded guilty to the charge of murder. Likewise, where an accused, while admitting having presented a false petition, states that he did so under the influence of certain persons mentioned,¹⁰ or unthinkingly without the intention to injure,¹¹ he cannot be said to have pleaded guilty to the

1a. ('24) AIR 1924 All 299 (300) : 46 All 64 : 25 Cr.L.J. 327, *Umed Singh v. Emperor*.

('11) 12 Cr.L.J. 585 (587) : 36 Mad 457 : 12 I. C. 961, *G. G. Jeremiah v. F. S. Vas.*

2. ('98) 1898 All W N 16 (16), *Queen-Empress v. Dhyan Singh*.

3. ('09) 7 Cri L Jour 295 (296) : 5 All L Jour 157, *Emperor v. Deoki*.

3a. ('36) AIR 1936 Cal 292 (293) : 37 Cr. L. J. 818, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Jiban Kumar De*. (An admission of guilt in proceedings under S. 110, Cr. P. C., or in proceedings of a more informal nature does not amount to a plea of guilty.)

4. ('84) 2 Weir 336 (336, 337), *In re Gurapu Marigadu*.

('06) 3 Cri L Jour 337 (338) : 8 Bom L R 240, *Emperor v. Chinia Bhika Koli*.

('76) 25 Suth W R Cr 23 (23), *Queen v. Sonaoollah*.

('70) 2 N W P H C R 479 (480), *Queen v. Hursookh*. (The accused was charged of murdering his brother.)

('90) 14 Bom 564 (566), *Queen-Empress v. Sakharan Ramji*.

[See also ('88) 1 C P L R Cr 25 (26), *Empress v. Mt. Adhika*. (Case of public nuisance—No proof of common injury — Acts admitted by the accused did not constitute any offence.)]

5. ('73) 5 N W P H C R 110 (111), *Queen v. Chit Ram*.

6. ('85) 11 Cal 410 (412), *Netai Luskar v. Queen-Empress*.

('91) 1891 Rat 532 (532, 533), *Queen v. Lakshman*.

(1864) 1 Suth W R Cr 17 (18), *Queen v. Gour Chunder*.

('67) 8 Suth W R Cr 38 (38, 39), *Queen v. Sheikh Boodhoo*.

('99-01) 1 Upp Bur Ral 76 (76), *Nga Shwe Kyi v. Queen-Empress*.

7. ('86) 9 Mad 61 (63) : 2 Weir 337, *Aiyavu v. Queen-Empress*.

8. ('94) 1894 Rat 693 (693), *Queen-Empress v. Mhatarya*.

9. ('80) 5 Cal 826 (828), *Empress v. Faimbilce*.

[See ('69) 11 Suth W R Cr 6 (6), *Queen v. Jaipal Koiree*. (Charge of grievous hurt.)]

10. ('86) 1886 All W N 66 (66), *Empress v. Sundar*.

11. ('81) 7 Cal 96 (97) : 8 Cal L Rep 471, *Empress v. Gopal Dhanuk*.

charge of intentionally giving a false complaint. Where the prisoner states that he is guilty but adds that he did not commit the offence with which he is charged, it does not amount to a plea of guilty.¹² A prisoner accused of dacoity admitted having accompanied the dacoits for a short distance but stated that he turned back immediately and had nothing to do with the dacoity, it was held that it did not amount to a plea of guilty to the charge of dacoity.¹³

Where a native Indian subject charged with the murder of another native Indian subject in a foreign territory admitted the causing of death but stated that he was not punishable for the act as the act was committed outside British India, it was held that the plea was really one of not guilty.¹⁴ After the accused has claimed to be tried, any confessional statement made by him at the end of the trial is not a plea of guilty on which the Judge can convict him without taking the verdict of the jury.¹⁵ The use of expressions like "Your honour will please pardon the fault; in future, no such thing will happen" is not itself an incriminating statement.¹⁶

A plea of guilty is not a *confession* such as is dealt with in the Evidence Act. The plea is a statement which if accepted by the Court, amounts to a waiver on the part of the accused, of trial, in which alone a confession might be utilised in evidence.¹⁷

See also Note 5 to S. 255.

8. Partial plea of guilty. — Where in a charge of intentionally giving false evidence in two alternate statements, the accused pleads guilty as to one, it does not by any means follow that a verdict of not guilty is to be recorded in the alternative matter of the charge. That ought to be tried in the ordinary way.¹ Where the prisoner pleads not guilty to the graver offence charged but guilty to the minor offence charged, the Court should proceed to try him for the graver offence. It is not competent to the Public Prosecutor to withdraw the charge after the accused had been arraigned and pleaded not guilty. The prisoner is entitled to a trial and a clear verdict of the jury.²

9. "Claims to be tried." — A plea of "*not guilty*" is not recognised by the Code. The accused can plead *guilty* under this section; he can *claim to be tried* or he can refuse to plead which amounts to the same thing as claiming to be tried. A plea of *not guilty* amounts

12. ('69) 11 Suth W R Cr 53 (53), *Queen v. Mittun Chowdhry*.

13. ('67) 7 Suth W R Cr 39 (39), *Queen v. Greedhary Manjee*.

14. ('88) 1883 Pun Re No. 22 Cr, p. 49 (50), *Fakir v. Emprcss*.
See also S. 272 Note 2.

15. ('66) 2 Weir 334 (335).

(('05) 2 Cri L Jour 609 (610) : 7 Bom L R 731, *Emperor v. Bai Nani*. (Opinion of assessors was not taken.)

16. ('12) 13 Cr. L. J. 62 (63) : 13 I. C. 398 (Cal), *Jang Bahadur Lal v. Emperor*.

17. ('34) AIR 1934 Pat 330 (334) : 35 Cr.L.J. 1322, *Shyama Charan v. Emperor*.

Note 8

1. ('66) 8 Suth W R Cr Letters 6 (6), *In re Thako Chokree*.

('72) 8 Beng L R App 25 (26), *Queen v. Hossain Ali*.

2. ('66) 5 Suth W R Cr Letters 4 (4), *In re Bissonath*.

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Note 9

to a claim to be tried.¹ Where an accused claims to be tried or makes a plea which amounts to such a plea, the Court should regularly try the accused and cannot convict him on a confession before the committing Magistrate.² In such cases there should be a formal trial by the jury or with the aid of assessors.³ If the accused, claiming to be tried, pleads that his act comes under any of the general exceptions in the Penal Code, he must plead them specifically. In the absence of such a plea, the absence of such circumstances will be presumed under S.105 of the Evidence Act.⁴ But this does not mean that the accused must lead the evidence. If it is apparent from the evidence on the record, whether produced by prosecution or by the defence, that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves satisfactorily that the accused comes within the exception.⁵ Thus, where a right of private defence is not pleaded, the Court on finding on the evidence before it that the accused acted in his right of private defence, is bound to take

Note 9

1. ('14) AIR 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cr. L. J. 460, *Emperor v. Nirmal*. ('31) AIR 1931 Cal 341 (343) : 58 Cal 1214 : 32 Cr. L. J. 667, *Mad. Yusuf v. Emperor*. See also Note 1 and S. 272 Note 2.
2. ('70) 2 N W P H C R 479 (480), *Queen v. Hursookh*. ('86) 1886 All W N 22 (23), *Empress v. Tika Ram*.
3. ('73) 5 N W P H C R 110 (112), *Queen v. Cheit Ram*. ('90) 14 Bom 564 (566), *Queen-Empress v. Sakharan*. ('88) 1888 Rat 410 (410, 411), *Queen-Empress v. Malhari*. ('04) 1 Cri L Jour 772 (773) : 6 Bom L R 671, *Emperor v. Mahmud Ismail*. ('05) 2 Cri L Jour 609 (610) : 7 Bom L R 731, *Emperor v. Bai Nani*. ('07) 6 Cri L Jour 424 (425) : 9 Bom L R 1346, *Emperor v. Somabhai Nathabhai*.
4. ('15) AIR 1915 Cal 773 (778) : 30 Ind Cas 113 (117) : 16 Cri L Jour 561 (FB), *Emperor v. Upendranath Das*. (Plea of grave and sudden provocation.) ('16) AIR 1916 Cal 633 (636) : 16 Cr. L. J. 724, *Emperor v. Dwijendra Chandra*. (Plea of accident taken by the accused.) ('22) AIR 1922 Lah 1 (20) : 3 Lah 144 : 23 Cr. L. J. 513, *Narain Das v. Emperor*. (Right of private defence of property set up.) ('04) 1 Cri L Jour 427 (427, 428) : 1904 A W N 113, *Emperor v. Gullu*. ('10) 11 Cri L Jour 374 (375, 377) : 32 All 451 : 6 I. C. 589, *Emperor v. Wajid*. (Case of subordinate officers acting under orders of their superior officers.) ('12) 13 Cri L Jour 905 (911) : 17 Ind Cas 1001 (1007) (Cal), *Jhakri Chamar v. Emperor*. (Case of right of private defence.) ('20) AIR 1920 Cal 39 (40) : 21 Cri L Jour 317, *Mantajali v. Emperor*. (Case of unsoundness of mind.) ('25) AIR 1925 Cal 1214 (1214), *Kali Das v. Deodhari Mistri*. (Case of an obstruction to way in good faith.) ('27) AIR 1927 Cal 324 (326) : 28 Cri L Jour 334, *Adam Ali v. Emperor*. ('98) 1898 All W N 210 (210), *Queen-Empress v. Sukha*. ('98) 1898 All W N 209 (210), *Queen v. Chakauri*. ('98) 21 All 122 (125, 126) : 1898 A W N 208, *Queen-Empress v. Timmal*. ('86) 1886 Rat 229 (230, 231), *Queen-Empress v. Nepal*. ('78) 1 Cal L R 62 (65), *In re Jamsheer Sirdar*. See also S. 342 Note 23.
5. ('23) AIR 1923 All 327 (328) : 45 All 329 : 24 Cri L Jour 225, *Mt. Anandi v. Emperor*. (Case under S. 84, Penal Code — Insanity — Previous and subsequent madness of accused should be considered as leading to inference of insanity.) ('11) 12 Cr. L. J. 18 (18) : 8 Ind Cas 1088 (Mad), *In re Garugu Ramayya*. (Case in which the accused exceeded his right of private defence — Sentence altered from one of death to rigorous imprisonment for seven years.) ('12) 13 Cri L Jour 905 (911) : 17 Ind Cas 1001 (Cal), *Jhakri Chamar v. Emperor*. (Case in which evidence disclosed that the accused had a right of private defence — Accused were acquitted.)

cognizance of the same.⁶

10. Plea must be by the accused himself. — The accused should plead by his *own mouth*¹ and not by his pleader² unless such pleader has been permitted by the Court to appear in the place of the accused.³ See also S. 255 Note 7.

As to admissions by pleader, see the undermentioned cases.⁴

11. Record of the plea. — If the accused pleads guilty, the Court should make a record of such plea.¹ It is not the duty of the Court, at the time of recording such plea, to decide whether any statement accompanying it is true or false. Any such statement must be regarded only as explanatory of the plea.² The whole of the statement made by a prisoner should be recorded as nearly as possible in the very words used by him, though it need not be recorded in a foreign language unknown to the Court or Magistrate, the use of which makes it necessary to have recourse to an interpreter. The language in which the statement is conveyed to the Court by the interpreter is the language in which it should be recorded.³ The plea of guilty should be taken

6. ('36) AIR 1936 Rang 1 (2) : 37 Cri L Jour 293, *Nga Ba Sein v. Emperor*.
 ('24) AIR 1924 All 645 (651) : 26 Cri L Jour 501, *Emperor v. Kishen Lal*.
 ('24) AIR 1924 All 694 (694) : 25 Cr. L. J. 472, *Umed Singh v. Emperor*. (Plea of justification should be considered in a defamation case even though not raised.)
 ('82) 11 Cal L R 232 (233, 234), *In the matter of Kali Charan Mookerjee*.
 ('97) 1 Cal W N 545 (547), *Pasupat Gope v. Ram Bhajan*.
 See also S. 290 Note 1.

Note 10

1. ('04) 1 Cri L Jour 939 (939) : 6 Bom L R 861, *Emperor v. Sursing*.
 ('71) 15 Suth W R Cr 42 (42) : 6 Beng L R App 148, *Queen v. Roopa Gowalla*.
2. ('04) 1 Cri L Jour 939 (939) : 6 Bom L R 861, *Emperor v. Sursing*.
 (1900) 2 Bom L R 751 (752), *Queen-Empress v. Sangaya*. (Plea of guilty by a pleader appointed by the Court to defend the accused on a charge of murder is not binding on the accused.)
3. ('26) AIR 1926 Bom 218 (222) : 50 Bom 250 : 27 Cri L Jour 440, *Dorabshah Bomanji v. Emperor*.
4. ('20) AIR 1920 All 99 (101) : 21 Cr.L.J. 777, *Sheo Narain v. Emperor*. (Such admissions should not be taken — Every fact must be proved in a murder case.)
 ('72) 17 Suth W R Cr 49 (49), *Queen v. Kazim Mundle*. (They cannot be used against the accused.)
 ('90) 1890 Pun Re No. 2 Cr, p. 3 (5), *Shib Ram v. Simla Municipal Committee*.
 See also S. 340 Note 9.

Note 11

1. ('07) 6 Cri L Jour 434 (436) : 12 C W N 140, *Deputy Legal Remembrancer v. Upendra Kumar Ghose*.
 ('08) 7 Cri L Jour 295 (296) : 1908 A W N 54 : 5 A L J 157, *Emperor v. Deoki*.
 ('08) 8 Cr. L. J. 380 (381) : 30 All 540 : 1908 A W N 241 : 5 A L J 305, *Emperor v. Kheoraj*.
 ('88) 1 C P L R Cr 25 (26), *Empress v. Mt. Adhika*.
 ('10) 11 Cri L Jour 193 (193) : 4 Ind Cas 1126 (Mad), *In re Sadayan*.
 (1900) 23 Mad 151 (154), *Queen-Empress v. Chinna Pavuchi*.
 ('31) AIR 1931 Cal 341(343) : 58 Cal 1214 : 32 Cr.L.J. 667, *Mahomed Yusuf v. Emperor*.
 ('81) 7 Cal 96 (97) : 8 C L R 471, *Empress v. Gopal Dhanuk*.
 ('26) AIR 1926 All 318 (320) : 27 Cri L Jour 449, *Shanker v. Emperor*.
 ('88) 1888 Rat 386 (386), *Queen-Empress v. Sarwel*.
 ('17) AIR 1917 Bom 220 (221) : 18 Cr.L.J. 699, *Laxmya Shiddappa v. Emperor*.
2. ('91) 1891 Rat 532 (532), *Queen-Empress v. Lakshman*.
3. ('80) 5 Cal 826 (829), *Empress v. Viambilee*.

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Notes 11-12

down in the form of question and answer and in the exact words used by the accused.⁴

It is also desirable that shorthand notes of proceedings of Sessions Courts should be maintained so as to ensure a full and accurate record of what happens in Court.⁵

12. Plea of guilty — When may be accepted. — A plea of guilty may be accepted by the Court and the accused may be convicted thereon without the matter going before the assessors or the jury.¹ But the Court is not *bound* to accept a plea of guilty in all cases. On the other hand, the Court must carefully consider whether the accused has fully understood the nature of the charge to which he pleads guilty.^{1a} In cases where the natural sequence of accepting the plea of guilty would be a sentence of death, it is not in accordance with the usual practice to accept a plea of guilty.^{1b} Murder is a mixed question of law and fact and unless the Court is satisfied that the accused knew exactly what was implied by his plea of guilty, the plea should not be accepted but the case should be tried; specially where the accused is an ignorant person.² An accused person does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged that disclose an offence under that section. Sometimes a "plea of guilty" is an admission only of the facts alleged and not the offence, as when such facts do not in law constitute the offence.³ So a plea of

4. ('03) 5 Bom L R 999 (1000), *Emperor v. Abdul Hoosain*.

5. ('24) AIR 1924 Cal 257 (288) : 25 Cr.L.J. 817 (FB), *Emperor v. Barendra Kumar*. See also S. 356 Note 11.

Note 12

1. ('67) 8 Suth W R Cr L 21 (21), *In re Nobind Mali*.
- ('67) 8 Suth W R Cr L 6 (6), *In re Thakochokree*.
- ('66) 6 Suth W R Cr L 4 (4), *In re Neamul*.
- ('66) 5 Suth W R Cr L 2 (2), *In re Kellai Jenah*.
- ('66) 6 Suth W R Cr L 3 (3), *In re Alfoo*.
- ('66) 2 Weir 335 (335).
- ('68) 10 Suth W R Cr 43 (43) : 2 Beng L R 23 (FB), *Queen v. Sree Kant*.
- ('05) 2 Cal L Jour 18n (18n), *Magha Sheikh v. Emperor*.
- ('34) AIR 1934 Pat 330 (334) : 35 Cri L Jour 1322, *Shyama Charan v. Emperor*.
- 1a. ('35) AIR 1935 Rang 49 (51) : 12 Rang 616 : 36 Cr.L.J. 336, *Nga Ywa v. Emperor*.
- 1b. (1900) 23 Mad 151 (154), *Queen-Empress v. Chinna Pavuchi*.
- ('28) AIR 1928 Cal 775 (776) : 30 Cri L Jour 508, *Hasaruddin Md. v. Emperor*.
- ('17) AIR 1917 Bom 220 (221) : 18 Cr.L.J. 699, *Laxmya Shiddappa v. Emperor*.
- ('06) 3 Cri L Jour 337 (338) : 8 Bom L R 240, *Emperor v. Chinia Bhika*.
- ('06) 3 Cri L Jour 80 (81) : 1905 Pun Re No. 54 Cr, *Pala Singh v. Emperor*.
- ('34) AIR 1934 Sind 204 (205) : 28 S. L. R. 327 : 36 Cr. L. J. 324, *Achar Sanghar v. Emperor*.
2. ('22) AIR 1922 All 233 (233) : 23 Cri L Jour 283, *Dalli v. Emperor*.
- ('22) AIR 1922 All 266 (267) : 24 Cri L Jour 609, *Mt. Sukhia v. Emperor*.
- ('97-1901) 1 Upp Bur Rul 78 (79), *Nga San Daik v. Queen-Empress*.
- ('05) 2 Cal L Jour 18n (18n), *Magha Sheikh v. Emperor*.
- ('96) 19 All 119 (120) : 1896 A W N 192, *Queen-Empress v. Bhadu*.
- ('25) AIR 1925 All 647 (647, 648) : 26 Cr. L. J. 1316, *Lahori v. Emperor*. (The accused was a man of considerable intelligence in this case.)
- ('25) AIR 1925 Sind 188 (189) : 17 S. L. R. 268 : 26 Cr.L.J. 177, *Emperor v. Kasim*.
- ('06) 3 Cri L Jour 317 (318) (Kathiawar), *Emperor v. Woman Behni*.
- ('66) 1866 Pun Re No. 47 Cr, p. 56, *Crown v. Zoolfoo*.
- ('68) 1868 Pun Re No. 3 Cr, p. 6, *Crown v. Chongutta*.
- ('06) 3 Cri L Jour 337 (338) : 8 Bom L R 240, *Emperor v. Chinia Bhika*.
3. ('15) AIR 1915 Cal 153 (153) : 15 Cri L Jour 703, *Gaya Roy v. Emperor*.
- ('26) AIR 1926 Lah 406 (406) : 7 Lah 359 : 27 Cr. L. J. 907, *Basant v. Emperor*.

guilty cannot be accepted when the offence in question has not been committed in the eye of law.⁴ A plea of guilty cannot be accepted when it is clear that the offence was not correctly stated to him.⁵ Each case depends, however, upon its own circumstances which should be examined to see whether the plea of guilty is one which should be acted upon;⁶ where the prisoner has the services of a pleader and a plea of guilty is made advisedly, the Court can certainly convict him on his plea.^{6a} But where an accused, who is charged for an offence under S. 302, Penal Code (for which there is a clear *prima facie* evidence), pleads guilty to an offence under S. 304, Penal Code, the Court cannot accept the plea of guilty but should proceed to try him for the offence charged.⁷ There is no provision for an inquiry for the purpose of seeing if it is right and proper to convict the accused on his plea; if any such enquiry is necessary it should take the form of a trial and be conducted as such.⁸

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Notes 12-18:

Though the section provides for a conviction being based on the accused's plea of guilty entered at the *commencement* of the proceedings, this does not mean that if at any later stage the accused pleads guilty the Court is not entitled to record the plea and convict the accused on such plea.⁹

13. "Thereon" in sub-section (2).—The word 'thereon' shows that the conviction is on the plea recorded before the Sessions Judge and has no reference to what has passed before the Magistrate in the preliminary enquiry. So, if the accused makes a plea which amounts to a claim to be tried before the Sessions Judge, he cannot be convicted on a confession made before the committing Magistrate.¹

Where an accused pleads guilty to the offence charged, he may either be convicted for the offence or, as has been seen in Note 12, the regular trial may be proceeded with. He must not be convicted of a different offence of which he did not plead guilty and for which he was not tried.² Thus, a person pleading guilty to a charge of murder cannot be convicted of culpable homicide not amounting to murder.³ Similarly,

('32) AIR 1932 Lah 363 (364) : 33 Cri L Jour 646, *Bahadur Singh v. Emperor*.
(19) AIR 1919 Bom 160 (160) : 43 Bom 842 : 20 Cr. L. J. 681, *Murarji Raghunath v. Emperor*.

('30) AIR 1930 Bom 176 (176) : 31 Cr. L. J. 926, *Emperor v. Mahadeo Govind*.

4. ('28) AIR 1928 Lah 827 (828) : 29 Cr. L. J. 645, *Mt. Darkan v. Emperor*.

('08) 8 Cri L Jour 421 (421) : 4 M L T 324, *In re Manikam Pillai*.

See also S. 243 Note 2.

5. ('93-1900) 1893-1900 Low Bur Rul 328 (328), *Nga Nge v. Queen-Empress*.

6. ('23) AIR 1923 Nag 251 (254) : 24 Cr. L. J. 570, *Manjoo v. Emperor*.

6a. ('86) 1886 Rat 229 (236), *Queen-Empress v. Nepal*.

7. ('88) 1888 Rat 410 (410, 411), *Queen-Empress v. Malhari*.

8. ('91) 1891 Rat 532 (533), *Queen-Empress v. Lakshman*.

9. ('34) AIR 1934 Pat 330 (334) : 35 Cri L Jour 1322, *Shyama Charan v. Emperor*.

. Note 13

1. ('70) 2 N W P H C R 479 (480), *Queen v. Hursoolh*. (This procedure seriously prejudiced the accused.)

('72-92) 1872-1892 Low Bur Rul 497 (497), *Nga Tha Maung v. Queen-Empress*. (Confession before a Myook.)

2. ('99) 2 Weir 335 (335, 336).

3. ('09) 10 Cri L Jour 5 (6) : 3 S L R 58 : 2 Ind Cas 372, *Emperor v. Watlu*.

('93) 2 Weir 335 (335, 336).

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Notes 13-14

a person pleading guilty to a charge of culpable homicide not amounting to murder cannot be convicted of causing grievous hurt.⁴ In order that there may be a conviction on a plea of guilty, the plea must be in respect of the *offence charged*. Thus, where an accused was charged of murder but the Court finding that there was no evidence under that charge, convicted her of an offence under section 318 of the Penal Code considered to have been admitted by the accused, the conviction is illegal.⁵

The fact that the accused, tired of a lengthy trial or impressed by the weight of the evidence against him, or partly the one and partly the other, decides to cut short proceedings in the hope that a lenient sentence would be passed on him, is not in itself a ground for departing from the ordinary tariff of punishment for the offence.⁶

14. Procedure where plea of guilty is not accepted. —

Section 272 provides that where an accused person *refuses to or does not plead or claims to be tried*, the Court shall proceed to try the case. There is no specific provision enabling the Court to try the case where the accused *pleads guilty* and the Court does not accept the same, though sub-s.(2) of this section provides that he *may* be convicted on such plea. In England where the Court does not think it expedient to act upon the accused's plea of guilty, the usual procedure is to advise him to withdraw his plea of guilty and to plead not guilty.¹ In this country, the general trend of opinion is that the accused may be treated in such cases as if he had pleaded not guilty, and that the trial may be proceeded with in the ordinary way.² The High Court of Calcutta has, however, in the undermentioned case,³ held that the discretion denoted by the word "may" is either to convict the accused, or in a suitable case, to leave the matter there and *discharge* him, but does not include the power to proceed with the trial against him. In this view it has further held therein that where a person has pleaded guilty, he ceases *ipso facto* to be an accused person. According to the Chief Court of Oudh, the *only course* open to the Court where a plea of guilty is not accepted by it is to proceed to trial.⁴

4. ('88) 1888 Rat 413 (413), *Queen-Empress v. Raghu*.

5. ('88) 1888 Rat 386 (386), *Queen-Empress v. Sarwel*.

6. ('34) AIR 1934 Pat 330 (335) : 35 Cri L Jour 1322, *Shyama Charan v. Emperor*.

Note 14

1. ('31) AIR 1931 Cal 341 (343) : 58 Cal 1214 : 32 Cri L Jour 667, *Mahommed Yusuf v. Emperor*.

[See also ('09) 10 Cr.L.J. 325 (340) : 3 Ind Cas 625 (Cal), *Khudiram Bose v. Emperor*.]

2. ('09) 10 Cr.L.J. 484 (485, 486) : 4 Ind Cas 57 (Cal), *Sukdev Tewari v. Emperor*.

('14) AIR 1914 All 558 (558) : 16 Cri L Jour 103, *Surjan Singh v. Emperor*.

(1900) 23 Mad 151 (153, 154), *Queen v. Chinia Pavuchi*. (22 Mad 491, distinguished.)

('26) AIR 1926 All 318 (320) : 27 Cri L Jour 449, *Shankar v. Emperor*.

('28) AIR 1928 Cal 775 (776) : 30 Cr.L.J. 508, *Hasaruddin Mahommed v. Emperor*.

(Such a plea should not be acted upon in a case where the natural sequence would be a sentence of death.)

('70) 13 Suth W R Cr 55 (56) : 4 Beng L R App 101, *Queen v. Gobadur Bhooyan*.

3. ('31) AIR 1931 Cal 341 (343) : 58 Cal 1214 : 32 Cri L Jour 667, *Mahommed Yusuf v. Emperor*.

4. ('17) AIR 1917 Oudh 362 (366) : 18 Cri L Jour 742 : 20 Oudh Cas 136, *Kesho Singh v. Emperor*.

As to the meaning of the word "conviction" in this sub-section, see the undermentioned case.⁵

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Notes 14-15

15. Plea of guilty by a co-accused. — Under S. 30 of the Evidence Act, when more persons than one are *being tried jointly* for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. So the question arises whether in cases where one of several accused jointly tried pleads guilty to the charge, he can be said to be jointly tried within the meaning of S. 30 of the Evidence Act, so as to render his admissions receivable in evidence against the other accused. In the undermentioned case,¹ the High Court of Calcutta has held that where a person pleads guilty, the only course open to the Court (*whether it accepts such plea or not*) is either to convict him or discharge him and that he can no longer be said to be an accused person jointly tried with others. This view, as has been seen in Note 14, in so far as it relates to cases where the plea is not accepted by the Court, is against the general trend of opinion. In cases where the plea of guilty is *accepted* by the Court, a conviction should follow and the accused will, of course, cease to be an accused person from that moment. Section 30 of the Evidence Act, will not therefore apply.² In cases where the plea of guilty is *not accepted* by the Court and the Court proceeds to trial against him, the accused does not cease to be so until the end of the trial and S. 30 will apply.³

Where one of the accused pleads guilty and the Court accepts it, it should not defer his conviction in order that his confession may be

5. (1900) 10 Mad L J 147 (158, 159) (F B), *Subramania Aiyar v. Queen-Empress*.

Note 15

1. ('31) AIR 1931 Cal 341 (343, 344) : 58 Cal 1214 : 32 Cri L Jour 667, *Mohammad Yusuf v. Emperor*.
2. ('99) 22 Mad 491 (493) : 2 Weir 746, *Queen-Empress v. Lakshmayya Pandaram*. ('95) 19 Bom 195 (197, 198), *Queen-Empress v. Pahuji*. ('95) 17 All 524 (526) : 1895 A W N 111, *Queen-Empress v. Pirbhui*. ('02) 25 Mad 61 (68) : 28 I A 257 : 11 M L J 233 : 3 Bom L R 540 : 5 C W N 866 : 8 Sar 160 (P C), *Subramaniya Iyer v. King-Emperor*. ('81) 1881 All W N 99 (100), *Empress v. Baiju*. ('74) 11 Bom H C R 146 (148), *Reg. v. Kalu Patil*. ('26) AIR 1926 All 318 (320) : 27 Cri L Jour 449, *Shankar v. Emperor*. ('88) 1888 Rat 400 (400), *Queen-Empress v. Chand*. (1900) 1900 Pun Re No. 11 Cr, p. 25 (27), *Piara Singh v. Empress*. ('84) 7 Mad 102 (103, 104) : 2 Weir 740, *Venkatasamy v. Queen*. ('01) 23 All 53 (54) : 1900 A W N 192, *Queen v. Pallua*. ('95) 2 Weir 493 (493), *In re Muppidi Krishna Moorthy*. ('11) 12 Cr. L. J. 479 (479) : 38 Cal 446 : 12 I C 87, *Emperor v. Keramat Sirdar*. ('11) 12 Cr. L. J. 605 (605, 606) : 12 I C 981 : 1911 Pun Re No. 15 Cr, *Kanhaya v. Emperor*. ('01) 3 Bom L R 437 (438), *King-Emperor v. Annaya*.
3. ('01) 3 Bom L R 437 (438), *King-Emperor v. Annaya*. ('09) 10 Cri L Jour 484 (486) : 4 Ind Cas 57 (Cal), *Sukdev Tewari v. Emperor*. ('15) AIR 1915 All 221 (224) : 37 All 247 : 16 Cri L Jour 327, *Emperor v. Dip Narain*. ('13) 14 Cri L Jour 566 (567) : 21 I C 166 : 1 Upp Bur Rul 170, *Emperor v. Nga Po Tha*. (1900) 23 Mad 151 (154), *Queen v. Chinia Pavuchi*.

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Notes 15-16

considered against his co-accused. Such a procedure is clearly against the spirit of the law.⁴ The accused should be convicted at once⁵ and should be removed from the dock in which case he can give evidence against his co-accused.⁶ It is always desirable to pass a sentence completely before calling one accused who pleads guilty in a joint trial to give evidence against a co-accused,⁷ so that the witness may give his evidence free of all corrupt influence which the fear of impending punishment and the desire to obtain immunity to himself at the expense of other prisoner might otherwise produce.⁸ But the admissibility of the evidence of such accused pleading guilty ought not to be decided on the narrow technical ground that he had not been convicted but on the broad ground that when he gave his evidence he was not in charge of jury and no issue remained to be tried between him and the Crown.⁹

Where, in a joint trial, A is charged with murder and B with being an accessory after the fact, the question whether the deceased, was murdered by A is an issue between B and the Crown, and hence, the counsel for B is entitled to insist on the proof of the murder and challenge the evidence of it even if A has pleaded guilty.¹⁰

See also Note 8 to section 255.

16. Appeal.—Where an accused pleads guilty and he is convicted thereon, he has no right of appeal except as to the extent or legality of the sentence. See section 412.

Where the Court has recorded that the accused pleaded guilty, the High Court cannot in a case in which the accused appeared by a pleader admit the affidavit of the accused for the purpose of showing that he did not plead guilty. If there has been any mistake in the matter it is the vakil and not the client, who ought to make an affidavit.¹

Where an accused person has been convicted on his own plea of guilty, he is not entitled on notice being issued to him under S. 439 sub-s.(2) of the Code for showing cause against enhancement of sentence to go behind the plea of guilty as a confession of the facts

4. ('01) 23 All 53 (54, 55) : 1900 A W N 192, *Queen v. Paltua*.
(1908) 8 Cri L Jour 380 (381) : 1908 A W N 241 : 5 A L J 505 : 30 All 540, *Emperor v. Kheoraj*.

(1900) 23 Mad 151 (154), *Queen v. Chinia Pavuchi*.

(1931) AIR 1931 Cal 341 (343) : 58 Cal 1214 : 32 Cri L Jour 667, *Mahomed Yusuf v. Emperor*.

(1900) 1900 Pun Re No. 11 Cr, p. 25 (27), *Piara Singh v. Empress*.

5. ('14) AIR 1914 All 558 (558) : 16 Cri L Jour 103, *Surjan Singh v. Emperor*.

6. ('17) AIR 1917 Oudh 362 (366) : 18 Cri L Jour 742 (746) : 20 Oudh Cas 136, *Kesho Singh v. Emperor*.

7. ('92) 2 Weir 520 (520, 521), *In re Marudaimuthu*.

8. ('31) AIR 1931 Cal 341 (344) : 58 Cal 1214 : 32 Cr. L. J. 667, *Mahomed Yusuf v. Emperor*.

9. ('02) 25 Mad 61 (68) : 28 I A 257 : 11 M L J 233 : 3 Bom L R 540 : 5 C W N 366 : 8 Sar 160 (P C), *Subramaniya Aiyar v. King Emperor*.

10. ('36) AIR 1936 P C 242 (245) : 37 Cr. L. J. 914 (P C), *Mahadeo v. The King*.

Note 16

1. ('96) 19 Mad 209 (210) : 1 Weir 850, *Queen-Empress v. Bashyam Chetty*.

alleged or to withdraw the plea.² The High Court of Rangoon has, however, held that, in such a case, the accused is entitled to show cause against both his conviction and sentence notwithstanding his plea of guilty.³

Section 271
Note 16

272.* If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case:

Section 272

Provided that, subject to the right of objection **Trial by same jury** hereinafter mentioned, the same **or assessors of several offenders in succession.** jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

Synopsis

1. Legislative changes.
2. "Refuses to, or does not, plead, or if he claims to be tried."
3. Trial by same jury or assessors of several offenders — Proviso.

Other Topics (miscellaneous)

Effect of the proviso. See Note 3.	Section inapplicable to cases and counter-cases. See Note 3.
No case against accused — Procedure. See Note 2.	Simultaneous trial of several persons illegal. See Note 3.
Plea of "not guilty." See Note 2.	

1. Legislative changes. — The first paragraph of this section corresponds to S. 363 of the Code of 1861 and S. 238 of the Code of 1872. The proviso corresponds to S. 347 of the Code of 1861 and S. 265 of the Code of 1872.

2. "Refuses to, or does not, plead, or if he claims to be tried." — An accused person charged with an offence can either plead "guilty" or may "claim to be tried." A plea of "not guilty" is not recognised by the Code,¹ though such a plea, if made, will be considered as amounting to a "claim to be tried." As a matter of practice, however, the expression "not guilty" is generally used and is taken as amounting to a "claim to be tried."

Where an accused makes no answer to the question whether he is guilty, an enquiry should be made whether he is obstinately mute or is dumb *ex visitatione dei*. In either case a plea of claiming to be tried should be recorded and the trial proceeded with.² Where, in

* 1882 : S. 272; 1872 : Ss. 238, 265; 1861 : Ss. 347, 363.

2. ('29) AIR 1929 Cal 747 (749, 751) : 56 Cal 1145 : 30 Cr. L. J. 1038, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Jnanendra Nath*. (Per Mukherjee, J., *contra*.)

3. ('35) AIR 1935 Rang 49 (50) : 12 Rang 616 : 36 Cr. L. J. 336, *Nga Ywa v. Emperor*.

Section 272 — Note 2

1. ('14) AIR 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460, *Emperor v. Nirmal Kanta Roy*.

See also S. 271 Notes 1 and 9.

2. ('69) 1869 Rat 19 (19), *Reg. v. Sattya*.

Section 272
Notes 2-3

answer to a charge of murder, the accused stated : "I did not mean to kill him ; why should I kill my brother ? Nor did I strike him so much that he should die," it was held that the statement amounted to a plea of "not guilty."³ See also the undermentioned case.^{3a}

Where an accused is put upon his trial and has pleaded "not guilty" to the charge or has claimed to be tried, he is entitled to have the trial proceeded with⁴ as a protection against a future proceeding against him in respect of the same charge.⁵ He cannot be released without trial on the ground that there is no case against him.⁶ Nor can he be convicted without trial solely upon a confession before the committing Magistrate.⁷

3. Trial by same jury or assessors of several offenders —
Proviso. — It has been seen in S. 233 that where several *charges* are made against an accused person, the general rule is that each charge should be tried separately. The same principle will also apply where several *persons* are accused of offences in a case. The general rule is that they should be tried separately except in cases falling within S. 239.¹ This proviso enacts that in those cases in which several accused persons in a Sessions case are to be tried separately, it is not necessary to choose a fresh jury or a fresh set of assessors for each such separate trial, and that the same jury or assessors may act in all the trials, subject, of course, to the right of the accused provided in the Code to object to the jury or any one or more members of the jury.²

But the same jury may try or the same assessors may aid in the trial of any number of accused persons in a case only one *after* the other and not *simultaneously*.³ A simultaneous trial in such cases is an illegality which is not curable by S. 537 of the Code.⁴

In the undermentioned case⁵ certain members of two opposing parties in a riot were sent up for trial under two distinct committals. After the close of the case for the prosecution in one of the cases, the Sessions Judge postponed the taking of the evidence for the defence

3. ('70) 2 N W P C R 479 (480), *Queen v. Hursookh*.

3a. ('83) 1883 Pun Re No. 22 Cr, p. 49 (50), *Fakir v. Empress*. (Accused saying that he killed A but claiming that he was not liable to punishment as the Court had no jurisdiction over him—Plea is one of claiming to be tried.)

See also S. 271 Note 7.

4. ('83) 12 Cal L R 120 (121), *Empress v. Sagambur*.

('68) 10 Suth W R Cr 43 (43) : 2 Beng L R 23 (FB), *Queen v. Srikanth Charal*.

('04) 1 Cri L Jour 772 (773) : 6 Bom L R 671, *Emperor v. Mohamed Ismail*. (Judge considering that the plea of the accused did not amount to a plea of guilty.)

5. ('81) 1881 All W N 60 (60), *Empress v. Sunder*.

6. ('81) 1881 All W N 60 (60), *Empress v. Sunder*.

[See also ('74) 1874 Pun Re No. 3 Cr, p. 5, *Crown v. Jamal*. (A Sessions Court has no authority to discharge an accused person duly committed without trial.)]

7. ('70) 2 N W P H C R 479 (480), *Queen v. Hursookh*.

Note 3

1. ('87) 9 All 452 (457) : 1887 A W N 111, *Queen-Empress v. Abdul Kadir*.

2. ('26) AIR 1926 All 334 (335, 336) : 48 All 325 : 27 Cri L Jour 445, *Rafuzzaman Khan v. Chhotey Lal*.

('31) AIR 1931 Cal 709 (709) : 32 Cri L Jour 1233, *Rajatulya v. Khuda Karigar*.

3. ('81) AIR 1931 Cal 709 (709, 710) : 32 Cr.L.J. 1233, *Rajatulya v. Khuda Karigar*.

4. ('21) AIR 1921 Low Bur 51 (55) : 11 L B R 73 : 23 Cr.L.J. 49, *Eusooof v. Emperor*.

5. ('81) 6 Cal 96 (99) : 6 C. L. R. 521 : 3 Shome L R Cr 39, *Hossein Buksh v. Empress*.

and proceeded to examine the witnesses for the prosecution in the other case before the same jury. He then took the evidence of the witnesses for the defence in the first case and in the counter-case in the order named and then summed up the facts in both the cases to the jury who returned a verdict in respect of all the accused. Princep, J., observed as follows :

"The law declares that the 'same jury may try as many accused persons successively as to the Court seems fit.' By this we understand that one trial is to follow the other, that is, that, on the conclusion of one trial, the same jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which, though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Independently of the irregularity of the proceeding, no jury ought, we think, to be placed in such an embarrassing position."

Section 273
Note 3

273.* (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect.

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

Section 273

1. Object and applicability of the section. — The section is intended to provide a short and effective way by which charges which have no merits may be disposed of.¹ This special power is, however, only conferred on the High Courts² and cannot be exercised by Sessions Judges.³

Applications under this section should be disposed of by the High Court in the exercise of its ordinary original criminal jurisdiction.⁴

2. "The Judge may make on the charge an entry to that effect" — Sub-section (1). — Where the Court is of opinion that no offence is made out, it is its duty to make an order under this section.

* 1882 : S. 273; 1872 and 1861 : Nil.

Section 273 — Note 1

1. ('29) AIR 1929 Cal 756 (760) : 57 Cal 1042 : 31 Cr.L.J. 506 (FB), *Girish v. Emperor*.

2. ('29) AIR 1929 Cal 756 (760) : 57 Cal 1042 : 31 Cr.L.J. 506 (FB), *Girish v. Emperor*.

3. ('35) AIR 1935 Nag 202 (204) : 31 Nag L R 360 : 36 Cri L Jour 1389, *Maroti Jairam v. Emperor*. (All that Sessions Court may do after hearing evidence and then coming to the conclusion that there is no evidence that accused has committed offence, is that it may direct jury to return verdict of not guilty, but it cannot do so before commencement of trial.)

[See ('80) 7 Cal L R 143 (143), *Empress v. Poresollah Sheikh*.]

4. See ('83) 9 Cal 397 (404), *Charoo Chunder v. Empress*. (Application under S. 14 of Act X of 1875.)

Section 273
Notes 2-3

and stay proceedings.¹ But the charge must be *clearly* unsustainable; otherwise the Judge should not take into his own hands the functions of the jury.² Where in a trial before the High Court it appeared that the mode of taking evidence in the preliminary inquiry was entirely erroneous, it was held that an entry under this section should be made and the prisoner sent back before the Magistrate for the depositions to be taken afresh.³

3. Effect of the entry — Sub-section (2). — An entry made under this section has not the effect of an acquittal. The accused may again be tried for the same offence.¹ Section 439 has no application to an entry made under this section. See sub-s.(4) of that section. For stay of proceedings under other sections, see S.145 sub-s.(5); S.240; S. 464 sub-s.(2); and S. 465 sub-s.(1).

C. — Choosing a Jury.

Section 274

274.* (1) In trials before the High Court the
Number of jury. jury shall consist of nine persons.

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than five or more than nine, as the *Provincial Government*,^a by order applicable to any particular district or to any particular class of offences in that district, may direct:

Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons.

a. Substituted by A. O. for "Local Government."

1. Legislative changes.

Difference between the Code of 1861 and the Code of 1872 —

The number of which a jury was to consist, under the Code of 1861, was *five* or an uneven number not less than five and not more than nine. This number was reduced to *three* in the Code of 1872. Both S. 327 of the Code of 1861 and S. 236 of the Code of 1872, however, dealt with the number of jury in *Sessions Courts* only.

* 1882 : S. 274; 1872 : S. 236; 1861 : S. 327.

Note 2

1. ('94) 21 Cal 97 (99), *Queen v. Sukee Kuar*.
2. ('29) AIR 1929 Cal 756 (761) : 57 Cal 1042:31 Cr.L.J. 506 (FB), *Girish v. Emperor*.
3. ('68) 1 Beng L R O Cr 37 (38, 39), *Queen v. Rajkrishna Mitter*. (Mode of taking the evidence in the preliminary investigation erroneous—Note must be made.)

Note 3

1. ('32) AIR 1932 Sind 157 (159):26 S L R 407 :34 Cr.L.J. 14, *Maniram v. Emperor*. See also S. 403, Explanation.

Difference between the Codes of 1872 and 1882 —

The provision as to the number of jury in the High Courts was newly added to the section in 1882.

Difference between the Codes of 1882 and 1898 —

There was no change effected in the Code of 1898, but by the Criminal Law Amendment Act, XII of 1923, the word "five" in sub-s.(2) of the section was substituted for the word "three" which occurred in the second paragraph of the old section. The proviso to the section was also newly added by the said Act of 1923.

2. Non-compliance with the section — Effect of. — A trial by a jury consisting of a larger number of men than is authorized by the section is a nullity.¹

3. "Jury," meaning of. — See S. 267 Note I.

4. Jury in cases of offences punishable with death — Proviso. — As has been seen in S. 269, the Provincial Government may direct that the trial of certain offences shall be by jury in any district. Where an offence punishable with death is so declared to be triable by jury, this proviso will apply, and the jury should consist of *nine* persons unless it is impracticable to get that number, in which case the number should be at least seven. Under S. 326, the number of jurors to be summoned is to be double the number required for the trial. Where a lesser number of persons is summoned, and some of them do not attend, with the result that seven persons are empanelled, it cannot be said that it is *impracticable* to get a jury of nine, and consequently the tribunal is not one legally constituted.¹ Where only fourteen persons were summoned but eleven of them were present out of whom, however, only seven were empanelled and it was not shown that it was not practicable to get nine persons, it was held that the jury was illegally constituted and the trial bad.²

But where eighteen persons were summoned out of whom only eight attended and consequently only a jury of seven was empanelled, it was held that the proceedings were not vitiated.³

Where there is nothing on the record to show whether the trial Court considered the practicability of having nine jurors, the High Court on appeal ought to proceed on the assumption that the trial in

Section 274 — Note 2

1. ('04) 1 Cri L Jour 43 (44):26 All 211:1904 A W N 1, *Emperor v. George Booth*.

Note 4

1. ('28) AIR 1928 Cal 645 (645, 646): 55 Cal 794: 29 Cr. L. J. 927, *Serajul Islam v. Emperor*. (Twelve persons only summoned.)
 ('30) AIR 1930 Cal 716 (717), *Remembrancer of Legal Affairs, Bengal v. Benozir Ahmad*. (Only fourteen persons summoned.)
 ('30) 31 Cri L Jour 425 (426): 122 Ind Cas 557 (Cal), *Amir Khan v. Emperor*.
 2. ('30) AIR 1930 Cal 60 (61): 56 Cal 1154: 31 Cr. L. J. 377, *Dwarika v. Emperor*.
 3. ('35) AIR 1935 Cal 407 (411): 62 Cal 900: 36 Cri L Jour 944 (SB), *Emperor v. Bent Pramanik*.
 ('34) AIR 1934 Cal 10 (13): 61 Cal 190:36 Cr. L. J. 803, *Mukunda Murari v. Emperor*.
 ('31) AIR 1931 Cal 261 (262): 32 Cr. L. J. 187 (SB), *Emperor v. Damullya Molla*.
 [But see ('31) AIR 1931 Cal 793 (795):58 Cal 1272:33 Cr. L. J. 129, *Shahab Ali v. Emperor*. (Only seven jurors present—*Held*, that the Judge never applied his mind to the provisions of S. 274, that it was the duty of the Judge to consider whether it was practicable to have nine jurors, and that trial was vitiated.)]

Section 274
Note 4

the lower Court took place in full accordance with the requirements of sub-s.(2) of this section.⁴

As to when an objection as to the constitution of the jury can be taken, see Note 6 to S.276.

Section 275

275.* (1) In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.

(2) In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans.

This section was substituted for the original section by the Criminal Law Amendment Act, XII of 1923.

Synopsis

- | | |
|--|---|
| <p>1. Scope of the section.</p> <p>2. Right to be tried by majority of jurors of the nationality of the accused.</p> | <p>3. Privileges of Europeans other than British subjects.</p> <p>4. "Who has been found . . . Indian British subject."</p> <p>5. "European."</p> |
|--|---|

1. Scope of the section.— Section 275, as it stood before 1923, provided that, in a trial by jury of a person not an European or American, a majority of the jury should consist of persons who were neither Europeans nor Americans. Section 450, now repealed, provided that in all trials of European *British subjects* before the High Court or the Court of Session the accused may claim to be tried by jury, *half* the number of which should be Europeans or Americans, provided, in cases triable with the aid of assessors, he may, instead of claiming to be tried by jury, claim that *half* the number of assessors should be

*** Code of 1898, original S. 275.**

275. In a trial by jury before the Court of Session of a person not being an *Jury for trial of persons* European or an American, a majority of the jury *not Europeans or Americans* shall, if he so desires, consist of persons who are *before Court of Session.* neither Europeans nor Americans.

1882 : S. 275; 1872 : S. 241; 1861 : S. 325.

4. ('40) AIR 1940 P C 176 (178), *Mirza Akbar v. King-Emperor*.

('35) AIR 1935 Cal 407 (411):36 Cr. L. J. 944; 62 Cal 900 (SB), *Emperor v. Bent Pramanik*. (Dissenting from AIR 1931 Cal 793.)

Europeans or Americans. Section 460, also now repealed, provided that in the case of an European *not being a British subject*, or an American, *half* the number of the jury or assessors, as the case may be, should, if practicable, consist of Europeans or Americans.¹ This section and S.284A, together deal with the matter dealt with by the said Ss. 275, 450 and 460, but with the following important changes:

Section 275
Notes 1-3

In trials by jury —

If the accused is an European *British subject*, he may claim that the *majority* of the jury shall be Europeans or Americans. If the accused is an Indian *British subject*, he may claim that the *majority* of the jury shall consist of Indians. If he is an European *not being a British subject*, or an American, he may claim that a majority of the jury shall consist of Europeans or Americans and this will be allowed only where it is *practicable*.

In trials with the aid of assessors —

If the accused is an European *British subject*, he may claim that *all* the assessors should be Europeans or Americans. If he is an Indian *British subject*, he may claim that *all* the assessors should be Indians. If he is an European *not being a British subject* or an American, he may claim that all the assessors shall be Europeans or Americans and this will be allowed where it is *practicable* to do so.

The claim to be tried as an European or Indian *British subject* mentioned in Ss. 528A and 528B is a different and distinct one from the claim to be tried by a majority of European or Indian jury as mentioned in this section, though it can only be put forward by a person who has, in the language of the section, been found under the provisions of the Code to be an European or an Indian *British subject*.²

A claim to be tried under this section can validly be made whether the complainant and the accused are both European or Indian *British subjects*, or one is an European and the other an Indian *British subject*.³

2. Right to be tried by majority of jurors of the nationality of the accused. — Under the High Court Criminal Procedure Act, 1875, a person who was not an European *British subject* was not entitled to be tried by a jury consisting of a majority of persons who were neither Europeans nor Americans.¹ Such a right was first recognised by the Code of 1882. There is, however, no provision that the jurors should be *co-religionists* with the accused.²

3. Privileges of Europeans other than British subjects. — Europeans other than European *British subjects* or Americans have, under sub-s.(2) of this section, a right that a majority of the jury shall,

Section 275 — Note 1

1. See also (1865) 3 Suth W R Cr 14 (14), *Empress v. John Lokley*. (Case under S. 323 of the Code of 1861.)
2. ('25) AIR 1925 Cal 384 (387) : 51 Cal 980 : 26 Cr. L. J 385, *Emperor v. Harendra*.
3. ('35) AIR 1935 Rang 67(68) : 13 Rang 104 : 36 Cr.L.J. 595 (FB), *Scott v. Emperor*.

Note 2

1. ('75) 1 Bom 232 (236), *Reg. v. Lahu Bhai Gopaldas*.
2. ('65) 1 Suth W R Cr 2 (2), *In re Bharut Chandra Christian*.

Section 275
Notes 3-5

if practicable, consist of persons who are Europeans or Americans; and, under S.285A, in the case of trials with the aid of assessors, all the assessors shall, if practicable, be persons who are Europeans or Americans. They have no other special privileges.¹

4. "Who has been found Indian British subject." — It is not sufficient for the accused to merely *assert* that he is an European or Indian British subject. He should have been *found under the provisions of this Code* to belong to the particular nationality.¹ As to such provisions, see Ss. 443, 528A and 529B.

5. "European." — An "Anglo-Indian" is not an European within the meaning of this section.¹

Section 276

276.* The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High Court may from time to time by rule direct :

Provided that—

first, pending the issue under this section of rules for any Court the practice now maintained; prevailing in such Court in respect to the choosing of jurors shall be followed;

secondly, in case of a deficiency of persons summoned, the number of jurors persons not summoned when eligible; required may, with the leave of the Court, be chosen from such other persons as may be present ;

thirdly, in a trial before any High Court in the town which is the usual place of trials before special jurors. sitting of such High Court —

(a) if the accused person is charged with having committed an offence punishable with death, or

* 1882 : S. 276; 1872 : 240; 1861 : S. 342.

Note 3

1. ('33) AIR 1933 Nag 136 (147): 34 Cr.L.J. 505 : 29 Nag LR 251, *Rego v. Emperor*.

Note 4

1. ('25) AIR 1925 Oudh 469 (470) : 28 Oudh Cas 230 : 26 Cri L Jour 1217, *F. S. Hay v. Emperor*.
(1929) AIR 1929 Sind 23 (23) : 22 Sind L R 472 : 29 Cri L Jour 721, *Emperor v. Soomar Abdulla*. (It is the assertion of the claim which gives jurisdiction to the Magistrate to inquire into the matter.)

Note 5

1. ('34) AIR 1934 Pat 200 (201) : 13 Pat 177 : 35 Cr. L. J. 827, *Guthrie v. Emperor*.

(b) if in any other case a Judge of the High Court so directs,

the jurors shall be chosen from the special jury list hereinafter prescribed; and

fourthly, in any district for which the *Provincial Government*^a has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

a. Substituted by A. O. for "Local Government."

Section 276
Notes 1-2

Synopsis

- | | |
|---|--|
| <p>1. Legislative changes.</p> <p>2. Scope of the section.</p> <p>3. "Shall be chosen by lot from the persons summoned to act."</p> | <p>4. Deficiency of persons — Second proviso.</p> <p>5. Special jury.</p> <p>6. Defect in selecting jurors by lot.</p> <p>7. High Court rules as to balloting.</p> |
|---|--|

1. **Legislative changes.** — There was no material difference between S. 342 of the Code of 1861 and S. 240 of the Code of 1872 corresponding to this section.

Difference between the Codes of 1872 and 1882 —

A proviso corresponding to the proviso *first*, *second* and *third* of this section was added in S. 276 of the Code of 1882.

The words "in such manner as the High Court may from time to time by rule direct" were newly added.

Difference between the Codes of 1882 and 1898 —

The last paragraph of the proviso was newly added in 1898.

Amendment in 1923 —

The words "in the Presidency Towns" were substituted by the words "in a trial before any High Court in the town which is the usual place of sitting of such High Court," by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

2. **Scope of the section.** — Section 326 provides that the names of those who are to be summoned to act as jurors should be drawn by lot from among the whole body of persons who are in the list of jurors. This section provides that those again who are to try a particular case are to be similarly chosen by lot from among the persons so summoned, or, where there is a deficiency, from amongst such other persons as might be present in Court. Where a Judge fails to obtain a panel in this manner, it is his duty to postpone the trial until the requisite number of jurors has been obtained in the manner provided by law.¹

Section 276 — Note 2

1. ('37) AIR 1937 Cal 389 (390) : ILR (1937) 2 Cal 482 : 38 Cri L Jour 870, *Suba v. Emperor*. (Deficiency can be made up from persons actually present whom Judge considers suitable — If he is unable to do this, the only course is to postpone the trial and summon another jury.)
(03) 7 Cal W N 188 (191, 192); *Brojendra Lal Sarkar v. Emperor*.

Section 276
Note 2

The object of these provisions is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case and an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided therein to secure perfect impartiality.^{1a}

This section and the following Ss. 277, 278 and 279 must be read together as prescribing the procedure for empanelling jurors,² the former, with all its provisos, being a general section dealing with the general nature of the procedure, the details of that procedure being given in the latter.³ The procedure to be adopted is as follows : In the first instance a ballot should be taken from among the persons summoned under S. 326,⁴ without any preliminary enquiry as to how many of them are present *i. e.*, the names of the persons summoned should be drawn from the box, one by one, each after another, and called aloud as each is drawn and the accused asked whether he has any objection to such juror. If he objects, the objection should be decided and the juror either retained or rejected as the case may be. When all the names have been so drawn and a number of persons have answered to their names and accepted without objection, a deficiency in the number of persons required, if any, will become manifest. The deficiency will be the number by which the number of persons answering their names and empanelled falls short of the number of persons of which the jury should consist. At this stage, the second proviso to the section begins to operate and the Court has to exercise a discretion whether to allow persons to be chosen from among those present in Court in sufficient number to supply the deficiency, or whether to adjourn the case for a fresh jury to be summoned. If the Court decides to choose from among the persons present, the accused should be asked, as each such person is chosen, whether he objects to him and after deciding the objection should proceed to choose other persons present in the same manner until the deficiency is made up.⁵

A jury not empanelled in accordance with these principles is not one constituted in accordance with the law.⁶

1a. ('27) AIR 1927 Cal 787 (790) : 28 Cri L Jour 889, *Rosonali v. Emperor*. (Overruled on another point by AIR 1928 Cal 83 (FB).)

('11) 12 Cri L Jour 537 (539) : 12 Ind Cas 513 (Oudh), *Makbul Ahmad v. Emperor*. (Procedure prescribed by S. 276 is imperative and it must be followed.)

See also S. 279 Note 2 and S. 326 Note 5.

2. ('31) AIR 1931 Cal 793 (794) : 58 Cal 1272 : 33 Cr. L. J. 129, *Sahabali Sheikh v. Emperor*.

('33) AIR 1933 All 941 (946) : 56 All 210 : 35 Cri L Jour 668, *Lala v. Emperor*.

3. ('28) AIR 1928 Cal 83 (87) : 55 Cal 371 : 29 Cri L Jour 437 (FB), *Kedarnath v. Emperor*. (Per Mukerji, J.)

4. ('29) AIR 1929 Oudh 154 (155) : 30 Cri L Jour 384, *Ram Adhin v. Emperor*.

5. ('28) AIR 1928 Cal 83 (85, 86) : 55 Cal 371 : 29 Cri L Jour 437 (FB), *Kedarnath v. Emperor*. (AIR 1927 Cal 242 and AIR 1927 Cal 787, overruled.)

See also S. 279 Note 4.

6. ('28) AIR 1928 Pat 1 (3) : 7 Pat 61 : 28 Cr. L. J. 881 (SB), *Akbar Ali v. Emperor*.

('27) AIR 1927 Cal 593 (595) : 54 Cal 1026 : 28 Cri L Jour 615, *Rahamat Sheikh v. Emperor*. (But so far as the decision says that the choosing by lot applies only where more than the required number are present, it must be deemed to be overruled by AIR 1928 Cal 83 (FB).)

('29) AIR 1929 Cal 92 (93) : 30 Cri L Jour 484, *Intaz Mandal v. Emperor*.

3. "Shall be chosen by lot from the persons summoned to act."—Sub-s.(2) of S. 279 indicates that the manner of choosing *by lot* provided by this section applies only to jurors *attending in obedience to summons* and not to persons selected from those present in Court.¹

It is desirable, if not necessary, that the Judge should, where all the jurors have been chosen by lot, specifically state that they have been so chosen by lot.² Where one of the jurors was a person who was not entitled to sit on the jury, having not been summoned, it was held that the Court was not properly constituted.³

Where, out of the persons summoned the Court asked those who knew English to sit apart and from out of such persons chose the number required *by lot*, and this procedure was consented to by the Public Prosecutor and by the counsel for the accused in view of the fact that there were in the case certain documents in English and identity of hand-writing was a fact in issue, it was held that the choosing having been done by lot the action of the Court in making the choice from amongst those who knew English was well within its inherent powers of ensuring a fair trial.⁴

4. **Deficiency of persons—Second proviso.**—The word "juror" in the second proviso to the section is a general term meaning both *special* and *common* jurors and, therefore, the procedure provided therein for making up any deficiency in the number of persons summoned applies both to common as well as to special jurors called under the third and fourth provisos to the section.¹ Thus, where eighteen special jurors were summoned but only five were present, it was held that it was open to the Judge to supplement the five special jurors with persons who happened to be present though they were not in the special jury list.²

Where the jury, at the end of the ballot, were found to be four short and four gentlemen fit to be jurors were chosen from among the by-standers, it was held that the procedure adopted was correct.³

As has been seen in Note 2 above, the Court has a *discretion* in case of a deficiency in the number of persons summoned, either to

Note 3

1. ('28) AIR 1928 Pat 1 (2) : 28 Cri L Jour 881 : 7 Pat 61, *Akbar Ali v. Emperor*. ('17) AIR 1917 Mad 770 (771) : 18 Cri L Jour 15 (16), *In re Anipe Palladu*. (Dissenting from 33 All 385.)
2. ('25) AIR 1925 Cal 798(799) : 26 Cr.L.J. 819, *Government of Bengal v. Muchu Khan*. [See also ('28) AIR 1928 Cal 83 (86) : 55 Cal 371 : 29 Cr.L.J. 437 (FB), *Kedarnath v. Emperor*.]
- See also S. 279 Note 4.
2. ('27) AIR 1927 Nag 117 (117) : 28 Cri L Jour 177, *Sonia Koshti v. Emperor*.
3. ('27) AIR 1927 Cal 820 (820) : 28 Cri L Jour 874, *Emperor v. Irjan*. (The High Court did not, however, order a retrial as the verdict was in accordance with the facts of the case.)
4. ('30) AIR 1930 Cal 437 (440) : 32 Cri L Jour 455, *Mohiuddin v. Emperor*.

Note 4

1. ('31) AIR 1931 Cal 793(794, 795) : 58 Cal 1272 : 33 Cr.L.J. 129, *Sahebal v. Emperor*.
2. ('33) AIR 1933 Cal 638 (639) : 60 Cal 725 : 34 Cr.L.J. 1098, *Manir Sheikh v. Emperor*. [See ('39) AIR 1939 Sind 209 (219) : 41 Cri L Jour 28 : I L R (1940) Kar 249, *Shewaram v. Emperor*.]
2. ('33) AIR 1933 Cal 638(639) : 60 Cal 725 : 34 Cr.L.J. 1098, *Manir Sheikh v. Emperor*.
3. ('31) AIR 1931 Cal 178 (179) : 32 Cr. L. J. 190 (FB), *Emperor v. Panchu*.

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Notes 4-5

choose the number of jurors required from among those present and proceed with the trial, or to adjourn the trial.⁴ But the persons from amongst whom the deficiency is made up must be *present in Court*. Persons who are not present in Court cannot be *sent for*, for the purpose of being called as jurors and then chosen. A trial with a jury consisting of persons so chosen is not a trial by a jury empanelled according to law.⁵

A person is *present* within the meaning of the section if he is in the precincts of the Court building either because he has been summoned for other cases or by mere chance. It is not necessary that he should be present within the four walls of the actual court-room in which the proceedings are being conducted. The intention of the Legislature is only to prevent the summoning of the individuals from the *locality* where a deficiency occurs in the number of persons summoned.⁶

There is no provision in the Code by which the Court is to ascertain beforehand how many of the persons summoned to serve as jurors have attended and thus to determine the deficiency which has to be supplied. The stage at which it should be ascertained whether the persons summoned have attended or not is not reached until their names are called out for the purpose of empanelling a jury.⁷

The deficiency mentioned in the proviso refers to the deficiency in the number required to make up the quorum under S. 274 and not to the deficiency in the minimum number required for drawing lots.⁸

The word "chosen" in the proviso simply means "selected" and not "chosen by lot."⁹

5. Special jury. — Provisos 3 and 4 deal with cases in which a special jury may be summoned.¹ A special juror is a person whose name has been entered in a special list of persons prepared under Ss. 313 and 325, such persons having been selected by reason of their possessing superior qualifications in respect of property, character or education

4. ('28) AIR 1928 Cal 83 (86) : 55 Cal 371 : 29 Cr. L. J. 437 (FB), *Kedarnath v. Emperor*.

('31) AIR 1931 Cal 178 (179) : 32 Cr. L. J. 190 (FB), *Emperor v. Panchu Sheikh*.

5. ('39) AIR 1939 Sind 209 (219) : 41 Cr. L. Jour 28 : I L R (1940) Kar 249, *Shewaram v. Emperor*. (The actual presence of the potential juror in the Court is the condition of his eligibility—The fact that the person subsequently summoned may be on the special jury list is no substitute for the fact that he was not present.)

('37) AIR 1937 Cal 389 (390) : I L R (1937) 2 Cal 482 : 38 Cr. L. J. 870, *Suba v. Emperor*. (Court cannot summon jurors from town and fill up deficiency from amongst them.)

('29) AIR 1929 Cal 728 (729) : 56 Cal 835 : 31 Cr. L. J. 281, *Abedali v. Emperor*.

('28) AIR 1928 Cal 551 (552) : 30 Cr. L. J. 120, *Md. Sagirruddin v. Emperor*.

('29) 30 Cr. L. J. 136 (137) : 113 Ind Cas 328 (Cal), *Sadarat v. Emperor*.

6. ('32) AIR 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cr. L. J. 694, *Israil v. Emperor*.

7. ('39) AIR 1939 Sind 209 (219) : 41 Cr. L. J. 28 : I L R (1940) Kar 249, *Shewaram v. Emperor*. (A deficiency is only apparent after names of all those summoned and present have been exhausted by chances of lottery and challenge.)

('33) AIR 1933 All 941 (946) : 56 All 210 : 35 Cr. L. Jour 668, *Lala v. Emperor*.

8. ('33) AIR 1933 All 941 (947) : 56 All 210 : 35 Cr. L. J. 668, *Lala v. Emperor*.

9. ('33) AIR 1933 All 941 (947) : 56 All 210 : 35 Cr. L. J. 668, *Lala v. Emperor*.

('17) AIR 1917 Mad 770 (771) : 18 Cr. L. Jour 15, *In re Anipe Palladu*.

Note 5

1. ('08) 8 Cr. L. J. 281 (297) : 10 Bom LR 848, *Emperor v. Bal Gangadhar Tilak*.

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Notes 5-6

which make them fit to serve as special jurors. Where the accused is charged with an offence punishable with death, a trial before the High Court should *invariably* be by a special jury. In other trials before the High Court *if the Judge so directs* the jurors may be chosen from the special jury list. In the undermentioned case² in which the accused was charged with an offence under S. 124A of the Penal Code, the High Court allowed a special jury.

The Sind Judicial Commissioner's Court (now the Chief Court of Sind) is a High Court within the meaning of proviso 3 to this section, and a Judge of that Court, exercising jurisdiction as a Sessions Court, has power to direct a special jury to be empanelled under clause (b) of the proviso.³

The word 'chosen' in provisos 3 and 4 means "chosen by lot" as in the substantive part of the section.⁴

6. Defect in selecting jurors by lot. — There is a conflict of opinion on the question whether a defect or irregularity in the constitution of the jury, as for example, in not selecting jurymen by lot, is one curable by the application of S. 537. On the one hand, it has been held by the High Courts of Madras,¹ Nagpur² and Patna³ and the Chief Court of Oudh⁴ that it is curable under S. 537. On the other hand, the High Courts of Allahabad⁵ and Calcutta⁶ and the Judicial Commissioner's Court of Sind⁷ have taken a contrary view on the ground that an irregularity in the constitution of the jury affects the constitution of the Court and its competence. It is submitted that the latter view is preferable.

It has been held that an objection as to the constitution of the jury under S. 274⁸ or as to any defect or irregularity in the constitution

2. ('28) AIR 1928 Bom 74 (74) : 29 Cri L Jour 411, *Emperor v. Phillip Spratt*.
3. ('39) AIR 1939 Sind 209 (218) : 41 Cri L Jour 28 : I L R (1940) Kar 249, *Shewaram v. Emperor*. (Reference to S. 276 in S. 266 is to the substantive part of S. 276 and not to the provisos.)
4. ('39) AIR 1939 Sind 209 (219) : 41 Cri L Jour 28 : I L R (1940) Kar 249, *Shewaram v. Emperor*.

Note 6

1. ('17) AIR 1917 Mad 770 (771) : 18 Cri L Jour 15, *In re Anipe Palladu*.
2. ('27) AIR 1927 Nag 117 (117) : 28 Cri L Jour 177, *Sonia Koshti v. Emperor*.
3. ('28) AIR 1928 Pat 1 (2) : 28 Cr. L. J. 881 : 7 Pat 61, *Albar Ali v. Emperor*. [But see ('28) AIR 1928 Pat 31 (34) : 28 Cri L Jour 843 : 7 Pat 50, *Tajali Mian v. Emperor*.]
4. ('29) AIR 1929 Oudh 154 (155) : 30 Cri L Jour 384, *Ram Adhin v. Emperor*.
5. ('11) 33 All 385 (387) : 9 I. C. 278 : 12 Cri L Jour 46, *Bradshaw v. Emperor*.
6. ('37) AIR 1937 Cal 389 (390) : I L R (1937) 2 Cal 482 : 38 Cr. L. J. 870, *Suba v. Emperor*. (High Court in appeal ordered retrial.)
7. ('27) AIR 1927 Cal 242 (243) : 28 Cri L Jour 194, *Bholanath v. Emperor*. (Overruled on another point in AIR 1928 Cal 83 (FB).)
- [See ('29) AIR 1929 Cal 728 (729) : 56 Cal 835 : 31 Cri L Jour 281, *Emperor v. Abedali Fakir*. (Retrial was ordered.)]
- [But see ('82) 8 Cal 739 (742) : 12 Cal L R 233, *Empress v. Jhubboo Mahton*.]
7. ('39) AIR 1939 Sind 209 (220) : 41 Cri L Jour 28 : I L R (1940) Kar 249, *Shewaram v. Emperor*.
8. ('32) AIR 1932 Cal 750 (751) : 33 Cri L Jour 869, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Ajit Munshi*.
- ('30) AIR 1930 Cal 291 (291) : 57 Cal 1062, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhajoo Majhi*.

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of the jury under this section⁹ cannot be taken for the first time in appeal. It is submitted that this view is open to criticism. If the objection is one which affects the very constitution of the Court, it must be one affecting the jurisdiction of the Court itself, and, under general principles of law, can be raised at any time.¹⁰

7. High Court rules as to balloting. — See the undermentioned case.¹

Section 277

277.* (1) As each juror is chosen, his name shall be called aloud, and upon his appearance, the accused shall be asked if he objects to be tried by such juror.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated :

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

1. Legislative changes (omitted)

2. Scope of the section. — The names of the jurors chosen should be called out and the objection of the accused to such persons taken. The Court cannot, before the names are so called, send away the persons summoned, merely on their own representation that they were relations of the accused.¹

3. Failure to object — Effect of. — See Note 4 to Section 278.

4. Defect in choosing jury. — See Note 6 to Section 276.

Section 278

278.† Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed:—
(a) some presumed or actual partiality in the juror ;

* 1882 : S. 277; 1872 : S. 243; 1861 : S. 343.

† 1882 : S. 278; 1872 : Ss. 244, 245, 405; 1861 : Ss. 334, 344, 345.

9. ('28) AIR 1928 Pat 1 (2) : 28 Cr. L. J. 881 : 7 Pat 61, *Akbar Ali v. Emperor*. ('17) AIR 1917 Mad 770 (771) : 18 Cri L Jour 15, *In re Anipe Palladu*.

10. See ('29) AIR 1929 Cal 92 (93) : 30 Cr.L.J. 484, *Intaz Mandal v. Emperor*.

Note 7

1. ('76) 1 Bom 462 (465), *Reg. v. Vithal Das*. (Case under S. 33 of Act X of 1875.)

Section 277 — Note 2

1. ('02-03) 7 Cal W N 188 (191, 192), *Brojendra Lal Sirkar v. Emperor*. (Disregard of the provisions of this section is not a mere irregularity curable by S. 537, Cr. Pro. Code.)

- (b) some personal ground, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years;
- (c) his having by habit or religious vows relinquished all care of worldly affairs;
- (d) his holding any office in or under the Court;
- (e) his executing any duties of police or being entrusted with police-duties;
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury;
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted;
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

Synopsis

1. Legislative changes.
2. Objection as to partiality — Clause (a).
3. Inability to understand language — Clause (g).
4. Failure to object — Effect of.

1. Legislative changes (*omitted*)

2. Objection as to partiality — Clause (a). — Where a juror who was the head-master of a school of one X, was alleged to be an acquaintance of the Public Prosecutor who was alleged to be the retained pleader of the estate of the said X, the accused himself having nothing to do with X, it was held that, that fact was not a valid ground of objection within the meaning of this section.¹ But where it appeared that there was litigation pending between the accused's master and another person whose agent the juror was, it was held that the facts gave a ground for presumed partiality in the juror.²

3. Inability to understand language—Clause (g). — Inability to understand the language in which the evidence is given or when such evidence is interpreted, the language in which it is interpreted, is a valid ground of objection. The effect of the incompetence of the

Section 278 — Note 2

1. ('25) AIR 1925 Cal 729 (730) : 26 Cri L Jour 1009, *Jessarar v. Emperor*.
2. ('28) AIR 1928 Pat 31 (32):7 Pat 50:28 Cr. L. J. 843, *Tajali Mian v. Emperor*.

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juror on this ground is to deny to the accused an essential part of the protection accorded to him by law.¹ See also S. 297 Note 16.

4. Failure to object — Effect of. — The objection to each juror must be raised upon his appearance in obedience to the call made under S. 277. A failure to object to a juror at that time would amount to a waiver¹ and if the trial proceeds the constitution of the jury cannot be assailed later on.²

In *Ras Behari Lal v. Emperor*,³ a juror had been empanelled and joined in a verdict of guilty who could not understand the language in which the evidence was given. Such inability was unknown to the accused until after the event. In these circumstances, their Lordships of the Privy Council held that there was a grave injustice or a "scandal and perversion of justice." Accordingly, the conviction was set aside and the Crown was left to take such course as to a new trial as the law would allow. In *Alexander Kennedy v. The King*,⁴ an objection was raised to certain members of the jury on the ground of actual or presumed partiality; but the objection was not raised at the time when the jury was empanelled because the accused was not aware of the facts at that time. It was contended on the authority of *Ras Behari Lal's case* that in such cases, the objection should be given effect to and that the conviction should be quashed. This contention was rejected by the Privy Council which observed as follows:

"Their Lordships see nothing in that decision (*Ras Behari Lal's case*) to warrant the wide proposition contended for that in every case in which there was material for a successful challenge and it was not made for excusable reasons an adverse verdict should be set aside."

Section 279

279.* (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present, then by

* 1882 : S. 279; 1872 : S. 243; 1861 : S. 342.

Note 3

1. ('37) AIR 1937 P C 108 (113) : 38 Cr. L. J. 503 (PC), *Alexander v. The King*. ('33) AIR 1933 P C 208 (209) : 34 Cri L Jour 843 (844) : 12 Pat 811 : 60 Ind App 354 (PC), *Ras Behari Lal v. Emperor*. (In this case one of the jurors did not know sufficient English to follow the address of the lawyers and Judge's charge or the English evidence—*Held* there was miscarriage of justice.)

Note 4

1. ('17) AIR 1917 Mad 770 (770, 771):18 Cr. L. J. 15 (15, 16), *In re Anipe Palladu*.
2. ('32) AIR 1932 Oudh 31 (32): 33 Cr. L. J. 280, *Girdhariji v. Jitendra Mohan*. ('29) AIR 1929 Cal 1 (6): 30 Cri L Jour 494, *Bazlur Rahman v. Emperor*. (1900) 2 Weir 515 (516), *In re Komali Viswasam*.
3. ('33) AIR 1933 P C 208 (211): 34 Cri L Jour 843: 12 Pat 811: 60 I A 354 (PC). (Reversing AIR 1932 Pat 302.)
4. ('37) AIR 1937 P C 108 (113): 38 Cri L Jour 503 (PC).

any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury :

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Provided that no objection to such juror or other person is taken under section 278 and allowed.

Synopsis

1. Legislative changes.
2. Scope and object of the section.
3. Objection to a juror — Decision on.
4. Procedure on allowing objection to juror — Sub-section (2).

1. Legislative changes. — The word "recorded" in sub-s. (1) of the section was not present in the Code of 1861 or of 1872. It was introduced in section 279 of the Code of 1892.

2. Scope and object of the section. — As has been seen in the Notes to S. 276, the object of Ss. 276 to 279 is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case.¹

Section 276 is a general section dealing with the general nature of the procedure. The details of that procedure are given in Ss. 277 to 279.² Sub-section (2) of this section deals with a case where there is no effective lot owing to absence or objection or both and it provides how the number is to be completed.³ It contemplates the possibility of a person not in the jury list being chosen to serve on the jury in case of emergency.⁴

3. Objection to a juror — Decision on. — Every objection taken to a juror must be *decided* by the Court and it should make a *record* of such decision.¹ Where an objection, on any of the grounds (a) to (g) of section 278 is made out to the satisfaction of the Court, it "shall" be allowed. An objection on the ground of *any other circumstance* will be allowed only when, *in the opinion of the Court*, such circumstance renders the juror improper to act as such.² The Court has a wide discretion in the matter of accepting or overruling

Section 279 — Note 2

1. ('03) 7 Cal W N 188 (192), *Brojendra Lal Sarkar v. Emperor*. ('27) AIR 1927 Cal 787 (790) : 28 Cri L Jour 889, *Rosonali v. Emperor*. See also S. 276 Note 2 and S. 326 Note 5.
2. ('28) AIR 1928 Cal 83 (87) : 55 Cal 371 : 29 Cri L Jour 437 (FB), *Kedarnath Mahto v. Emperor*.
3. ('28) AIR 1928 Pat 1 (2, 6) : 7 Pat 61 : 28 Cr. L. J. 881, *Akbar Ali v. Emperor*.
4. ('25) AIR 1925 Cal 798 (799) : 26 Cr. L. J. 819, *Govt. of Bengal v. Muchu Khan*.

Note 3

1. (1865) 3 Suth W R Cr Cir 1 (1). (The name of objector and nature of objection also should be recorded.)
2. ('71) 16 Suth W R Cr 56 (56), *Empress v. Krishnochuran*. (Objection under cl. 3 of S. 344 of the Code of 1861.)
- (‘81) 7 Cal 42 (46) : 8 Cal L R 273, *In the matter of Rochia Mohato*. (Being a clerk in magistrate's office—No disqualification for sitting as a juror.)

Section 279
Notes 3-4

objections and, in this respect, its decision is final.³ Thus, where on objection being taken as to the presumed or actual partiality in a juror, the Court decides that no such partiality has been made out, that decision is absolutely final and cannot be challenged in appeal.⁴ If, however, the Court finds that such partiality has been made out, but in spite of that finding the Court overrules the objection, the decision may, according to the undermentioned case,⁵ perhaps be challenged in appeal.

4. Procedure on allowing objection to juror — Sub-section (2). — Where an objection to a juror is allowed, his place should be supplied by any other juror attending in obedience to a summons and chosen in the manner provided by S. 276, i. e., *by lot*. If no such juror is present, his place should be supplied by any other person present in Court whose name is on the jury list, or whom the Court considers a proper person to serve on the jury subject to a successful objection as stated in the proviso.¹ This latter selection need not, as has been seen in the Notes to S. 276, be *by lot*,² though it must only be from among the persons *present*.^{2a} A requisition of persons from outside for the purpose of choosing jurors is not legal.³ See also Notes to section 276.

Section 280

280.* (1) When the jurors
Foreman of jury. have been chosen, they shall appoint
one of their number to be foreman.

* 1882 : S. 280; 1872 : S. 246; 1861 : S. 346.

3. ('38) AIR 1938 Nag 328 (334) : ILR (1938) Nag 516 : 39 Cr. L. Jour 818, *In re Surajpalsingh*. (An objection that a juror is not an European British subject is an objection under S. 278, Cr. P. C., either under cl. (b) or cl. (h) and the decision of the Sessions Judge on the point is final under S. 279 (1).)

('25) AIR 1925 Cal 798 (799) : 26 Cr. L. J. 819, *Govt. of Bengal v. Muchu Khan*. ('02) 7 Cal W N 188 (190), *Brojendra Lal Sarkar v. Emperor*.

4. ('40) AIR 1940 Cal 277 (279) : ILR (1940) 1 Cal 531 : 41 Cr. L. J. 719, *Yawar Bakht v. Emperor*.

5. ('40) AIR 1940 Cal 277 (279) : ILR (1940) 1 Cal 531 : 41 Cr. L. J. 719, *Yawar Bakht v. Emperor*.

Note 4

1. ('28) AIR 1928 Cal 83 (85) : 55 Cal 371 : 29 Cr. L. J. 437 (FB), *Kedarnath Mahto v. Emperor*.

('38) AIR 1938 Nag 328 (334) : ILR (1938) Nag 516 : 39 Cr. L. J. 818, *In re Surajpal Singh*.

('29) AIR 1929 Cal 728 (729) : 56 Cal 835 : 31 Cr. L. J. 281, *Abdali Fakir v. Emperor*.

('27) AIR 1927 Cal 787 (790, 791) : 28 Cr. L. J. 889, *Rosonali v. Emperor*.

2. ('27) AIR 1927 Cal 593 (596) : 54 Cal 1026 : 28 Cr. L. J. 615, *Rahamat Sheikh v. Emperor*. (A I R 1925 Cal 798, relied on.)

('27) AIR 1927 Cal 787 (791) : 28 Cr. L. J. 889, *Rosonali v. Emperor*. (Overruled on another point by A I R 1928 Cal 83 (FB).)

('28) AIR 1928 Cal 83 (85, 87) : 55 Cal 371 : 29 Cr. L. J. 437 (FB), *Kedarnath Mahto v. Emperor*.

('17) AIR 1917 Mad 770 (771) : 18 Cr. L. J. 15 (16), *In re Anipe Palladu*.

2a. ('39) AIR 1939 Sind 209 (219, 220) : 41 Cr. L. J. 28 : ILR (1940) Kar 249, *Shewaram v. Emperor*. (Sub-s. (2) especially provides for the selection of a person on the jury list not summoned but present.)

3. ('29) AIR 1929 Cal 728 (729) : 56 Cal 835 : 31 Cr. L. J. 281, *Abd Ali Fakir v. Emperor*. (Retrial ordered where person in special jury list was requisitioned.)

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

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Notes 1-2

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

1. Legislative changes (*omitted*)

2. Foreman — To deliver the verdict of the jury. — Where, in a trial by jury, some of the accused were acquitted and some convicted and it was found that the foreman of the jury had taken a bribe in connexion with the same trial, it was held that the verdict of the jury could not be sustained and that the conviction should be set aside.¹

281.* When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873.

Section 281

1. Legislative changes. — There was no provision for swearing the jury in the Code of 1861 or of 1872.¹ It was first introduced in the Code of 1892.

2. Indian Oaths Act, 1873 — Omission of jury to be sworn. — Section 5, clause (c) of the Oaths Act, 1873, enacts that oaths and affirmations shall be made by jurors. But an omission on the part of a juror to do so would not invalidate the proceedings.¹ See s. 13 of that Act.

3. Form of oath. — The form of oath is prescribed by the several High Courts under s. 7 of the Oaths Act, 1873.

282.† (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not

Section 282

Procedure when juror ceases to attend, etc.

* 1882 : S. 281; 1872 and 1861 — Nil.

† 1882 : S. 282; 1872 : S. 254; 1861 : S. 350.

Section 280 — Note 2

1. ('33) AIR 1933 Cal 639(640):60 Cal 751:34 Cr.L.J. 1072, *Hafez Molla v. Emperor*.

Section 281 — Note 1

1. (1864) 3 Bom H C R Cr Cas 56 (57), *Reg v. Lakshman Ramchandra*.

Note 2

1. ('73) 20 Suth W R Cr 19 (20), *Queen v. Ramsodoy Chuckerbutty*.

Section 282
Notes 1-2

practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

(2) In each of such cases the trial shall commence anew.

Synopsis

1. Legislative changes.
- 1a. Scope of the section.
2. Inherent power of Court to discharge jury.
3. "Is prevented from attending throughout the trial."
4. "The trial shall commence anew."

Other Topics (miscellaneous)

- Postponement or discharge of jury—Discretion. See Note 3.
 "Sufficient cause"—
 Misconduct of jury. See Note 2.
 Non-appearance of witness. See Note 2.
 Subsequent discovery of deafness or dumbness of juror. See Note 4.
 Expression of views beforehand. See Note 2.

1. Legislative changes. — The provision as to the adding of a new juror when "any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted" did not exist in the corresponding sections of the Codes of 1861 and 1872 but was newly added in the Code of 1882.

1a. Scope of the section. — This section is limited to cases where a jury has been properly empanelled at the outset and one or more of the casualties which are bound to occur sometimes in human lives has in fact occurred. Sub-s.(2) of this section also contemplates the addition of a juror after the trial of the case has begun and not before.¹

2. Inherent power of Court to discharge jury. — The Code provides for the discharge of the jury only in the following cases :

1. Under this section when in the course of the trial a juror is absent, or is unable to attend, or does not understand the language of the proceedings.
2. Under S. 283 when the prisoner becomes incapable of remaining at the bar.
3. Under S. 305 where, in trials before the High Court the Judge disagrees with the opinion of the majority of the jury.

But the said sections are not exhaustive of all the circumstances under which a jury may be discharged. In a case which obviously

Section 282 — Note 1a

1. ('39) AIR 1939 Sind 209 (220): 41 Cr.L.J. 28 : ILR (1940) Kar 249, *Shewaram v. Emperor*.

demands interference but which is not within those for which the Code specifically provides, the Court has an *inherent power* to make such order as the ends of justice require.¹ Thus, a Judge may discharge a jury on the ground that a juror has *misconducted* himself during the trial,² or on the ground that the judge finds reason for doubting the impartiality of the jury.^{2a} The power should not however be exercised lightly nor until the Judge has satisfied himself by judicial *inquiry* that reasonable grounds exist for exercising such a right.³ But the Judge is not bound to hold an inquiry whenever a juror is alleged to have misconducted himself. The question whether the Judge should or should not hold an inquiry is a matter within his discretion.^{3a} The Judge has undoubted jurisdiction for the purposes of such inquiry to call upon persons to appear before him, to administer oath to them and to require them to give evidence.⁴ A juror may be guilty of misconduct where he is found talking to the Court Inspector when the case is called on for hearing,⁵ or where during the progress of the trial he talks to persons connected with the accused or discusses the case which is being tried before him.⁶ A mere expression of opinion to a friend in a private

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Note 2

Note 2

1. ('23) AIR 1923 Cal 724 (724, 725): 50 Cal 872: 24 Cr.L.J. 677, *Rahim v. Emperor*. ('37) AIR 1937 Pat 369 (371, 372): 16 Pat 8: 38 Cr.L.J. 777, *Bipat Gope v. Emperor*.
2. ('25) AIR 1925 Cal 729 (731): 26 Cri L Jour 1009, *Jessarat v. Emperor*. (Casual remark by juror that he had already formed an opinion is no ground for discharge.) ('29) AIR 1929 Cal 343 (345): 56 Cal 1032: 31 Cri L Jour 366, *Abdur Rashid v. Emperor*. (Suspicion in the mind of Public Prosecutor against some of the jurors is no ground for discharge.)
- 2a. ('23) AIR 1923 Cal 724 (724): 50 Cal 872: 24 Cri L Jour 677, *Rahim Sheikh v. King-Emperor*. (Jury may be discharged on the ground of necessity also.) ('37) AIR 1937 Pat 369 (371): 16 Pat 8: 38 Cr.L.J. 777, *Bipat Gope v. Emperor*.
3. ('24) AIR 1924 Cal 323 (326): 51 Cal 418: 25 Cr.L.J. 776, *Mamfru v. Emperor*. (Obiter.) ('34) AIR 1934 Cal 428 (429): 61 Cal 498: 35 Cr.L.J. 941, *Nagan Kundu v. Emperor*. (There is inherent power to discharge for other similar sufficient cause also.)
- 3a. ('37) AIR 1937 Pat 369 (372): 16 Pat 8: 38 Cri L Jour 777, *Bipat Gope v. Emperor*. (Inherent power of Sessions Judge to discharge jury is not confined to cases of misconduct only.)
3. ('23) AIR 1923 Cal 724 (724): 50 Cal 872: 24 Cr. L. J. 677, *Rahim Sheikh v. King-Emperor*.
4. ('24) AIR 1924 Cal 323 (327): 51 Cal 418: 25 Cr. L. J. 776, *Mamfru v. Emperor*. (Misconduct must be established by what is regarded as evidence in the eye of the law.) ('29) AIR 1929 Cal 343 (345): 56 Cal 1032: 31 Cr.L.J. 366, *Abdur Rashid v. Emperor*. [See also ('25) AIR 1925 Cal 729 (731): 26 Cri L Jour 1009, *Jessarat v. Emperor*. (No reasonable grounds proved—Court refused to discharge jury.)]
- 3a. ('36) AIR 1936 Oudh 268 (269): 37 Cri L Jour 749: 12 Luck 170, *Bindeshi v. Emperor*. (Vague allegations against juror unsupported by affidavit—Contents of application making allegations found not true—Refusal to hold inquiry—Held, Judge exercised proper discretion in refusing inquiry.)
4. ('27) AIR 1927 Cal 628 (629): 55 Cal 279: 28 Cr.L.J. 783, *Bhuban v. Emperor*.
5. ('29) AIR 1929 Cal 57 (58): 56 Cal 150: 30 Cri L Jour 435, *Rebati Mohan v. Emperor*. (Foreman of the jury.)
6. ('27) AIR 1927 Cal 628 (629): 55 Cal 279: 28 Cr.L.J. 783, *Bhuban v. Emperor*.
21. ('21) AIR 1921 Cal 631 (631): 22 Cr. L. J. 510, *Emperor v. Nazar Ali Beg.* (Juror expressing outside the Court his opinion as to the guilt of the accused before the defence had been heard in full and before the case had been summed up to the jury—De novo trial before fresh jury ordered.) [See ('36) AIR 1936 Oudh 268 (269): 37 Cri L Jour 749: 12 Luck 170, *Bindeshi v. Emperor*. (If a juror expresses his opinion clearly regarding the guilt or innocence of an accused person before the charge to the jury has been delivered the Sessions Judge will be well advised in discharging the jury and holding a fresh trial with a fresh jury.)]

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Notes 2-4

conversation will not, however, be a ground for discharging the jury.⁷ Nor can the jury be discharged merely because a witness for the defence does not attend and a postponement of the case is asked for.⁸

Where the foreman of the jury gave out the verdict in Court after the prosecution evidence was over and before the defence evidence was let in, it was held in the undermentioned case⁹ that the Judge had no power to discharge the jury and that he should have proceeded with the trial after explaining to the jury their error in not waiting until all the evidence was over. In a somewhat similar case in the Calcutta High Court, the Advocate-General was allowed to enter a *nolle prosequi* under s. 333 and the difficulty was thus got over.¹⁰

Where a juror is found guilty of misconduct during trial, the Judge is, however, not bound to discharge the *whole* jury. He may deal with the matter on the analogy of this section and add a new juror in place of the juror removed by choosing him from among the persons present in Court.¹¹

A jury can be discharged by the Judge in the exercise of his inherent power even after the verdict has been recorded.¹²

Where an order discharging a jury in the exercise of the inherent power of a Sessions Judge is found to be unjustified, the only relief that the High Court can give is to order a fresh trial before another jury.¹³

See also sections 296 and 300 and Notes thereon.

3. "Is prevented from attending throughout the trial." — Whether a juror is prevented from attending *throughout the trial* depends, among other things, on the days during which the trial is going to take place, and whether an adjournment should be given for any length of time. There is a discretion in the judge whether to postpone the trial to a date on which the juror should be able to attend or to discharge the jury. If the juror is able to attend in a very short time it is a wrong exercise of discretion to discharge the jury.¹

4. "The trial shall commence anew." — Where a new juror is added or the jury is discharged under this section, the trial must commence anew and cannot be continued from the stage at which the juror or the jury was discharged. Thus, where, after the examination of some witnesses in the case a juror was found to be deaf and was consequently discharged, and a new juror added, it was held that the

7. ('32) AIR 1932 Cal 750 (751) : 33 Cr. L. J. 869, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Ajit Munshi*. (The opinion was expressed at an early stage but was detected and brought to the notice of Court at the end of trial.)

8. ('02) 4 Bom L R 939 (940), *In re Putaswami*.

9. ('86) 2 Weir 497 (498), *In re Doraiswamy Aiyar*. (Verdict was returned in reply to the question put by the judge and misunderstood by the foreman.)

10. ('03) 7 Cal W N xxxi (xxxii), *Emperor v. Olu Muhammad*.

11. ('29) AIR 1929 Cal 57 (58) : 56 Cal 150 : 30 Cr. L. J. 435, *Rebati Mohan v. Emperor*. (None of the summoned jurors was present.)

12. ('34) AIR 1934 Cal 428 (429) : 61 Cal 498 : 35 Cr. L. J. 941, *Nagen Kundu v. Emperor*. (Rule of English Law followed as embodying a principle of justice.)

13. ('37) AIR 1937 Pat 369 (371) : 16 Pat 8 : 38 Cr. L. J. 777, *Bipat Gope v. Emperor*.

Note 3

1. ('27) AIR 1927 Cal 199 (199, 200) : 28 Cr. L. J. 141, *Emperor v. Monmothanath*.

trial should have commenced anew.¹ Similarly, where, in the course of a trial, it appears that any juror is unable to understand the language in which evidence is given, or, when such evidence is interpreted, the language in which it is interpreted, a new juror should be added, or the jury should be discharged and a fresh jury empanelled and the trial must commence anew.²

Section 282
Note 4

Discharge
of jury in case
of sickness of
prisoner.

283.* The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

Section 283

1. Legislative changes. — This provision of law was first incorporated in the Code of 1872.

2. Scope of the section. — See Note 2 to Section 282.

D. — Choosing Assessors.

284.† When the trial is to be held with the aid of assessors, not less than three and, if practicable, four shall be chosen from the persons summoned to act as such.

Section 284

Assessors how
chosen.

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. "Not less than three." 3. "And if practicable, four." 4. "Shall be chosen," meaning of. 5. "From the persons summoned to act as such." 6. Objections as to assessors. | <ol style="list-style-type: none"> 7. Procedure when an assessor is discovered subsequently to be interested in the case. See S. 285 Note 6. 8. Power of Appellate Court to appoint assessors. 9. Effect of non-compliance with the section. |
|---|---|

Other Topics (miscellaneous)

Commencement of trial with assessors. See Note 4.

Qualifications of assessors. See Note 4.

Record of reasons for not having four assessors. See Note 3.

1. Legislative changes.

1. The words "two or more persons" which occurred in S. 342 of the Code of 1861 were omitted in S. 239 of the Code of 1872 but were re-introduced in S. 284 of the Code of 1882.

2. Amendment by Act XII of 1923 —

(a) The words "not less than three and if practicable, four" have been substituted for the words "two or more."

(b) The words "as the Judge thinks fit" have been omitted.

* 1882 : S. 283; 1872 and 1861 — Nil.

† Code of 1898, original S. 284.

Assessors how
chosen.

When the trial is to be held with the aid of assessors, two or more shall be chosen, as the judge thinks fit, from the persons summoned to act as such.

1882 : S. 284; 1872 : S. 239; 1861 : S. 342.

Note 4

1. ('14) AIR 1914 All 91 (92) : 36 All 481 : 15 Cri L Jour 538, *Emperor v. Narain*. (Although in this case statements of witnesses previously examined were read over and their admission secured.)
2. ('38) AIR 1938 Pat 60 (62) : 39 Cri L Jour 302, *Ram Babu v. Emperor*.

Section 284
Notes 2-5

2. "Not less than three." — Under the present section as amended in 1923, there should at least be *three* assessors. Prior to this amendment, the minimum number required was *two*. The section is imperative, and where at least the minimum number of assessors do not attend, the Court is not properly constituted and has no jurisdiction to try the case.¹

3. "And if practicable, four." — Where a lesser number of assessors than four is chosen the Court should give reasons to explain the impracticability of having four. But a trial with three assessors without a record of these reasons is not irregular and does not offend against the provisions of this section.¹

4. "Shall be chosen," meaning of. — This section, unlike S. 276, does not prescribe that the assessors are to be chosen by lot. In fact it does not say that they ought to be chosen in any particular manner. It is not the law that the assessors must be chosen by lot. The word 'chosen' does not necessarily imply that there ought to be a selection from a larger number than required for the trial.¹

A mere *choosing* of assessors is not enough. They must *function* as assessors at the trial. It is only when proceedings are commenced at which assessors can give their aid, that the trial with their aid as contemplated under S. 268 and this section can be said to have commenced. So where, though the required number of assessors is chosen as required by this section, some of them are discharged on some ground or other *before the trial actually starts*, and the same goes on with less than the required number of assessors, the requirements of this section are not satisfied.^{1a}

The selection of the assessors is entirely with the Judge. In selecting them regard must be had to the nature of the case, to the person who is tried, to the nature of the evidence that is brought against him, and to the public feeling. The assessors ought not to be pleaders, nor young men fresh from college, devoid of experience. They must be persons of independent condition in life, men of judgment and experience.²

5. "From the persons summoned to act as such." — As to the summoning of assessors, see Ss. 326 and 327.

Section 279 empowers the Judge, under special circumstances, to choose a person present in Court to act as a *juror* though he had not

Section 284 — Note 2

1. ('24) AIR 1924 Oudh 417 (417), *Pragi v. Emperor*. (Trial with two assessors after 1923, *held* illegal.)

('24) AIR 1924 Nag 287 (287) : 20 Nag L R 129 : 25 Cri L Jour 459, *Jairam v. Emperor*. (Do.)

('01) 25 Bom 694 (696) : 3 Bom L R 274, *King-Emperor v. Jayram*. (Trial with one assessor when the minimum number required was two.)

Note 3

1. ('25) AIR 1925 Pat 381 (382) : 26 Cri L Jour 713, *Jamal Momim v. Emperor*. See also Note 9.

Note 4

1. ('38) AIR 1938 Pat 60 (62) : 39 Cri L Jour 302, *Ram Babu v. Emperor*.

1a. ('91) 15 Bom 514 (515), *Queen-Empress v. Bastiano Alexander*.

2. ('75) 23 Suth W R Cr 35 (39), *Empress v. Ram Dutt Chowdhry*.

been summoned as required by S. 276. There is no provision corresponding to that with regard to the selection of assessors. So, no person can be asked to act as an assessor unless he had been summoned under ss. 326 and 327 to act as such¹ and such summons can be issued only to persons whose names have been included in the list prepared under S. 321.² But where on the date of the trial only three of the assessors summoned under S. 326 remain present and a person present in Court whose name is on the list of persons qualified to serve as assessors is served with a summons to appear and act as such and the Judge chooses him as an assessor on the date of the trial, it cannot be said that he was not chosen in accordance with law and the trial is not contrary to law.^{2a} Where an assessor summoned to appear on a particular day failed to appear on that day but appeared on a subsequent date during the same session when another trial had to commence, it was held that he could be selected to act as assessor in that trial.³

Where the assessors with whose aid the case was tried were chosen from the persons summoned to act as *jurors*, it was held that the trial was illegal.⁴

6. Objections as to assessors.— There is no section, corresponding to S. 278, providing for objections to the selection of any particular person as an assessor. It is, however, an elementary principle that assessors selected should be above suspicion inasmuch as their opinion is of great value both to the Judge who tries the case, and to the superior Court. There is no reason therefore why an objection of presumed or actual partiality, when it is urged at the time of the selection of assessors, should not be allowed.¹

There is no provision in the case of assessors corresponding to S. 282 as in the case of jurors. Even if the principle of that section applies, the fact that an assessor (who understands the language of the Court) does not understand English will not invalidate a trial unless there has been a failure to interpret in the court language evidence which had been given in English. Similarly, the fact that some documents are in English which the assessor is unable to understand will

**Section 284;
Notes 5-6**

Note 5

1. ('94) 1894 All W N 207 (207), *Empress v. Badri*.
(13) 14 Cri L Jour 654 (654) : 35 All 570 : 21 I. C. 894, *Man Singh v. Emperor*.
(Trial with the aid of two assessors, one of whom only was summoned for particular sessions is illegal.)
- (10) 11 Cr. L. J. 724 (725) : 13 Oudh Cas 337 : 8 I. C. 874, *Khub Singh v. Emperor*.
(Failure to object to person sitting as assessor when such person's name is not in the assessor's list is immaterial—Trial is illegal notwithstanding such failure to object.)
- (18) AIR 1918 Pat 420 (420) : 3 Pat L J 141 : 19 Cr. L. J. 363, *Balak v. Emperor*.
See also Note 9 and S. 326 Note 4.
2. ('86) 1886 Rat 304 (304), *Queen-Empress v. Govind Rao*.
- 2a. ('38) AIR 1938 Pat 60 (62) : 39 Cri L Jour 302, *Ram Babu v. Emperor*.
3. ('16) AIR 1916 All 54 (56) : 17 Cri L Jour 17 (18), *Chutta v. Emperor*.
4. ('33) AIR 1933 Oudh 351 (352) : 34 Cri L Jour 1093, *Sheopal v. Emperor*.

Note 6

1. ('23) AIR 1923 Pat 116 (119) : 22 Cr. L. J. 262, *Shivadhin Singh v. King-Emperor*. (Objection on the ground of the assessor being a tenant of other party.)

Section 284
Notes 6-9

not go against the competency of the assessor or the lawful constitution of the Court.²

7. Procedure when an assessor is discovered subsequently to be interested in the case. — See Section 285 Note 6.

8. Power of appellate Court to appoint assessors. — An appellate Court has no power to appoint the assessors for the purposes of appeal.¹

9. Effect of non-compliance with the section. — The provisions of this section are *mandatory*. So, where a trial commences and proceeds with less than minimum number of assessors,¹ or where some of the required number of assessors are appointed out of persons not summoned to act as such,² the Court is not properly constituted and the whole trial is illegal. But where an assessor summoned to appear on a particular date for the purpose of any particular case, appears only on a different date, and a different case is started with him as one of the assessors,³ or where only three assessors are chosen without giving reasons for not choosing four (after the amendment in 1923),⁴ the trial is not illegal.

Section 284A**284A.* (1) In a trial with the aid of assessors**

*** Code of 1898 : S. 460.**

In every case triable by jury or with the aid of assessors, in which an European (not being a British subject) or an American is the accused person, or one of the accused persons, not less than half the number of jurors or assessors shall, if practicable and if such European or American so claims, be Europeans or Americans.

2. ('38) AIR 1938 Pat 60 (62, 63) : 39 Cr. L. J. 302, *Ram Babu v. Emperor*.

Note 8

1. ('68) 1868 Pun Re No. 17 Cr, p. 42, *Crown v. Syud Ahmad*.
See also S. 423 Note 12.

Note 9

1. ('24) AIR 1924 Oudh 417 (417), *Pragi v. Emperor*. (Trial with two assessors after 1923.)

('25) AIR 1925 Oudh 110 (110) : 27 Oudh Cas 213 : 26 Cr. L. J. 359, *Ram Narain v. Emperor*. (Do.)

('01) 25 Bom 694 (696) : 3 Bom L R 274, *King-Emperor v. Jayram*. (Trial with one assessor where minimum number required was two — Irregularity not cured by S. 537.)

('01) 2 Weir 340 (340) : 24 Mad 523 : 11 M L J 241, *King-Emperor v. Thirumalai Reddi*. (Trial with only one assessor capable of acting, the other being deaf and dumb.)

('99) 21 All 106 (107) : 1898 All W N 185, *Queen-Empress v. Babu Lal*. (Do.)

('91) 15 Bom 514 (515), *Queen-Empress v. Bastiano Alexander*. (Trial with one assessor after the other though summoned, has been discharged before the commencement of trial.)

2. ('94) 1894 All W N 207 (207), *Queen-Empress v. Badri*. (S. 537 held inapplicable to such a case.)

('18) AIR 1918 Pat 420 (420) : 3 Pat L J 141 : 19 Cr. L. J. 363, *Balak Singh v. Emperor*.

('13) 14 Cr. L. J. 654 (654) : 35 All 570 : 21 I. C. 894, *Man Singh v. Emperor*.

('10) 11 Cr. L. J. 724 (725) : 13 Oudh Cas 337 : 8 I. C. 874, *Khud Singh v. Emperor*.
See also Note 5 and S. 326 Note 4.

3. ('16) AIR 1916 All 54 (56) : 17 Cr. L. J. 17 (18), *Chutta v. Emperor*.

4. ('25) AIR 1925 Pat 381 (382) : 26 Cr. L. J. 713, *Jamal Momim v. Emperor*.
See also Note 3.

Assessors for trial of European and Indian British subjects and others.

of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

Section 284A

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.

This section was newly inserted by the Criminal Law Amendment Act, XII of 1923.

1. Scope of the section. — See Note 1 to Section 275.

2. Failure to claim privilege. — See Section 528B.

285.* (1) If in the course of a trial with the

Section 285

Procedure when assessor is unable to attend.

aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

Synopsis

- | | |
|--|---|
| <p>1. Legislative changes.</p> <p>2. Scope and applicability of the section.</p> <p>3. "Prevented from attending, or absent themselves" — Sub-section (2).</p> | <p>4. "Shall proceed with the aid of the other assessor or assessors."</p> <p>5. All assessors absent — Sub-s.(2).</p> <p>6. If assessor is an interested person — Procedure.</p> |
|--|---|

* 1882 : S. 285; 1872 : S. 259; 1861 : S. 353.

Section 285
Notes 1-4

Other Topics (miscellaneous)

Absentee assessor resuming. See Note 4.	Irregularities curable. See Note 4.
Address after discharge of assessors. See Note 5.	Irregularities not curable. See Note 5.
At least, one assessor to be present throughout. See Note 2.	Section applies to defects after trial is begun. See Note 2.
Evidence after discharge of assessors. See Note 5.	Subsequent discovery of incapacity. See Note 6.
	"Sufficient cause." See Note 6.

1. Legislative changes.

- (1) There is no material difference between the corresponding sections of the Codes of 1861 and 1872.
- (2) The words "prevented from attending throughout the trial" which occurred in S. 259 of the Code of 1872 have been substituted by the words "prevented from attendance" in the Codes of 1882 and 1898.

2. Scope and applicability of the section. — This section applies only where, *in the course of a trial*, an assessor is unable to attend. It contemplates the case of a trial which has *commenced with the requisite number* of assessors who, at the commencement of the trial, were capable of acting as competent assessors. It has no application to trials conducted *from the start* with less than the requisite number of competent assessors.¹

There must be at least *one* assessor attending throughout the proceedings² and this requirement is a condition precedent to the exercise of jurisdiction by the Court.³

3. "Prevented from attending, or absent themselves" — Sub-section (2). — The words "prevented from attending, or absent themselves" in sub-s. (2) of this section should be read with sub-s. (1) and should be understood to mean "prevented from attending *throughout the trial*, or absent themselves."¹

4. "Shall proceed with the aid of the other assessor or assessors." — This procedure has to be adopted only when it is *not practicable* to enforce the attendance of the absentee assessor. Where the Judge allowed one of two assessors to absent himself for one of the days of the trial and proceeded to try the case with the other assessor, it was held that the Judge ought not to have proceeded with the trial,

Section 285 — Note 2

1. ('99) 21 All 106 (107): 1898 A W N 185, *Empress v. Babu Lal*. (Three assessors chosen—One found to be deaf—Trial proceeded with two — One more found to be deaf after prosecution evidence was over—Trial, however, proceeded—Illegal.)
- ('91) 15 Bom 514 (515), *Queen-Empress v. Bastiano*.
- ('94) 1894 All W N 207 (207), *Queen-Empress v. Badri*.
- ('01) 25 Bom 694 (696): 3 Bom L R 274, *King-Emperor v. Jayram*.
- ('18) AIR 1918 Pat 420 (420): 3 Pat L Jour 141: 19 Cr.L.J. 363, *Balak v. Emperor*.
- ('69) Weir's 3rd Edn. 927 (927), *High Court Proceedings, 22nd July 1869*. (Where at the close of the trial one of the assessors was discovered to be so deaf and blind as to be incapable of understanding the proceedings, the trial was held to be null and void.)
2. ('91) 13 All 337 (338): 1891 A W N 93, *Empress v. Md. Mahmud Khan*.
- ('02) 6 Cal W N 715 (716), *King-Emperor v. Messeruddin Shikdar*.
3. ('01) 24 Mad 523 (535): 11 M L J 241, *King-Emperor v. Therumalai Reddi*. See also S. 267 Note 2.

Note 3

1. ('91) 13 All 337 (338, 339): 1891 A W N 93, *Empress v. Md. Mahmud Khan*.

but should have adjourned the trial till a day when both assessors could attend.¹ Where an assessor absents himself, he should not be allowed to return and take part in the proceedings at a later stage.² The reason is that when once the trial is resumed by the Judge in the absence of an assessor, such assessor ceases to occupy the position of an assessor aiding at the trial.³ If, consequently, he is allowed to return and take part in the proceedings and give his opinion, the procedure is not in accordance with law,⁴ and is contrary to the intentions of this section and S. 295.⁵ The procedure is, however, only an irregularity which is cured by S. 537 unless it has occasioned a failure of justice.⁶

Section 285
Notes 4-6

5. All assessors absent — Sub-section (2). — It has been seen already in Note 2 that for a valid trial at least one assessor must attend throughout the trial. If *all* the assessors are prevented from attending or no one assessor is able to attend throughout the trial, the proceedings should be stayed and a new trial held with the aid of fresh assessors.¹ But a Sessions Judge is only authorised to record evidence in the absence of the jury or the assessors when *additional evidence* is called for by the appellate Court, under S. 429, sub-s.(3)² or by the High Court under section 375, sub-s.(2). Where material evidence was recorded after all the assessors were discharged, it was held that such evidence was recorded *coram non iudice*, — that is, before a tribunal which had no authority to record it.³ The same principle will apply where there was no assessor present during the address on behalf of the accused.⁴ The non-compliance with this sub-section affects the jurisdiction of the Court and the irregularity is, therefore, not one curable under section 537.⁵

6. If assessor is an interested person — Procedure. — Where it is discovered after the trial has begun, in a case tried with the aid of assessors, that one of them is interested or otherwise unfit to sit as an assessor, this section does not apply as the said assessor is neither prevented from attending nor absents himself. In such a case, the

Note 4

1. ('94) 1894 Rat 695 (695), *Empress v. Piso*.
2. ('01) 24 Mad 523 (532, 534) : 11 M L J 241, *Emperor v. Therumalai*.
3. ('94) 8 C P L R Cr 9 (12), *Empress v. Ghasia Chamar*.
4. ('94) 1894 Rat 695 (695), *Empress v. Piso*.
5. ('02) 6 Cal W N 715 (716), *King-Emperor v. Messeruddin Shikdar*.
6. ('94) 8 C P L R Cr 9 (12), *Empress v. Ghasia Chamar*.
7. ('94) 1894 Rat 695 (695), *Empress v. Piso*.
8. ('01) 24 Mad 523(532,534) : 11 M L J 241, *Emperor v. Therumalai*. (Davies, J., dissenting.)

Note 5

1. ('91) 13 All 337(338) : 1891 All W N 93, *Queen-Empress v. Md. Mahmud Khan*.
2. ('93) 15 All 136 (137) : 1893 All W N 50, *Queen-Empress v. Ram Lall*.
See also S. 268 Note 4 and S. 428 Note 8.
3. ('93) 15 All 136 (137) : 1893 All W N 50, *Queen-Empress v. Ram Lall*.
('73) 5 N W P H C R 110 (112), *Queen v. Cheit Ram*. (Trial should not have proceeded without assessors when a material addition was made to the plea of guilty.)
See also S. 268 Note 4.
4. ('91) 13 All 337(339) : 1891 All W N 93, *Queen-Empress v. Md. Mahmud Khan*.
5. ('93) 15 All 136 (137) : 1893 All W N 50, *Queen-Empress v. Ram Lall*. (Material evidence recorded after assessors were discharged—Illegality.)
See also S. 268 Note 4.

Section 285
Note 6

Sessions Judge should ask the High Court under S. 483 to set aside the order by which the incompetent assessor was appointed as well as all the subsequent proceedings and then choose another assessor and proceed with the trial *de novo*.¹ Where, however, at the end of the trial one of the assessors expresses the opinion that the accused is guilty adding that he has personal knowledge of the matter, there is no necessity of a *de novo* trial as the assessor cannot be said to be an interested person. The proper course for the Judge is simply to ignore the opinion of the assessor if he comes to the conclusion that it is improperly expressed or that he has been influenced by extra-judicial considerations.²

DD. — Joint trials.

Section 285A

285A. In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian; and such European, Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 284A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter.

1. Legislative changes. — This section together with the heading was inserted by the Criminal Law Amendment Act, XII of 1923.

Compare Ss. 452 and 461 of the Code of 1882, S. 242 of the Code of 1872 and S. 326 of the Code of 1861.

The undermentioned cases¹ under S. 452 of the Code, which has now been repealed, are no longer of any importance.

2. "And is so tried." — The words "and is so tried" in this section mean "if he is in fact so tried" or "if he is eventually so tried." Thus, a European was accused jointly with an Indian and when they

Note 6

1. ('12) 13 Cri L Jour 473 (473, 474) : 15 Ind Cas 313 (Mad), *Sessions Judge of Tanjore v. Thiagaraja Thevan*. (Assessor son-in-law of the person murdered.) ('33) AIR 1933 Lah 926 (927) : 35 Cr.L.J. 107 : 15 Lah 20, *Emperor v. Lal Singh*. (Interested assessor — High Court has power under S. 561A to order retrial.)
2. ('39) AIR 1939 Lah 475 (479) : 41 Cri L Jour 55 : ILR (1939) Lah 243, *Emperor v. Palku*. (Distinguishing AIR 1933 Lah 926.)

Section 285A — Note 1

1. ('90) 14 Bom 160 (162), *In re Job Solomon*. ('76) 1 Bom 232 (235), *Reg. v. Lalubhai Gopaldas*.

appeared for the first time before the Sessions Judge, the European wanted to be tried as a European British subject and the other accused wanted to be tried jointly with him. The Sessions Judge instead of starting the proceeding under S. 271 referred the matter for the orders of the High Court as it was not possible to get sufficient European jurors in the place. The High Court directed the case to be tried by another Sessions Court. The Indian accused when he appeared before the latter Court claimed to be tried separately and contended that as no trial was in progress when he had previously stated that he did not want to be tried separately, he was not bound by his previous choice. The contention was held to be untenable.¹

Section 285A
Notes 2-3

3. Failure to claim separate trial — Effect. — See Section 528B. See also the undermentioned case.¹

*E. — Trial to Close of Cases for
Prosecution and Defence.*

286.* (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

Section 286

(2) The prosecutor shall then examine his witnesses.

Synopsis

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|---|--|
| 1. Legislative changes. | 9. Attendance of witnesses. See Section 216. |
| 2. "When the jurors or assessors have been chosen." | 10. Cross-examination to follow examination-in-chief. |
| 3. "The prosecutor shall open his case." | 11. Improper examination. |
| 4. "By reading." | 12. Questions by judge, jury or assessors. |
| 5. Examination of accused before opening of case. | 13. Duty of prosecution. |
| 6. "Shall then examine his witnesses." | 14. Trial ought not to be stopped before the close of the prosecution. |
| 7. Examination must be oral. | 15. Treatment of witnesses. |
| 8. Using depositions given before the Magistrate. See Ss. 288 and 353 and Notes thereunder. | |

* 1882 : S. 286; 1872 : S. 247; 1861 : S. 364.

Note 2

1. ('38) AIR 1938 Nag 328 (333) : ILR (1938) Nag 516 : 39 Cri L Jour 818, *Surajpalsingh v. Emperor*.

Note 3

1. ('38) AIR 1938 Nag 328 (333) : ILR (1938) Nag 516 : 39 Cri L Jour 818, *Surajpalsingh v. Emperor*. (Where an Indian accused originally wished to be jointly tried with the European accused, but when the case came before a different Sessions Court claimed to be separately tried, which was not permitted, and revision from this order was also dismissed, *held*, he could not in an appeal from the conviction in such trial, re-agitate the claim for separate trial.)

Section 286
Notes 1-3

Other Topics (miscellaneous)

Adjournment for prosecution. See Note 2.	Evidence taken by another Judge. See Note 2.
Discrepancies—Opportunity to explain. See Note 13.	Fresh witnesses in Sessions. See Notes 3 and 6.
Evidence in absence of jury. See Note 6.	Tender for cross-examination. See Note 6.

1. Legislative changes. — This section was first introduced in its present form by the Act of 1882 and remains unaltered in the present Code.

2. "When the jurors or assessors have been chosen." — After the jurors are sworn, the trial should proceed and cannot be postponed to enable the prosecution to examine a witness on commission.¹ If, after the swearing in of the jury, the Judge is unable to attend, as where he falls ill suddenly, the trial can proceed further before a new Judge with the same jury provided no evidence has been taken and, if taken, the latter Judge does not act upon it.²

3. "The prosecutor shall open his case." — The opening of the prosecution must always be confined to matters which are necessary to enable the jury to follow the evidence. The prosecutor will have to state all that it is proposed to prove in the case, so that the jury may see if there is any discrepancy between the opening statement of the prosecutor and the evidence afterwards adduced in support thereof. It would be wholly improper for him to open any matter to the jury in respect whereof no evidence is intended to be read or can be adduced at the trial. Nor is it the stage where a doubtful question of admissibility should be raised or decided. Very great care must be taken by the prosecutor in the observations to be made to the jury and topics of prejudice connected with the character of the prisoner should be carefully excluded.¹

The prosecutor should state in his opening address who the witnesses are, whom he proposes to call and who have not already been examined. Though the mere fact that a witness has not been examined before the committing Magistrate is no ground for refusing to take the evidence of a relevant witness tendered for the prosecution, the examination of additional witnesses should not, as a general rule, be sprung as a surprise on the accused.² The Court should see that the prosecution puts forward a real case from the beginning and sticks to it up to the end.³

Section 286 — Note 2

1. ('92) 19 Cal 113 (122), *Queen-Empress v. Jacob*.
2. ('27) AIR 1927 Bom 161 (162) : 28 Cr.L.J. 402, *Emperor v. Dorabji Pestonji*. See also S. 350 Note 2.

Note 3

1. ('29) AIR 1929 Cal 617 (620, 625) : 30 Cri L Jour 993 (SB), *Padam Prasad v. Emperor*. (Per Rankin, C. J. and C. C. Ghose, J.)
2. ('38) AIR 1938 Pat 579 (582) : 40 Cri L Jour 147, *Yusuf v. Emperor*. (Public Prosecutor should give notice to accused of new evidence in his opening address.) ('89) 1889 Pun Re No. 1 Cr, p. 1 (4), *Khan Mahammad v. Empress*.
3. ('27) AIR 1927 Mad 533 (535) : 28 Cri L Jour 285, *In re Biswanath Das*. ('28) AIR 1928 All 696 (697) : 29 Cr.L.J. 1084 : 51 All 463, *Bhan Deb v. Emperor*. (Prosecution cannot be permitted at the last moment without notice to accused to change its ground.)

A Full Bench of the High Court of Lahore has expressed an opinion in the undermentioned case⁴ that, in accordance with the practice of the English Courts, a summary of the evidence proposed to be called should be given to the Sessions Court and the accused before the trial, if a witness has not been called in the committing Magistrate's Court.

4. "By reading." — The accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, for, unless he has such knowledge, he may be seriously prejudiced in his defence.¹

5. Examination of accused before opening of case. — Section 342 of the Code empowering the Court to examine the accused *at any stage*, must be read subject to the provisions of this section. Therefore, a Court should not, before the prosecutor opens his case and examines his witnesses, under this section, examine the accused under section 342.¹

6. "Shall then examine his witnesses." — The prosecution witnesses should, as far as possible, be called to prove events in their chronological order.¹ It is entirely in the discretion of the Public Prosecutor to say what witnesses he will examine^{1a} and in what order. The Judge cannot dictate to the prosecution the order in which the witnesses are to be examined, though he may suggest that the proper method and order of calling the witnesses should be observed.²

4. ('36) AIR 1936 Lah 533 (537) : 37 Cri L Jour 742 : 17 Lah 176 (FB), *Mt. Niamat v. Emperor*.

Note 4

1. ('16) AIR 1916 Cal 188 (192) : 16 Cri L Jour 497 (501) : 42 Cal 957, *Amritalal Hazra v. Emperor*.

See also S. 221 Note 1, S. 223 Note 1, S. 255 Note 3 and S. 535 Note 3.

Note 5

1. ('22) AIR 1922 All 266 (267) : 24 Cri L Jour 609, *Sukia v. Emperor*.

Note 6

1. ('23) AIR 1923 Cal 579 (581), *Emperor v. Ahirannessa Bibi*.

1a. ('38) 1938 P W N 681 (682), *Bankey Singh v. Dasrath Pandey*. (Prosecution not bound to examine all the witnesses that could possibly have spoken on the point.)

('36) AIR 1936 Lah 533 (536, 537) : 37 Cr. L. J. 742 : 17 Lah 176 (FB), *Mt. Niamat v. Emperor*.

('36) 14 Rang 45 (48), *Nga Aung Gyi v. Emperor*. (Discretion must be exercised under supervision of Court and consistently with practical rules of good sense.)

('94) 16 All 84 (86, 87) : 1894 A W N 7 (F B), *Queen-Empress v. Durga*. (Public Prosecutor should not refuse to call a truthful witness as a witness for Crown merely because evidence of such witness might in some respects be favourable to the defence.)

('82) Weir's 3rd Edn. 941 (941), *In re Modkarow*. (Prosecution not bound to call a witness whose evidence would probably be hostile.)

('35) AIR 1935 Pat 95 (96) : 36 Cr. L. J. 348, *Ibrahim v. Emperor*. (Court is not bound to examine any person as a Court witness, unless the evidence of such person appears to be essential to the just decision of the case.)

[See ('39) AIR 1939 Rang 390 (391) : 41 Cr. L. J. 153, *Nga Sar Kee v. The King*. (In exercising this discretion Public Prosecutor should bear in mind that his duty is to conduct case fairly and that he should not obtain unrighteous conviction.)]

2. ('38) AIR 1938 Rang 442 (445) : 40 Cri L Jour 265, *Brahmaya v. The King*. (If the Judge goes further and instructs him not to call a particular witness, this is going too far.)

('23) AIR 1923 Cal 579 (581, 582), *Emperor v. Ahirannessa Bibi*.

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As a general rule, the prosecutor is bound to call all available witnesses who prove their connexion with the transaction in question and who also must be able to give important information,³ unless he has reasonable grounds to believe that the witness, if called, would not speak the truth, or is unnecessary,⁴ or is an

- (1904) 8 Oudh Cas 55 (56) : 2 Cr. L. J. 191, *Emperor v. Ali Mohammad*.
 3. (1938) AIR 1938 Lah 176 (176) : 39 Cr. L. J. 410, *Bahadur Singh v. Emperor*. (Medical officer examined before committing Magistrate—He must also be examined before Sessions Court.)
 (1938) AIR 1938 Rang 442 (444, 445) : 40 Cri L Jour 265, *Brakmaya v. The King*.
 (1937) AIR 1937 All 182 (186) : 38 Cr. L. J. 401, *Francis Hector v. Emperor*.
 (1982) 8 Cal 121 (124, 125) : 10 C L R 151, *Dhunno Kazi v. Empress*. (Such witnesses can be dispensed with only when it is feared that they would not speak the truth.)
 (1985) 7 All 904 (905, 906) : 1885 A W N 284, *Queen-Empress v. Tulla*. (Material evidence excluded.)
 (1993) 15 All 6 (7) : 1892 A W N 114, *Queen-Empress v. Ban Khandi*.
 (1923) AIR 1923 Cal 517 (519) : 50 Cal 318 : 25 Cr. L. J. 467, *Md. Yunus v. Emperor*.
 (1915) AIR 1915 Cal 545 (546) : 16 Cr. L. J. 170 (172) : 42 Cal 422, *Ram Ranjan v. Emperor*. (It is duty of Prosecutor to investigate truth and not merely to support police.)
 (1920) AIR 1920 Pat 366 (371) : 21 Cr. L. J. 33, *Brahamdeo Singh v. Emperor*.
 (1929) AIR 1929 Pat 343 (345, 346) : 8 Pat 625 : 30 Cri L Jour 1136, *Mathura Tewary v. Emperor*.
 (1905) 3 Low Bur Rul 133 (142, 144), *King-Emperor v. Maung E*. (Material evidence excluded.)
 (1984) 10 Cal 1070 (1072), *Queen-Empress v. Ram Sahai Lall*. (Fact that witnesses were examined by committing Magistrate against the wish of police is not ground for not examining them at the Sessions trial.)
 (1909) 10 Cr. L. J. 321 (323) : 3 I. C. 623 (Lah), *Muzammal v. Emperor*.
 (1910) 11 Cr. L. J. 410 (411) : 6 I. C. 847 : 3 Sind L R 200, *Imperator v. Jumo*. (Two eye-witnesses withheld by prosecution.)
 (1967) 8 Suth W R Cr 87 (90), *Queen v. Nobokisto Ghose*.
 (1932) AIR 1932 Lah 500 (501) : 33 Cr. L. J. 497, *Lachhmi Narain v. Emperor*.
 (1924) AIR 1924 Mad 239 (240) : 25 Cri L Jour 75, *Doraiswami Udayan v. Emperor*.
 (1927) AIR 1927 Mad 475 (476) : 28 Cri L Jour 307, *Mathaya Thevan v. Emperor*.
 (1929) AIR 1929 Mad 906 (909, 910) : 53 Mad 69 : 31 Cr. L. J. 1006, *Veera Koravan v. Emperor*. (Practice of merely tendering material witness for cross-examination should be discouraged.)
 (1991) 1891 Rat 581 (581, 582), *Queen-Empress v. Dhamba*.
 (1969) 11 Suth W R Cr 25 (26, 27), *Queen v. Ahmed Ally*. (The practice of not examining a police-officer who investigates a case condemned.)
 (1933) AIR 1933 Oudh 265 (267) : 34 Cri L Jour 1009, *Ghirrao v. Emperor*. (Post mortem report of Civil Surgeon and reports of Chemical Examiner and Imperial Serologist excluded.)
 (1920) AIR 1920 Pat 42 (43) : 21 Cri L Jour 743, *Keshwar Gope v. Emperor*.
 (1932) AIR 1932 Cal 118 (119) : 58 Cal 1335 : 33 Cri L Jour 135, *Girish Chandra v. Emperor*.
 [See also (1981) 1881 Rat 173 (173, 174), *Queen-Empress v. Rampuri*. (Persons present at the search by investigating officer to be examined.)]
 4. (1938) AIR 1938 Cal 625 (626) : 39 Cr. L. J. 964, *Brinchipada Dafadar v. Emperor*. (Prosecution is not bound to call all witnesses — It is open to jurors to draw adverse inferences from non-examination.)
 (1938) AIR 1938 Pat 579 (581) : 40 Cr. L. J. 147, *Yusuf Mia v. Emperor*. (Sufficient and best evidence produced by prosecution—Evidence on less important facts not necessary.)
 (1938) AIR 1938 Rang 45 (48) : 39 Cr. L. J. 248, *Nga Kyaw Hla v. The King*. (It is not the duty of the prosecution to call as witnesses every one whose statements have been taken by the police but only to call such people as may be likely to give truthful and reliable evidence with regard to the matter in question.)
 (1937) AIR 1937 Rang 429 (430) : 39 Cr. L. J. 217, *Nga Ba U v. Emperor*. (Prosecution witnesses examined at committal proceedings — Intention of such witnesses to tell different story at Sessions trial — Such witnesses, relations of accused — Prosecution should not call them at Sessions trial.)

accomplice himself.^{4a} It is not proper to refuse to examine material witnesses on the ground that a witness may be favourable to the accused or may not be favourable to prosecution,⁵ or that he has

- (‘36) 14 Rang 45 (52), *Nga Aung Gyi v. Emperor*. (It is not the duty of the prosecution to call witnesses who are not in a position to give material information in connexion with the offence, or to tender such witnesses for cross-examination by the defence.)
- (‘94) 16 All 84 (86, 87) : 1894 A W N 7 (FB), *Queen-Empress v. Durga*. (False or unnecessary.)
- (‘27) AIR 1927 Mad 475 (476) : 28 Cr. L. J. 307, *In re Muthaya Thevan*. (Do.)
- (‘24) AIR 1924 Mad 239 (240) : 25 Cr. L. J. 75, *Doraiswami Udayan v. Emperor*. (Do.)
- (‘23) AIR 1923 Pat 413 (416); 2 Pat 809:24 Cr. L. J. 801, *Ramjit Ahir v. Emperor*. (Do.)
- (‘82) 8 Cal 121 (124, 125) : 10 C. L. R. 151, *Dhunno Kazi v. Empress*. (False.)
- (‘85) 7 All 904 (905) : 1885 A W N 284, *Queen-Empress v. Tulla*. (Do.)
- (‘92) 15 All 6 (7) : 1892 A W N 114, *Queen-Empress v. Bankhandi*. (Do.)
- (‘22) AIR 1922 Cal 461 (461) : 49 Cal 277 : 23 Cr. L. J. 742, *Emperor v. Reed*. (Do.)
- (‘23) AIR 1923 Cal 517 (519) : 50 Cal 318 : 25 Cr. L. J. 467, *Muhammad Yunus v. Emperor*. (Do.)
- (‘29) AIR 1929 Pat 343 (346) : 8 Pat 625 : 30 Cr. L. J. 1186, *Mathura Tewari v. Emperor*. (Do.)
- (‘05) 3 Low Bur Rul 133 (142), *King-Emperor v. Maung E*. (Do.)
- (‘16) AIR 1916 Lah 408 (409) : 17 Cr. L. J. 267 (268) : 1916 Pun Re No. 12 Cr, *Kaimi v. Emperor*. (Do.)
- (‘31) 1931 Mad W N 727 (728), *Nagaratna Tevan v. Emperor*. (Hostile.)
- (‘22) AIR 1922 Cal 382 (385) : 49 Cal 358 : 24 Cr. L. J. 221, *Emperor v. Balram Das*. (False.)
- (‘30) AIR 1930 Cal 134 (135) : 31 Cri L Jour 918, *Nayan Mandal v. Emperor*. (Hostile.)
- (‘30) AIR 1930 Lah 82 (84) : 31 Cri L Jour 176, *Amar Singh v. Emperor*. (Do.)
- (‘86) 2 Weir 378 (379), *In re Ramaswami Goundan*. (False.)
- (‘01) 24 Mad 321 (324) : 2 Weir 396, *Queen-Empress v. Ramaswami*. (Do.)
- (‘91) 1891 Rat 581 (582), *Queen-Empress v. Dhamba*. (Do.)
- (‘24) AIR 1924 Lah 241 (243) : 24 Cri L Jour 708, *Inder Singh v. Emperor*. (Unnecessary.)
- (‘28) AIR 1928 Pat 46 (48) : 28 Cr. L. J. 868, *Parbhu Dusadh v. Emperor*. (Do.)
- [See (‘36) AIR 1936 Lah 233 (233) : 37 Cri L Jour 742 : 17 Lah 176 (FB), *Mt. Niamat v. Emperor*. (In a murder case the fact that the prosecution witnesses are relatives of the murdered man is no valid reason for discarding their evidence—What would be of importance is that the witnesses had enmity with the accused.)]
- [See also (‘28) 29 Cri L Jour 999 (1000, 1001) : 112 Ind Cas 215 (216, 217) (Lah), *Bahadur v. Emperor*. (Unnecessary.)]
- See also S. 208 Note 7 and S. 252 Note 5.
- 4a. (‘18) AIR 1918 Cal 314 (315) : 19 Cri L Jour 81, *Ashraf Ali v. Emperor*.
5. (‘37) AIR 1937 All 182 (187) : 38 Cri L Jour 401, *Francis Hectar v. Emperor*. (‘37) 1937 O W N 353 (355), *Nizamuddin v. Emperor*. (A witness should not be withheld because he happens to make some adverse statements against the prosecution.)
- (‘36) AIR 1936 P C 289 (300) : 37 Cri L Jour 963 (PC), *Stephen Seneviratne v. The King*.
- (‘94) 16 All 84 (87) : 1894 A W N 7 (FB), *Queen-Empress v. Durga*.
- (‘20) AIR 1920 Pat 366 (371) : 21 Cri L Jour 33, *Brahamdeo Singha v. Emperor*. (It is the duty of Prosecutor to call every witness who can throw any light on the inquiry, whether they support the prosecution theory or defence theory.)
- (‘04) 1 Cri L Jour 305 (309) : 28 Bom 479 : 6 Bom L R 324, *Emperor v. Bal Gangadhar Tilak*.
- (‘22) AIR 1922 Pat 535 (539) : 1 Pat 401 : 24 Cr. L. J. 129, *Chandrika v. Emperor*.
- (‘34) AIR 1934 All 908 (918) : 57 All 267 : 36 Cr. L. J. 152, *Nem Singh v. Emperor*. (In a murder case where a witness has given evidence which supports a plea of alibi taken by accused, the prosecution authorities have no right to take it upon themselves to decide whether a witness who gives vital evidence of this sort is or is not a reliable witness—That is the function of the Court and prosecution has no right to usurp.)

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also been summoned by the defence,⁶ or that a serious charge is made against the witness by the accused.⁷ At the same time, the prosecution should exercise a careful discrimination and avoid the piling up of evidence, the overburdening of the record and consequent waste of time.^{7a} There is no provision in the Code entitling the prisoner to have a witness for the prosecution who is not called, put into the witness box for cross-examination. The accused may apply to have such witness examined under S.291, if he so requires.⁸ Nevertheless the Public Prosecutor in fairness should explain to the Court his reason for not calling his witness and offer to put him in the box for cross-examination by the accused⁹ especially where the witness is a material one and whose evidence has been relied upon by the committing Magistrate.¹⁰ But where the Public Prosecutor is of opinion that a witness is a false one, he need not even tender him for cross-examination.¹¹ Where any witness known to the prosecution is able to swear to facts very material to the case, the practice of merely allowing him to be tendered for cross-examination is not proper but he must be examined in the ordinary way as to the facts known to him.¹² In undefended cases the Court should in the interests of justice test the statement of the witnesses for the prosecution by questions in the nature of cross-examination.¹³ It cannot, however,

6. ('82) 8 Cal 121 (125) : 10 C L R 151, *Dhunno Kazi v. Empress*.
(20) AIR 1920 Pat 366 (371) : 21 Cri L Jour 33, *Brahamdeo Singha v. Emperor*.
7. ('73) 21 Suth W R Cr 13 (16), *Queen v. Madhub Chunder*.
- 7a. ('33) AIR 1933 All 690 (695) : 34 Cr. L. J. 967 : 55 All 1040, *Jhabwala v. Emperor*.
8. ('68) 5 Bom H C R Cr 85 (96), *Reg v. Fatchchand*.
[See also ('87) 14 Cal 245 (248), *Empress of India v. Kaliprosomno Doss*.]
9. ('85) 7 All 904 (905) : 1885 All W N 284, *Queen-Empress v. Tulla*.
(80) 5 Cal 614 (614, 615) : 5 Cal L Rep 364, *Empress v. Grish Chunder Talukdar*.
(89) 2 Weir 379 (380), *In re Eruva Perayya*.
- (22) AIR 1922 Pat 535 (539) : 1 Pat 401 : 24 Cri L Jour 129, *Chandrika Ram Kahar v. Emperor*.
- (09) 10 Cri L Jour 538 (539) : 4 Ind Cas 273 (Bom), *Mavsang Bhavan v. Emperor*.
- (10) 11 Cri L Jour 410 (411) : 3 Sind L R 200 : 6 I C 847, *Imperator v. Jumo*.
- (23) AIR 1923 Cal 717 (718) : 25 Cr. L. J. 190, *Nagendra Chandra v. Emperor*.
- (30) AIR 1930 Cal 134 (135) : 31 Cri L Jour 918, *Nayan Mandal v. Emperor*.
(Defence, having omitted to exercise its privilege of cross-examining witnesses not called, cannot be permitted to raise an objection to that effect later on.)
10. ('92) 14 All 521 (524) : 1892 All W N 110, *Queen-Empress v. Stanton*.
11. ('36) 14 Rang 45 (52), *Nga Aung Gyi v. Emperor*. (All that he is bound to do is to have the witness present at the trial so as to give the Court or the counsel for the defence, as the case may be, an opportunity of examining him as a witness for the defence—When such a witness is examined as a witness for the defence, then the prosecution has an undoubted right to cross-examine him.)
- (94) 16 All 84 (86, 87) : 1894 All W N 7 (F B), *Queen-Empress v. Durga*.
[See also ('38) AIR 1938 Rang 442 (445) : 40 Cri L Jour 265; *Brahmaya v. The King*. (Where witness has been examined as a witness in the committal Court, it is not the duty of the Public Prosecutor to call him unless it is thought that he can give material information in connexion with the offence charged; nor is it his duty to tender him for cross-examination.)]
12. ('29) AIR 1929 Mad 906 (909, 910) : 53 Mad 69 : 31 Cri L Jour 1006, *Veerakoravan v. Emperor*. (Especially in murder cases.)
13. ('85) 7 All 160 (162) : 1884 All W N 314, *Queen-Empress v. Kallu*. (Per Petheram, C. J.)
[See also ('38) AIR 1938 Pat 153 (158) : 39 Cri L Jour 384, *Darpan Poldarin v. Emperor*. (Lawyer appointed by Crown to defend a poor prisoner doing his work very badly—Judge should use his greater experience to cross-examine prosecution witnesses.)]

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take upon itself the role of a prosecutor and ask the prosecution witnesses to explain discrepancies.¹⁴ As to effect of non-examination by the prosecution of a material witness and the inference to be drawn therefrom, see section 114, illustration (g) of the Evidence Act and the undermentioned cases.¹⁵

14. ('25) AIR 1925 Oudh 726 (727) : 26 Cri L Jour 1236, *Sarju Singh v. Emperor*.
15. ('38) AIR 1938 Cal 625 (626) : 39 Cri L Jour 964, *Brinchipada Dafadar v. Emperor*. (It is open to the jurors to draw inference unfavourable to the prosecution for the non-examination of particular witnesses.)
- ('38) 39 Cri L Jour 7 (9) : 171 Ind Cas 906 (Lah), *Gulam Rasul v. Emperor*. (If the independent witnesses who were named in the first information report are not called by the prosecution, the Court is justified in assuming that their evidence would not have supported the prosecution.)
- ('38) AIR 1938 Pat 579 (581) : 40 Cr. L. J. 147, *Yusuf Mia v. Emperor*. (Effect of and inference to be drawn from absence of relevant prosecution witnesses is a matter to be considered with reference to circumstances of each particular case.)
- ('38) 1938 P W N 681 (682), *Bankey Singh v. Dasrath Pandey*. (It is for the Court to consider whether or not the non-examination of a witness calls for an adverse inference against the prosecution—If the prosecution is content with the witnesses examined by it, it is not bound to examine all the witnesses that could have possibly spoken on any point.)
- ('37) AIR 1937 All 182 (186) : 38 Cri L Jour 401, *Francis Hector v. Emperor*. (Prosecution deliberately withholding evidence of witnesses who are in a position to give relevant evidence must face the inference arising from such conduct.)
- ('36) AIR 1936 Pat 46 (48) : 37 Cr. L. J. 320, *Hari Mahito v. Emperor*. (Prosecution citing nine witnesses on certain point—Examining only three—Presumption adverse to prosecution held could not be drawn from that fact.)
- ('85) 7 All 904 (905, 906) : 1885 All W N 284, *Queen-Empress v. Tulla*. (Retrial ordered.)
- ('32) AIR 1932 All 185 (186) : 33 Cri L Jour 943, *Mohammad Bashir v. Emperor*.
- ('82) 8 Cal 121 (125) : 10 Cal L Rep 151, *Empress v. Dhunno Kazi*. (Retrial.)
- ('15) AIR 1915 Cal 545 (547) : 16 Cri L Jour 170 (172) : 42 Cal 422, *Ram Ranjan Roy v. Emperor*. (Witness favourable to accused withheld — Accused acquitted.)
- ('31) AIR 1931 Lah 408 (415) : 32 Cr. L. J. 818, *Indar Datt v. Emperor*. (Necessary prosecution witness disappearing mysteriously—Inference adverse to prosecution.)
- ('19) AIR 1919 Pat 27 (29) : 4 Pat L Jour 74 : 20 Cri L Jour 161 (FB), *Mt. Kesar v. Emperor*. (Failure to produce material evidence contained in the particular telegrams stamps the Crown's case ab initio with grave suspicion as to its honesty and *bona fides*.)
- ('20) AIR 1920 Pat 42 (43, 44) : 21 Cri L Jour 743, *Keshwar Gope v. Emperor*. (Conviction set aside.)
- ('20) AIR 1920 Pat 366 (371) : 21 Cr. L. J. 33, *Brahamdeo Singha v. Emperor*. (Do.)
- ('29) 1929 Mad W N 587 (591, 592), *Kumaraswami Asari v. Emperor*.
- ('22) AIR 1922 Pat 535 (539) : 1 Pat 401 : 24 Cri L Jour 129, *Chandrika Ram Kahar v. Emperor*. (Failure to produce first informant as a witness makes prosecution case suspicious.)
- ('22) AIR 1922 Pat 582 (584, 585) : 1 Pat 630 : 24 Cri L Jour 91, *Niru Bhagat v. Emperor*. (Non-production of material witnesses like the investigation officers is a serious omission.)
- ('28) AIR 1928 Pat 98 (100) : 28 Cr. L. J. 906, *Jogi Raut v. Emperor*. (Fact that material witnesses not produced is sufficient to discredit prosecution version.)
- ('07) 6 Cri L Jour 304 (313) : 11 C W N 1085, *Nibaran Chandra Roy v. Emperor*.
- ('16) AIR 1916 Lah 408 (409) : 17 Cri L Jour 267 (268) : 1916 Pun Re No. 12 Cr, *Kaimi v. Emperor*.
- ('30) AIR 1930 Cal 134 (136) : 31 Cri L Jour 918, *Nayan Mandal v. Emperor*. (Held that some witnesses were false and some not material and therefore non-production of them not illegal.)
- ('19) AIR 1919 Lah 158 (159) : 20 Cri L Jour 519, *Emperor v. Amolak Ram*.
- ('28) AIR 1928 Lah 125 (128) : 29 Cri L Jour 212, *Taj Mohammad v. Emperor*.
- ('29) AIR 1929 Pat 651 (654) : 9 Pat 647 : 31 Cri L Jour 306, *Krishna Maharana v. Emperor*.
- ('30) AIR 1930 Lah 163 (165) : 31 Cr. L. J. 131, *Jowaya v. Emperor*. (Held that non-production of witnesses was justified because they were unnecessary.)

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On this question of the examination of witnesses by the prosecution, their Lordships of the Privy Council, in *Stephen Seneviratne v. The King*,^{15a} observed as follows:

"Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."

Though there is nothing in the Code which says that the prosecutor at a sessions trial can examine only such witnesses as have been examined before a committing Magistrate,¹⁶ yet the prosecutor cannot, as of right, demand that any witness who was not examined by the committing Magistrate either under S. 208 or S. 219 should be called and examined, but the Court may call and examine such a witness if it considers it necessary in the interests of justice.¹⁷ But only the witnesses examined in the committing Magistrate's Court can be bound down to attend in the Sessions Court. If the witnesses are

('32) AIR 1932 Cal 118 (119, 120): 58 Cal 1335: 33 Cr. L. J. 135, *Girish Chandra Namadas v. Emperor*. (Non-production of witnesses does not in itself give rise to the presumption under S. 114 (g), Evidence Act.)

('32) AIR 1932 Cal 871 (875, 876): 34 Cri L Jour 181: 60 Cal 149, *Nafur Sardar v. Emperor*. (Where prosecution have examined sufficient witnesses to prove their case the mere fact that they had not examined other witnesses who could have given evidence is not sufficient to set aside conviction.)

('33) AIR 1933 Cal 600 (602): 60 Cal 1361: 35 Cri L Jour 33, *Bhuban Bijay Singh v. Emperor*. (Simply because the prosecution does not call certain witnesses, the Court need not raise the presumption under S. 114, Ill. (g) when the absence of the witnesses is explained properly.)

('23) AIR 1923 Oudh 217 (224): 24 Cri L Jour 770, *King-Emperor v. Narotam*. (Two eye-witnesses sent up by the police not examined by Court—*Held*, that there must be some limit to the number of witnesses a Court is asked to hear and no argument favourable to the accused could be based on the fact that the two witnesses had not been called.)

See also S. 208 Note 7 and S. 252 Note 5.

15a. ('36) AIR 1936 PC 289 (300): 37 Cri L Jour 963 (PC).

16. ('36) AIR 1936 Lah 533 (537): 37 Cr. L. J. 742: 17 Lah 176 (FB), *Mt. Niamat v. Emperor*. (Overruling AIR 1934 Lah 667.)

('89) 1889 Pun Re No. 1 Cr, p. 1 (4), *Khan Muhammad v. Empress*.

('34) AIR 1934 Bom 487 (487): 36 Cr. L. J. 344, *Emperor v. Dhondiba*. (Summary of evidence which a new witness is expected to give must be supplied to the Judge.)

('35) AIR 1935 Sind 31 (33): 28 Sind L R 317: 36 Cri L Jour 563, *Nandram v. Emperor*. (Prosecution need not examine in committing Magistrate's Court all witnesses whom it is going to produce in Sessions Court—But the principal witnesses at least must be examined in the committing Magistrate's Court.)

[See ('30) AIR 1930 Sind 99 (103): 24 Sind L R 96: 31 Cri L Jour 117, *Nurkhan v. Emperor*. (In committal proceedings there is no obligation on the part of the prosecution to get recorded by the committing Magistrate every jot and tittle of the evidence which they intend to place before the Sessions Court.)

('33) AIR 1933 All 690 (694, 695): 34 Cri L Jour 967: 55 All 1040, *Jhabwala v. Emperor*. (The mere fact that some evidence is not produced till proceedings in the Court of Session can in no way prejudice the accused if he has notice of it.)]

17. ('92) 14 All 212 (213, 214): 1892 All W N 63, *Queen-Empress v. Hayfield*.
See also S. 540 Note 7.

not so examined, the prosecution has to depend upon such witnesses, being willing to give evidence without being bound down to appear, or upon being able to persuade the Court under S.540 to summon such a witness.^{17a} The Sind Judicial Commissioner's Court has held that where a material witness has not been examined in the committing Magistrate's Court, his evidence cannot be relied on in the Sessions Court.^{17b} A Sessions Judge commits a material irregularity in procedure in refusing to take the evidence of the persons called as witnesses. Further, even if justified in so refusing, he should leave upon record clear and distinct reasons for adopting such a course.¹⁸ Where a case is tried by jury, the witnesses cannot be examined in the absence of the jury and their evidence, if taken, cannot be acted upon.¹⁹

When a material prosecution witness examined in the committing Magistrate's Court is not examined in the Sessions Court, it is open to the Judge either to draw an adverse inference against the Crown or to examine the witness as a court-witness. But the Judge cannot *compel* the prosecution to examine such witness as a prosecution witness or to tender him for cross-examination.²⁰

7. Examination must be oral. — The examination referred to in this section means oral examination of the witnesses present (except in cases where evidence is taken by commission or where the witness is deaf or dumb). Oral examination is, therefore, the general rule, and it is of utmost importance that the rule should be followed in all cases where the witness is present to be examined. The demeanour of the witness may be important for the assessor or Judge in forming an opinion of his truth.¹

8. Using depositions given before the Magistrate. — See Ss. 288 and 353 and the Notes thereunder.

9. Attendance of witnesses. — See Section 216.

10. Cross-examination to follow examination-in-chief. — The cross-examination of every witness should follow his examination-in-chief. See section 138 of the Evidence Act of 1872. It is both irregular and inconvenient to allow all the witnesses to be examined one day and to reserve the cross-examination to a subsequent date.¹ The accused is, therefore, not entitled as of right to postponement of the cross-examination. The Court may, however, grant such a postponement on reasonable grounds as, for instance, where the counsel is unprepared,²

17a. ('36) AIR 1936 Lah 533 (537) : 37 Cr. L. J. 742 : 17 Lah 176, *Mt. Niamat v. Emperor*.

17b. ('38) AIR 1938 Sind 97 (98, 99) : 39 Cr. L. J. 618 : 32 S L R 709, *Raban Lal v. Emperor*. (Important witness on whom prosecution and Court rely not examined in committing Court—Conviction will be set aside and retrial ordered.)

('35) AIR 1935 Sind 31 (33) : 28 S L R 317 : 36 Cr. L. J. 563, *Nandram v. Emperor*.

18. ('86) 1886 All W N 68 (68), *Empress v. Nathua*.

19. ('06) 3 Cr. L. J. 42 (43) : 7 Bom L R 979, *Emperor v. Ningappa Sayadappa*.

20. ('35) AIR 1935 Sind 60 (62) : 36 Cr. L. J. 869 : 29 S L R 422, *Emperor v. Dulo*.

Note 7

1. ('86) 9 Mad 83 (84, 85) : 2 Weir 356, *Subba v. Queen-Empress*.

Note 10

1. ('90) 2 Weir 381 (382), *In re Gothuri Venkatappa*.

2. ('14) AIR 1914 Cal 834 (835) : 41 Cal 299 : 15 Cr. L. J. 596, *Sadasiv v. Emperor*.

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or where the accused was undefended the first day and put only a few questions and applied the next day for cross-examination by his pleader explaining why he was not engaged before,³ or where the pleader, appointed to defend the accused, who had no instructions till then, requested the Court to postpone the cross-examination of the prosecution witnesses till the next day after the examinations-in-chief were over.⁴

11. Improper examination.—As to the impropriety of putting leading questions to or cross-examining its own witness by the prosecution or defence, see Ss. 142, 143 and 154 of the Evidence Act and the undermentioned cases.¹

12. Questions by Judge, jury or assessors.—Under s. 166 of the Evidence Act, the jurors or assessors may put any question to the witness through or by leave of the Court which the Judge himself might put and which he considers proper. Section 165 of the same Act enables the Judge to put any questions to the witnesses, which he may consider necessary. See also the undermentioned case.¹

13. Duty of prosecution.—Though the legitimate object of the prosecution is to see that the prisoner is convicted,¹ it is not its duty to obtain a conviction *at any cost*² or obtain an unrighteous

[See also ('20) AIR 1920 Pat 351 (352) : 22 Cr. L. J. 219 : 5 Pat L Jour 706, *Teka Ahir v. Emperor*. (Application for recalling witnesses for cross-examination on ground that on previous occasion the defence was not prepared to cross-examine, having been misled as to the date of the trial—*Held*, that application should be granted.)]

See also S. 344 Note 7.

3. ('20) AIR 1920 Pat 351 (352) : 22 Cr. L. J. 219 : 5 Pat L J 706, *Teka Ahir v. Emperor*.

4. ('29) AIR 1929 Cal 1 (5) : 30 Cr. L. J. 494, *Bazlar Rahman v. Emperor*.

Note 11

1. ('36) AIR 1936 Cal 675 (675, 676) : 37 Cri L Jour 1073 : I L R (1937) All 101, *Samarali v. Emperor*. (It is not right for Public Prosecutor to declare a prosecution witness as hostile — He must ask permission of Court to cross-examine offending witness.)

('22) AIR 1922 Pat 582 (584) : 1 Pat 630 : 24 Cr. L. J. 91, *Niru Bhagat v. Emperor*. (Section 142, Evidence Act.)

('21) AIR 1921 Pat 406 (407), *Dhannu Beldar v. Emperor*. (Leading questions could properly have been put not in examination-in-chief but in cross-examination of a hostile witness.)

('23) AIR 1923 Pat 62 (64) : 1 Pat 758 : 24 Cr. L. J. 69, *Jagdeo Singh v. Emperor*. (Leading question without declaring witness hostile.)

('26) AIR 1926 Cal 139 (143) : 53 Cal 372 : 27 Cri L Jour 266, *Khijiruddin v. Emperor*. (Court's permission not taken for cross-examining a party's own witness—S. 154, Evidence Act.)

('97) 20 All 155 (156, 157) : 1897 All W N 229, *Queen-Empress v. Zawar Husen*.

('21) AIR 1921 Cal 269 (270) : 23 Cr. L. J. 41, *Gangadhar Goala v. R.W.L. Reed*.

Note 12

1. ('38) AIR 1938 Pat 153 (158) : 39 Cr. L. J. 384, *Darpan Potdarin v. Emperor*. (When the lawyer appointed by the Crown to defend a poor prisoner does his work very badly, the Judge should use his greater experience to cross-examine the witnesses.)

Note 13

1. ('30) AIR 1930 Cal 134 (136) : 31 Cri L Jour 918, *Nayan Mandal v. Emperor*.

2. ('37) AIR 1937 Nag 274 (278) : 39 Cri L Jour 92, *Daljit Singh v. Emperor*. (The duty of the prosecutor is to elicit the truth rather than to exercise his ingenuity in pressing the case unduly against the accused.)

('32) AIR 1932 Bom 279 (282) : 56 Bom 434 : 33 Cr. L. J. 613, *Vasudeo v. Emperor*.

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conviction.³ The duty of the Public Prosecutor is to conduct the case fairly and fearlessly and with a full sense of responsibility that attaches to his position.⁴ He should not act as the counsel for any particular person or party and should not aggravate the case against the prisoner or keep back a witness because his evidence may weaken the prosecution case.⁵ He should place before the Court all materials, irrespective of the question as to whether they help the accused or go against him, such as statements before the police^{5a} and material documents.^{5b} His only object should be to aid the Court in discovering the truth.^{5c} He should avoid any proceeding likely to intimidate or unduly influence witnesses on either side. There should be on his part no unseemly eagerness for, or grasping at, a conviction.⁶ The prosecution should take great care not to leave anything ambiguous on the records and to

(16) AIR 1916 Cal 524 (526) : 16 Cr.L.J. 576 (577), *Emperor v. Narendranath*.
(82) 8 Cal 121 (124) : 10 Cal L Rep 151, *Empress v. Dhanoo Kazi*. (Object of prosecution is to secure not a conviction but that justice be done.)

3. (39) AIR 1939 Rang 390 (391) : 41 Cri L Jour 153, *Nga Sar Kee v. The King*.

(36) 14 Rang 45 (49), *Nga Aung Gyi v. Emperor*.

(94) 16 All 84 (86) : 1894 All W N 7 (FB), *Queen-Empress v. Durga*.

4. (39) AIR 1939 Rang 390 (391) : 41 Cr. L. J. 153, *Nga Sar Kee v. The King*.

(36) AIR 1936 P C 289 (300) : 37 Cri L Jour 963 (PC), *Venkata v. Subbayya*.

(36) 14 Rang 45 (49), *Nga Aung Gyi v. Emperor*.

(94) 16 All 84 (86) : 1894 All W N 7 (FB), *Queen-Empress v. Durga*.

(32) AIR 1932 Bom 279 (282) : 56 Bom 434 : 33 Cr.L.J.613, *Wasudeo v. Emperor*.

(15) AIR 1915 Cal 545 (546) : 16 Cr.L.J. 170 : 42 Cal 422, *Ram Ranjan v. Emperor*.

(33) AIR 1933 All 314 (317) : 55 All 379 : 34 Cr. L. J. 689, *Shukul v. Emperor*.

(It is the duty of the prosecution to bring out in evidence everything in favour of an accused person and lay before the Court all the evidence even though some of that evidence may result in an acquittal.)

(73) 20 Suth W R Cr 38 (38), *Queen v. Gunsha Moonda*. (It is the duty of the prosecution to point out to the Court any glaring discrepancy between the evidence being given by a witness before the Court of Session and that previously recorded by the committing officer.)

(20) AIR 1920 Pat 366 (371) : 21 Cri L Jour 33, *Brahmdeo Singha v. Emperor*.

(29) AIR 1929 Pat 275 (283) : 8 Pat 289 : 30 Cr.L.J. 675, *Kunja Subudhi v. Emperor*.

5. (71) 8 Bom H C R Cr 126 (153) (FB), *Reg v. Kashinath Dinkar*.

[See (39) AIR 1939 Rang 390 (392) : 41 Cr.L.J. 153, *Nga Sar Kee v. The King*.

(Public Prosecutor should place whole evidence before Court — It is for Judge and not for him to decide whether certain evidence should be believed or not.)]

5a. (29) AIR 1929 Pat 275 (283) : 8 Pat 289 : 30 Cr. L. J. 675, *Kunja Subudhi v. Emperor*.

(88) 1888 Pun Re No. 1 Cr, p. 1 (2), *Alia Baksh v. Empress*.

5b. (07) 5 Cr. L.J. 427 (429) : 34 Cal 698 : 11 Cal W N 666, *Jatindra v. Emperor*.

(94) 21 Cal 642 (653), *Queen-Empress v. Sagal Samba Sajao*.

5c. (37) AIR 1937 Nag 274 (278) : 39 Cri L Jour 92, *Daljit Singh v. Emperor*.

(86) 1886 Rat 229 (235), *Queen-Empress v. Nepal*.

(71) 8 Bom H C R Cr 126 (153) (FB), *Reg v. Kashinath Dinkar*.

6. (71) 8 Bom H C R Cr 126 (153, 154) (FB), *Reg v. Kashinath Dinkar*.

(16) AIR 1916 Cal 524 (526) : 16 Cr. L. J. 576 (577), *Emperor v. Narendranath*.

(15) AIR 1915 Cal 545 (546) : 16 Cri L Jour 170 (172) : 42 Cal 422, *Ram Ranjan Roy v. Emperor*. (Purpose of criminal trial is to investigate the offence and

determine the guilt or innocence of the accused.)

(17) AIR 1917 Cal 123 (131) : 18 Cri L Jour 385 (394) : 44 Cal 477 (FB), *Fateh Chand v. Emperor*. (Per Mookerjee, J.)

(24) AIR 1924 Nag 243 (245) : 26 Cr.L.J. 163, *Anant Wasudeo v. King-Emperor*.

(03) 8 Cal W N xvii (xvii). (Animosity in conducting case condemned.)

(16) AIR 1916 Cal 188 (204) : 16 Cri L Jour 497 (513) : 42 Cal 957, *Amritlal Hazra v. Emperor*.

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explain clearly by evidence circumstances having material bearing on the case.^{6a}

It is the duty of the Public Prosecutor to give opportunity to his witnesses to explain any discrepancies or contradictions in their depositions.⁷ But he is not expected to call witnesses with reference to defence theories.⁸ Nor is it open to him to call evidence to rebut and discredit the accused's defence before it is even known whether or not the accused intends to put forward that defence.⁹

It is no part of the prosecution's duty to suggest a motive for a crime nor is it the duty of the Court to determine why the crime was omitted.¹⁰

14. Trial ought not to be stopped before the close of the prosecution. — Sessions cases cannot be tried piece-meal. Before commencing a trial a Judge should satisfy himself that all necessary evidence is available. If it is not, he may postpone the case; but once having commenced he should, except for some very pressing reason, proceed *de die in diem* till the trial is finished,¹ the intention of the Code being that a trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish.²

Where, after the examination of some prosecution witnesses, some more remain to be examined, it is not open to the Judge to ask the jury whether they wish to hear any more evidence and, on their stating that they do not believe the evidence and wish to stop the case, record a verdict of acquittal; such a procedure is not warranted by law and no final opinion as to the reliability or otherwise of the evidence ought to be arrived at by the Judge or jury until the whole evidence is before them and has been considered.³

15. Treatment of witnesses. — A Sessions Judge is not justified in stopping the cross-examination and turning the witness out of

6a. ('29) 1929 Mad W N 395 (413), *Collett v. Emperor*.

('28) AIR 1928 All 25 (27) : 29 Cri L Jour 26, *Karan Singh v. Emperor*.

7. ('94) 16 All 207 (208, 209) : 1894 All W N 57, *Queen-Empress v. Naziruddin*.

[See ('38) AIR 1938 Pat 579 (585) : 40 Cri L Jour 147, *Yusuf Mia v. Emperor*.
(It is the duty of prosecution to see that negative answer of investigating officer in cross-examination does not create wrong impression of what witness had stated before police.)]

See also S. 162 Note 17.

8. ('04) 1 Cri L Jour 718 (726) (Kathiawar), *Emperor v. Daya Shankar*.

9. ('27) AIR 1927 Mad 533 (535) : 28 Cri L Jour 285, *In re Biswanath Das*.

10. ('38) AIR 1938 Rang 331 (332) : 40 Cri L Jour 49, *Tun Khine U v. The King*.
(('37) 1937 Mad W N 993 (994), *Public Prosecutor v. Basavayya*. (It is not necessary for the prosecution to prove the motive for a crime, although proof of the motive may often be an enlightening circumstance.)

('36) AIR 1936 Rang 60 (62) : 37 Cri L Jour 418, *U Zawana v. Emperor*. (Do.)

Note 14

1. ('04) 8 Oudh Cas 55 (57) : 2 Cri L Jour 191, *Emperor v. Ali Mohamed*.

('27) AIR 1927 All 721 (723) : 50 All 365 : 28 Cr.L.J. 950, *Sur Nath v. Emperor*.

[See ('12) 13 Cr.L.J. 861 (862) : 35 All 63 : 17 I. C. 797, *Badri Prasad v. Emperor*.]

2. ('12) 13 Cr.L.J. 861 (862) : 35 All 63 : 17 I. C. 797, *Badri Prasad v. Emperor*.

('04) 8 Oudh Cas 55 (57) : 2 Cri L Jour 191, *Emperor v. Ali Mohamed*.

3. ('96) 20 Mad 445 (445, 446) : 2 Weir 384, *Queen-Empress v. Ramalingam*.

Court because he is of opinion that the witness is not speaking the truth. This course is not sanctioned by law and is one which ought not to be followed.¹

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It is also illegal for a Judge to threaten a witness with the penalties of the law and no Judge should allow anything in the nature of a threat to be administered to a witness unless and until he has shown by his evidence that he is wilfully saying what is false or persistently refusing to give evidence on facts which must be within his knowledge.²

287.* The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

Section 287

Examination of accused before Magistrate to be evidence.

Synopsis

1. Scope of the section.
2. "Duly recorded."
3. "Committing Magistrate."

Other Topics (miscellaneous)

As against co-accused. See Note 1.
Confessions. See Note 1.
Previous conviction. See Note 1.
Proof of statements. See Note 1.
Record and committal by different Magistrates. See Note 3.
Section mandatory. See Note 1.
Statement to be taken as a whole. See Note 1.
Written statements of accused. See S. 256 Notes; S. 290 Note 6.

1. Scope of the section. — This section makes it *obligatory* on the prosecution in all cases to tender in evidence the statement of the accused made before the committing Magistrate and duly recorded by him under the provisions of the Code, *whether such statement tells for or against the accused*.¹ The statement so tendered and read as evidence has the same effect as any other evidence adduced before the Sessions Judge.² If the accused has confessed his guilt in such statement he can be convicted on the basis of such confession³ though he may retract

* 1882: S. 287; 1872: S. 248; 1861: S. 366.

Note 15

1. (1900) 1900 All W N 149 (149), *Meharban Ali v. Empress*.
2. ('92) 14 All 242 (256) : 1892 All W N 83, *Empress v. Hargobind Singh*.

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1. ('94) 1894 Rat 710 (713), *Queen-Empress v. Abdul Razak*.
- ('70) 13 Suth W R Cr 63 (63), *Queen v. Sheikh Meher Chand*.
2. ('40) AIR 1940 Pat 14 (15) : 40 Cr. L. J. 833, *Mosaheb Dome v. Emperor*. (An admission by the accused in the committing Magistrate's Court that he entered another's house on one night with intent to commit theft is evidence under S. 287.)
- ('66) 5 Suth W R Cr 1 (1), *Queen v. Suneechur*.
- ('92) 15 Mad 352 (353) : 2 Weir 394, *Empress v. Rama Tevan*.
3. ('66) 6 Suth W R Cr 83 (83), *Queen v. Hyder Jolaha*.
- ('66) 6 Suth W R Cr 73 (73), *Queen v. Ranjit Sontal*.
- ('21) AIR 1921 Sind 129 (130) : 16 Sind L R 67 : 25 Cr. L. J. 574, *Mahomed v. Emperor*. (Judge has only to consider whether confession has been voluntarily made and conviction can be based on such confession.)
- ('69) 12 Suth W R Cr 49 (49), *Queen v. Bhuttun Rujwun*.
- [See ('70) 14 Suth W R Cr 9 (10), *Queen v. Misser Sheikh*. (It is not necessary to read out the confessions to the accused and specifically to ask them whether they had any objection to the reception of those confessions.)]

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the confession before the Sessions Judge.⁴ Similarly, the accused is entitled to rely on such statement to prove points in his favour though under the ordinary law of evidence, he would not be entitled to make use of self-serving statements by him as evidence in his favour.⁵

The section does not contemplate that the committing Magistrate should be called as a witness in the Sessions Court and examined with reference to the recorded statement.⁶ In fact, the record of the statement prepared by the committing Magistrate would be the only evidence admissible to prove the statement. (See Evidence Act, s. 91.) But, under s. 533, if, in recording the statement any of the provisions of s. 364 are not complied with, evidence may be taken for the purpose of proving that the statement was made by the accused before the committing Magistrate.

The section does not prescribe the stage at which the statement of the accused should be produced and read as evidence. But it has been held that the statement should be read as part of the case for the prosecution before the accused enters upon his defence.⁷

The statement of the accused must be read as a *whole*. Thus, where there are several accused in a case, and the statement made by one of them in the committing Magistrate's Court is read in the Sessions Court under this section, the portions touching the other accused cannot be omitted.⁸ But under s. 310, if any portion of the statement bears on an alleged previous conviction charged against the accused, for the purpose of affecting the sentence to be passed on him in case of conviction, such portion should not be read or referred to unless and until the accused has been convicted of the subsequent offence or the verdict of the jury has been delivered or the opinion of the assessors has been recorded.

As to the weight to be attached to confessions, conviction on the

4. ('81) 1881 All W N 89 (89), *Empress v. Bhagua*.

('85) 1885 All W N 221 (224), *Empress v. Rama Nand*. (Exact value of confession should, however, be ascertained.)

('85) 1885 All W N 59 (59) (FB), *Empress v. Madar*. (Confession must be found to be spontaneous and voluntary act of party making it.)

('98) 20 All 133 (134) : 1897 A W N 224, *Queen-Empress v. Maiku Lal*.

('96) 18 All 78 (81) : 1895 A W N 227, *Queen-Empress v. Mahabir*. (Before Court acts on such confession, it must be satisfied as to its truth.)

('74) 11 Bom H C R 137 (138), *Reg. v. Balvant*. (In absence of evidence that confession of accused person has been induced by illegal pressure, it is not to be presumed that such confession was so induced.)

('15) AIR 1915 Bom 249 (250, 251) : 40 Bom 220 : 17 Cr. L. J. 133, *Fakira Appayya v. Emperor*. (Evidence Act, s. 24—It is doubtful if statement of confessional character will be admissible.)

('67) 8 Suth W R Cr 40 (40), *Queen v. Mt. Jema*.

5. ('93-1900) 1893-1900 L. B. R. 207 (208), *Aung Myat v. Queen-Empress*. (Statement read as evidence under this section can be taken into consideration in determining whether the accused has discharged the onus of proving that his case comes within one of the exceptions provided by law.)

6. See ('01) 5 Cal W N xlvii (xlvi), *Empress v. Mungroo Bhoojah*. (It was remarked that the practice of calling the committing Magistrate would be open to the gravest objection.)

7. ('87) 2 Weir 361 (361) : 10 Mad 295, *Queen-Empress v. Rang*.

('67) 8 Suth W R Cr Cir No. 11, p. 6 (6).

8. ('69) 5 Mad H C R App iv (iv).

confession of a co-accused, and the value of retracted confessions. see Notes under Ss. 164, 364 and 337.

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2. "Duly recorded." — An accused person made a confession under improper inducement by the police. The committing Magistrate admitted the confession in evidence and examined the accused with regard to it. It was held that as the confession was not admissible in evidence (Evidence Act, s. 24) the committing Magistrate ought not to have questioned the accused with reference to it and that the examination of the accused under the circumstances could not be said to be "duly recorded" within the meaning of this section and could not be produced in evidence in the Sessions Court under this section.¹ So also, an admission made by the accused before the committing Magistrate in answer to questions by the latter, when there is no evidence implicating the accused is not 'duly recorded'.²

As to the mode of recording the examination of the accused, see S. 364 and the Notes thereunder. As to the effect of irregularities in the mode of recording the examination, see S. 533 and Notes thereunder.

3. "Committing Magistrate."—The words "committing Magistrate" in the section include the Magistrate who held the preliminary enquiry on which the commitment was based, although the actual order of commitment was made by some other Magistrate. Hence, the statement of the accused recorded by a Magistrate who held the preliminary enquiry is admissible under this section although the case was actually committed to the sessions by some other Magistrate.¹ Thus, where a Magistrate who succeeds to the jurisdiction of another Magistrate commits a case to the sessions under S. 350 on evidence recorded by his predecessor, the statement of the accused recorded by such predecessor is admissible under this section.²

288.* The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion

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Evidence given at preliminary inquiry admissible.

* Code of 1898, original S. 288

Evidence given at preliminary inquiry admissible.

288. The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case.

1882 : S. 288; 1872 : S. 249; 1861—Nil.

Note 2

1. ('08) 8 Cr. L. J. 62 (64) : 4 L. B. R. 244, *Gaung Gyi v. Emperor*.
[See also ('15) AIR 1915 Bom 249 (250) : 17 Cr. L. J. 133 (134, 135, 137, 138) : 40 Bom 220, *Fakira Appayya v. Emperor*. (Confession before committing Magistrate induced by threat—Inducement or promise proceeding from person in authority — Question as to the admissibility of such confession before the Sessions Court left open.)]
2. ('40) 1940 Mad WN 1105 (1109), *Emperor v. Kuppammal*. (Following AIR 1916 Mad 407.)

Note 3

1. ('08) 7 Cr. L. J. 29 (30) : 31 Mad 40, *Sessions Judge of Mangalore v. Malinga*.
2. ('26) AIR 1926 Lah 271 (271) : 7 Lah 70 : 27 Cr. L. J. 627, *Ghulam v. Emperor*. ('08) 7 Cr. L. J. 29 (30) : 31 Mad 40, *Sessions Judge of Mangalore v. Malinga*. See also S. 350 Note 5.

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Notes 1-2

of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope, object and applicability of the section. 3. "Duly recorded in the presence of the accused." 4. "Under Chapter XVIII." 5. "Discretion of the presiding Judge." 6. "If such witness is produced and examined." | <ol style="list-style-type: none"> 7. May be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act. 8. Corroboration of evidence admitted under this section. 9. Practice and procedure. 10. Approver's evidence. |
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Other Topics (miscellaneous)

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|---|---|
| <p>Absence of cross-examination. See Note 3.</p> <p>Applicable to sessions trials and not to trials by Magistrates. See Note 2.</p> <p>Depositions retracted. See Notes 7 and 10.</p> | <p>Evidence of one witness and not of all witnesses. See Note 2.</p> <p>Sections 33, 155, 157 and 145, Evidence Act. See Note 2.</p> <p>Statements taken under S. 164 and S. 162. See Note 8.</p> |
|---|---|

1. Legislative changes.

- (1) There was no corresponding section in the Code of 1861. The section was first enacted in the Code of 1872. The undermentioned are cases decided under the Code of 1861.¹
- (2) The words "duly recorded in the presence of the accused under Chapter XVIII" were substituted for the words "duly taken in the presence of the accused before the committing Magistrate," and the words "for all purposes subject to the provisions of the Indian Evidence Act, 1872," were inserted at the end of the section by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

2. Scope, object and applicability of the section. — This section provides that when a witness is produced and examined in the Sessions Court, his evidence in the commitment proceedings may, in the discretion of the presiding Judge, be treated as evidence at the trial for all purposes. But for this section such evidence would, under the Evidence Act, be only admissible for the purpose of corroborating or contradicting the witness (see Ss. 145, 155 and 157 of the Evidence Act).¹ It would not be admissible as *substantive* evidence, *i. e.*, for proving the truth of the facts deposed to, except when the witness is not produced in the Sessions Court for any of the reasons specified in S. 33 of the Evidence Act. The present section vests a discretion in the Sessions Judge to treat such evidence as *substantive* evidence in the

Section 288 — Note 1

1. ('70) 1870 Rat 39 (40), *Reg. v. Hiroochima*.
(1864) 1 Suth W R Cr 14 (14), *Queen v. Radhy Dharec*. (Former deposition of witness should not be read until after his examination in Court.)
(1867) 7 Suth W R Cr 114 (114), *Queen v. Bheekun Doss*. (When deposition is received in evidence, at trial before Sessions Judge, there ought to be on record distinct proof of existence of state of things as makes deposition legal evidence.)

Note 2

1. ('25) AIR 1925 Lah 483 (485) : 27 Cri L Jour 289, *Ram Karan v. Emperor*.

case though none of the conditions laid down in S. 33 of the Evidence Act is present.^{1a} The object of the section is to reduce the danger of witnesses being tampered with between the commitment and trial.²

The section does not *ipso facto* make the evidence before the committing Magistrate evidence at the trial. It only confers a discretion on the Sessions Judge to treat as evidence before himself the evidence of a witness given before the committing Magistrate.^{2a} But, where under the Evidence Act, the evidence given before the committing Magistrate can be used at the sessions trial for any purpose, this section in no way restricts such user.³

The power conferred by the section is intended to be exercised with reference to each witness *individually*. The section does not contemplate a general order being passed with reference to the evidence of all the witnesses or a number of them *together*.⁴

The section applies only to sessions trials and not to trials before Magistrates.⁵ But it applies to trials with assessors as well as to trials by jury.⁶ In the undermentioned case⁷ it was remarked that the section applies only to prosecution witnesses and that the position of the section shows this.

The reasons given by the Magistrate in discharging the accused at first and the contents of the Sessions Judge's order in revision directing further inquiry are not admissible in evidence in the Sessions Court when the case is committed to sessions subsequently.⁸

3. "Duly recorded in the presence of the accused." — This section applies only to the evidence of a witness duly recorded in the presence of the accused by the committing Magistrate. Hence, the existence of a *record* or memorandum of evidence is a condition precedent to the applicability of the section.¹

Further, the evidence must have been *duly* recorded. (As to the mode of recording evidence in commitment proceedings, see Chapter XXV of the Code.) Under S. 208 and on general principles, the accused is entitled as of right to cross-examine the prosecution witnesses (in

1a. ('87) 1887 Pun Re No. 51 Cr, p. 132 (135), *Umar v. Empress*.

2. ('93-1900) 1893-1900 Low Bur Rul 280 (280), *Nga Ku De v. Queen-Empress*.

2a. ('37) AIR 1937 Sind 61 (65) : 38 Cr. L. J. 487, *Manghan Khan v. Emperor*. (S. 288 is not a section to be lightly used — It is not to be used as a matter of course but in the discretion of the Judge.)

('74) 11 Bom H C R 281 (282), *Reg. v. Arjun Megha*. (But exercise of discretion, considering it as matter of fact or law is open to review by appellate Court.)

3. See ('25) AIR 1925 Lah 483 (485) : 27 Cr. L. J. 289, *Ram Karam v. Emperor*. [See also ('34) AIR 1934 Lah 212 (214) : 35 Cri L Jour 349, *Emperor v. Natha Singh*. (Evidence may be admitted under S. 33, Evidence Act, if requisites of that section are satisfied.)]

4. ('85) Weir 3rd Edn. 934 (936), *In re Subba Naik*. (New trial should not be granted in spite of such order, when it does not occasion failure of justice.) [See also ('74) 21 Suth W R Cr 49 (51) : 12 Beng L R App 15, *Queen-Empress v. Amanullah*.]

5. ('94) 1894 Rat 728 (728), *Queen-Empress v. Ramdin*.

6. ('87) 1887 Pun Re No. 51 Cr, p. 132 (135), *Umar v. Empress*.

7. ('87) 1887 Pun Re No. 51 Cr, p. 132 (134), *Umar v. Empress*.

8. ('10) 11 Cr. L. J. 533 (539) : 7 Ind Cas 915 (Cal), *Harendra Pal v. Emperor*.

Note 3

1. ('87) 1887 Pun Re No. 51 Cr, p. 132 (134, 135), *Umar v. Empress*.

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Notes 3-4

commitment proceedings). Hence, the evidence of prosecution witnesses recorded without the accused being allowed to cross-examine them is not "duly recorded" and cannot be introduced into the record under this section.² But where the accused has declined to cross-examine the prosecution witnesses in spite of opportunity being given to him to do so, the absence of cross-examination by him does not affect the admissibility of the evidence under this section.³

The section requires also that the evidence in the committing Magistrate's Court should have been recorded in the *presence of the accused*. Hence, evidence recorded in the absence of the accused cannot be admitted under this section.⁴

See also the undermentioned case.⁵

4. "Under Chapter XVIII." — This section applies only to the evidence of a witness recorded under chapter XVIII. The statement of a witness made on any other occasion is not within the section.¹

Prior to the amendment of 1923 the words "before the committing Magistrate" occurred in the section in the place of the words "under chapter XVIII." The amendment makes it clear that evidence recorded under chapter XVIII falls within the section although it is not recorded

2. ('94) 21 Cal 642 (665), *Queen-Empress v. Sagal Samba*.
(30) AIR 1930 Sind 54 (55) : 31 Cr. L. J. 121, *Emperor v. Mahrab*. (Reservation by committing Magistrate of cross-examination of witness suo motu — Evidence cannot be admitted in Sessions Court.)
3. ('30) AIR 1930 Sind 54 (55) : 31 Cr. L. J. 121, *Emperor v. Mahrab*.
(26) AIR 1926 Lah 590 (593, 594) : 28 Cr. L. J. 33, *Muhammad Aslam Khan v. Emperor*. (Statements of witnesses recorded in presence of accused — Accused declining to cross-examine — Accused cross-examining on subsequent date — Statements are duly recorded.)
[See also ('80) 6 Cal L R 53 (56), *In the matter of Dham Mundul*. (In this case it was held that opportunity to cross-examine was not denied.)
(25) AIR 1925 Oudh 726 (727) : 26 Cri L Jour 1236, *Sarju Singh v. Emperor*. (Absence of cross-examination in spite of opportunity — Though technically admissible, evidence loses its weight.)]
4. ('04) 1 Cri L Jour 499 (500) : 1904 Pun Re No. 3 Cr, *Pathana v. Emperor*. (Approver's evidence taken in accused's absence.)
(13) 14 Cri L Jour 211 (212) : 35 All 260 : 19 Ind Cas 307, *Emperor v. Gulabu*.
(14) AIR 1914 Oudh 388 (389) : 16 Cr. L. J. 132 (133) : 17 Oudh Cas 363, *Putlu v. Emperor*. (Statements taken under S. 164.)
(94) 1894 Rat 728 (728), *Queen-Empress v. Ramdin*.
(87) 1887 Pun Re No. 51 Cr, p. 132 (134), *Umar v. Empress*.
(74) 21 Suth W R Cr 5 (5), *Queen v. Nussuruddin*.
(96) 23 Cal 361 (365), *Alimuddin v. Queen-Empress*.
5. ('86) 13 Cal 121 (123, 124), *Adyan Singh v. Queen-Empress*. (No objection taken by opposite party—Held that there was no reason to reject the evidence.)

Note 4

1. ('12) 13 Cr. L. J. 226 (229) : 14 I. C. 418 : 36 Mad 159, *In re Basrur Venkata Rao*. (Statement of a witness made during a search.)
(08) 7 Cri L Jour 325 (328) : 18 M L J 66 : 3 M L T 270 : 31 Mad 127, *In re Sankappa Rai*. (Statement to police-officer or to an investigating Magistrate.)
(04) 1 Cri L Jour 499 (500, 501) : 1904 Pun Re No. 3 Cr, *Pathana v. Emperor*. (Approver's statement before District Magistrate who is not committing Magistrate is not admissible under this section.)
(89) 1889 Rat 468 (470), *Queen-Empress v. Nana Raju*. (Statements to Magistrates not empowered to commit do not fall under S. 288.)
(22) AIR 1922 Mad 303 (303) : 23 Cr. L. J. 262, *Malaya Goundan v. Emperor*. (Signed statement given before monegar cannot be admitted as substantive evidence.)
(32) AIR 1932 Cal 683 (685) : 33 Cr. L. J. 770, *Nagendra Nath v. Emperor*.

with a view to commitment. Thus, evidence recorded under S. 219, after commitment, would fall within the section.²

Section 288
Notes 4-5

There is no special procedure provided for the recording of evidence under chapter XVIII. Hence, the evidence recorded by a Magistrate in a case which he starts with a view to trial by himself but which he subsequently decides to commit to the sessions can be held to be evidence recorded under chapter XVIII.³

5. "Discretion of the presiding Judge." — The section leaves it to the discretion of the presiding Judge whether or not to admit the evidence referred to in it.¹ But the power being one in derogation of the general principle that a Court can only act on the evidence given before it (see definition of evidence in the Evidence Act, S. 3), the decision to let in the previous deposition of a witness under this section should be arrived at after careful consideration and only where there are sound and reasonable grounds for such a decision.² The desire to expedite the trial or the fact that the counsel for both the sides have agreed to this course, is not a sufficient reason for acting under the section.³ The power should be confined to cases where the Judge has reason to think that a witness has deposed truly before the committing Magistrate but is not telling the truth before himself and that it is desirable in the interests of justice that the previous deposition of the witness should be brought on the record of the trial.⁴

2. ('26) AIR 1926 Cal 235 (237) : 53 Cal 181 : 26 Cr.L.J. 1577, *Abdul Gani v. Emperor*.

3. ('40) AIR 1940 Lah 389 (391) : 1 L R (1940) Lah 151, *Fazal v. Emperor*. (Mere mention of Chapter XVIII in this section does not mean that the provisions of that chapter must, in order to attract provisions of this section, be followed in their entirety.)

('26) AIR 1926 Cal 235 (237) : 53 Cal 181 : 26 Cr.L.J. 1577, *Abdul Gani v. Emperor*.

Note 5

1. ('37) AIR 1937 Sind 61 (65) : 38 Cri L Jour 487, *Manghan Khan v. Emperor*. (Section is not one to be lightly used.)

('22) AIR 1922 Lah 1 (12) : 3 Lah 144 : 23 Cr.L.J. 513, *Narain Das v. Emperor*. (Such evidence should not be allowed to be read out to witnesses before defence is given opportunity of cross-examining them.)

('85) Weir 3rd Edn. 934 (936), *In re Subba Naik*.

('87) 1887 Pun Re No. 51 Cr, p. 132 (134), *Umar v. Empress*.

2. ('74) 21 Suth W R Cr 49 (51) : 12 Beng L R App 15, *Queen v. Amanullah*. (Discretion is to be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not upon mere speculation or conjecture.)

('30) AIR 1930 Cal 706 (707) : 57 Cal 940 : 32 Cr.L.J. 180, *Khadem v. Emperor*. (Examination-in-chief of prosecution witness before committing Magistrate, without his cross-examination on vital point, brought on record before Sessions Court—Though Sessions Court had discretion it was not allowed in, as being unfair to defence.)

('96) 9 C P L R App Cr 24 (25), *Empress v. Tularam Brahmin*.

[See ('37) AIR 1937 Sind 61 (65) : 38 Cr.L.J. 487, *Manghan Khan v. Emperor*.]

3. ('85) Weir 3rd Edn. 934 (936, 937), *In re Subba Naik*.

4. ('40) AIR 1940 Mad 136 (137) : 41 Cr. L. J. 323, *In re Chinna Papiiah*. (But evidence of such witness should not be relied upon in absence of corroboration.)

('37) AIR 1937 Sind 61 (65) : 38 Cri L Jour 487, *Manghan Khan v. Emperor*.

('30) AIR 1930 All 746 (747) : 32 Cri L Jour 152, *Abdul Jalil Khan v. Emperor*.

('96) 9 C P L R Gr 24 (25), *Empress v. Tularam Brahmin*.

('85) Weir 3rd Edn. 934 (936), *In re Subba Naik*.

('29) AIR 1929 Lah 111 (112) : 29 Cr. L. J. 1047, *Sadar v. Emperor*. (Only one divergence though unexplained is not sufficient for making use of section.)

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Notes 5-7

But the Judge will not be justified in exercising his power under this section where there are only minor discrepancies between statements made before the committing Magistrate and before himself.^{4a} When the witness alleges that his statement before the committing Magistrate was the result of improper influence or pressure, the Sessions Judge should investigate into the truth of his allegation before coming to the conclusion that his deposition in the Sessions Court (which contradicts that in the committing Magistrate's Court) is false.⁵ See also Note 7.

6. "If such witness is produced and examined." — It is a condition precedent to the incorporation of the previous deposition of a witness under this section that he should be produced and examined as a witness at the sessions trial.¹ The examination contemplated is examination of the witness in the ordinary way. Hence, mere cross-examination of a witness or merely tendering a witness for cross-examination is not sufficient to satisfy the requirements of the section in this respect.² So also, the mere examination of a witness as to the fact of his having made the previous deposition is not enough for allowing action under this section.³

7. May be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act. — By force of this expression the previous deposition of a witness admitted under this section can be treated as *substantive* evidence in the case and not

(35) AIR 1935 Mad 479 (482) : 36 Cr.L.J. 1107, *In re Krishna Iyer*. (Statements in committing Magistrate's Court by relatives of accused resiled from in sessions trial—Statements can justifiably be accepted as evidence under this section.)

(29) AIR 1929 Mad 837 (839) : 31 Cr. L. J. 768 : 53 Mad 160, *Kesava Pillai v. Emperor*. (Witness retracting statement before Sessions Judge—Reason to think that he is not telling truth—Section can be applied.)

(24) AIR 1924 Mad 379 (381) : 47 Mad 232 : 25 Cri L Jour 715, *P. Somadu v. Appi Gadu*. (Do.)

4a. ('37) AIR 1937 Sind 61 (65) : 38 Cr. L. J. 487, *Manghan Khan v. Emperor*. (The provisions of Ss. 145, 154, 155 and 157 of the Evidence Act may in such circumstances be more appropriately used.)

5. (1900) 4 Cal W N 49 (55), *Barangi Lall v. Empress*.

('03) 7 Cal W N 345 (349, 350). *King-Emperor v. Bhut Nath*. (Repudiation of prior statement at the sessions—Allegations of improper influence as regards prior statement—Prior statement not to be relied upon.)

Note 6

1. ('20) AIR 1920 Nag 170 (171) : 16 Nag L R 30 : 21 Cr. L. J. 486, *Mt. Ajodhi v. Emperor*.

('75) 24 Suth W R Cr 11 (12), *Queen v. Majohur Roy*.

('85) Weir 3rd Edn. 934 (935), *In re Subba Naik*. (S. 288 is not an exception to the rule in S. 286. It does not dispense with examination of the witness as directed by S. 286.)

('87) 1887 Pun Re No. 51 Cr, p. 132 (134), *Umar v. Empress*.

('34) AIR 1934 Lah 212 (214) : 35 Cri L Jour 349, *Emperor v. Natha Singh*. (Witness produced but not examined—Section does not apply.)

('83) 1883 Pun Re No. 23 Cr, p. 54 (55), *Saib Dayal v. Empress*. (Magistrate committing witness along with accused for same offence—His statement at enquiry not admissible.)

2. ('85) Weir 3rd Edn. 934 (935), *In re Subba Naik*.

('16) AIR 1916 Mad 582 (583) : 16 Cr. L. J. 615 (615), *In re Kotaigadu*. (Witness simply tendered for cross-examination.)

('30) AIR 1930 Cal 706 (707) : 57 Cal 940 : 32 Cr.L.J. 180, *Khadem v. Emperor*. (Examination-in-chief of prosecution witness before committing Magistrate, without his cross-examination on vital point, brought on record before sessions.)

3. ('85) Weir 3rd Edn. 934 (936), *In re Subba Naik*.

merely as evidence useful for the purpose of corroborating or contradicting a witness.¹ The words "for all purposes subject to the provisions of the Indian Evidence Act, 1872" did not occur in the section as it stood prior to the amendment of 1923. Hence, the view taken in some of the decisions prior to the said amendment that the evidence admitted under this section could only be used for the purpose of corroboration or contradiction of a witness and not as a substantive evidence² is now no longer law.

The words "subject to the provisions of the Indian Evidence Act" do not mean that the previous statements of a witness admitted under this section can be treated as evidence only in those cases in which

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Note 7**

Note 7

1. ('37) AIR 1937 P C 119 (121) : 38 Cr. L. J. 498 : 64 I A 148 : ILR (1937) Bom 711 (PC), *Fakira v. Emperor*. (Words "subject to the provisions of the Indian Evidence Act, 1872" cannot be read so as to limit the purposes for which such evidence may be used.)
- ('40) AIR 1940 Nag 340 (347) : 1940 N. L. J. 459 (469), *Parmanand v. Emperor*.
- ('40) AIR 1940 Pat 289 (293) : 19 Pat 369, *Ncbti Mandal v. Emperor*.
- ('36) AIR 1936 Lah 357 (358) : 17 Lah 419 : 37 Cr. L. J. 567, *Narinjan v. Emperor*.
- ('36) AIR 1936 Pat 11 (14) : 36 Cri L Jour 235, *Emperor v. Lalji Roy*.
- ('25) AIR 1925 All 185 (186) : 47 All 276 : 26 Cri L Jour 450, *Tully v. Emperor*. (Previous statements relied upon for purpose of upholding conviction of appellants.)
- ('24) AIR 1924 Mad 379(381) : 47 Mad 232 : 25 Cr. L. J. 715, *Peda Somadu v. Appigadu*.
- ('25) AIR 1925 Lah 399 (399) : 6 Lah 171 : 27 Cr. L. J. 438, *Rakha v. Emperor*.
- ('25) AIR 1925 Lah 452 (453) : 6 Lah 199 : 26 Cri L Jour 1245, *Amir Zaman v. Emperor*. (The expression merely means that the law of evidence enacted in that Act must be complied with.)
- ('33) AIR 1933 Rang 57 (59) : 11 Rang 4 : 34 Cr. L. J. 286, *Nga Nyein v. Emperor*.
- ('27) AIR 1927 All 479 (480) : 27 Cr. L. J. 1365 : 49 All 251, *Behari v. Emperor*.
- ('23) AIR 1923 Pat 550 (554) : 2 Pat 517 : 24 Cr. L. J. 641, *Gansa Oraon v. Emperor*.
- ('30) AIR 1930 Pat 545 (547, 548) : 9 Pat 592 : 32 Cri L Jour 66, *Bhikari Pati v. Emperor*. (If truthful and corroborated sufficiently, it may be preferred to statement in Sessions Court.)
- ('28) 29 Cri L Jour 73 (75) : 106 Ind Cas 585 (587) (Lah), *Ala Singh v. Emperor*.
- ('23) AIR 1923 Mad 20 (23) : 45 Mad 766 : 24 Cr. L. J. 417, *Velliah Kone v. Emperor*.
- ('04) 1 Cri L Jour 184 (190) : 2 Low Bur Rul 125, *Shwe Hla v. Emperor*.
- ('06) 4 Cri L Jour 61 (64, 65) : 28 All 683 : 1906 A W N 187 : 3 All L Jour 852, *Dwarka Prasad v. Emperor*.
- ('22) AIR 1922 Bom 108 (109) : 46 Bom 97 : 22 Cr. L. J. 636, *Maruti Joti v. Emperor*.
- ('25) AIR 1925 Bom 266 (267, 268) : 26 Cr. L. J. 705 : 50 Bom 215, *Basappa v. Emperor*.
- ('26) AIR 1926 Cal 105 (105, 106) : 26 Cri L Jour 1553, *Fazaruddin v. Emperor*.
- ('26) AIR 1926 Cal 235 (238) : 53 Cal 181 : 26 Cri L Jour 1577, *Abdul Gani v. Emperor*. (Evidence admitted under this section was made basis of conviction.)
- ('30) AIR 1930 Cal 228 (230) : 31 Cri L Jour 916, *Tafiz Pramanik v. Emperor*. (Jurors are at liberty to believe evidence admitted under this section.)
- ('01) 24 Mad 414 (416), *Queen-Empress v. Doraisami Ayyar*. (Such evidence may be used as much in favour of the defence as in support of the prosecution.)
- ('34) AIR 1934 Lah 743 (745) : 15 Lah 765 : 35 Cr. L. J. 1005, *Puran v. Emperor*.
- ('17) AIR 1917 Lah 331 (332, 333) : 18 Cri L Jour 703 (705) : 1917 Pun Re No. 37 Cr, *Pirthi v. Emperor*. (Evidence brought in under this section cannot be accepted as proper corroboration of confession made to Magistrate and subsequently retracted.)
- ('85) 2 Weir 375 (375), *In re Vellaya Tevan*.
- ('87) 1887 Pun Re No. 51 Cr, p. 132 (136), *Umar v. Empress*.
- ('30) 1930 Mad W N 345 (346), *Guruswamy Pillai v. Emperor*. (Evidence before Magistrate retracted before Sessions Judge — Judge acts legally in convicting upon testimony tendered before Magistrate.)
2. ('06) 10 Cal W N cexliii (cexliii), *Emperor v. Gholam Kadir*.
- ('85) 7 All 862 (863), *Queen-Empress v. Dau Sahai*.
- ('99) 21 All 111 (112) : 1898 A W N 196, *Queen-Empress v. Jeochi*.
- (1900) 22 All 445 (446, 447) : 1900 A W N 169, *Queen-Empress v. Nirmal Das*.

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Note 7

such a course is expressly provided for by the Evidence Act. Nor does the expression mean that the prior depositions can be used as evidence in every case in which there is no express provision in the Evidence Act prohibiting such a course. The expression only means that the evidence admitted under this section is subject to the same rules as to admissibility and relevancy as any other evidence and that a Judge is not at liberty to admit irrelevant evidence under this section merely because it happens to be the deposition of a witness given before the committing Magistrate.³

As seen already, the evidence admitted under this section constitutes substantive evidence in the case quite as much as any other evidence. There is no legal objection to a conviction being based purely on the prior deposition of a witness admitted under this section.^{3a} But as a matter of prudence, before preferring the evidence given before the committing Magistrate to that given before himself and acting on such evidence, a Judge should have very substantial grounds for doing so.⁴ Especially, it would be highly unsafe to use as corroboration of a

3. ('25) AIR 1925 Sind 289 (292) : 19 Sind L R 71 : 26 Cr. L. J. 1063, *Bahadur Rano v. Emperor*. (Evidence before committing Magistrate — Amended section does not preclude its use as substantive evidence in Sessions Court — "Subject to the provision, etc." is meant to prevent irrelevant evidence.)

('25) AIR 1925 Lah 452 (453) : 6 Lah 199 : 26 Cri L Jour 1245, *Amir Zaman v. Crown*. (For instance, evidence, which had been wrongly admitted by the committing Magistrate, in violation of the provisions of the Evidence Act, could not be transferred to the session's file.)

('25) AIR 1925 Pat 51 (53) : 3 Pat 781 : 26 Cr. L. J. 270, *Jehal Teli v. Emperor*.

('26) AIR 1926 Pat 440 (442) : 27 Cri L Jour 594, *Bigna Kumhar v. Emperor*.

('26) AIR 1926 Cal 105 (105, 106) : 26 Cri L Jour 1553, *Fazaruddin v. Emperor*.

('27) AIR 1927 All 479 (480) : 49 All 251 : 27 Cr. L. J. 1365, *Behari v. Emperor*.

('25) AIR 1925 Bom 266 (267) : 26 Cr. L. J. 705 : 50 Bom 215, *Basappa v. Emperor*.

3a. ('40) AIR 1940 Nag 340 (347) : 1940 N L J 459 (469), *Parmanand v. Emperor*. (Corroboration not necessary.)

('36) AIR 1936 Lah 357 (358) : 37 Cr. L. J. 567 : 17 Lah 419, *Narinjan Singh v. Emperor*. (Section does not show that there need be corroboration.)

('35) AIR 1935 All 691 (692) : 36 Cr. L. J. 823, *Raja Ram v. Emperor*. (Independent corroboration is not invariably necessary.)

('34) AIR 1934 Oudh 222 (224) : 35 Cri L Jour 894, *Emperor v. Shankar*.

4. ('40) AIR 1940 Mad 136 (137) : 41 Cr. L. J. 323, *In re Chinna Pappiah*. (Where a witness in a Court of Session resiles from a statement made by him in a committing Court, his evidence should not be relied on in the absence of corroboration although it may be treated as substantive evidence under S. 288.)

('39) 41 P L R 862 (864), *Fazal v. Emperor*. (No conviction can be based on the statements of the prosecution witnesses if they without any exception resile from their statements made before the committing Magistrate, and there is no other independent evidence, direct or circumstantial, on the record.)

('36) AIR 1936 Lah 357 (359) : 37 Cr. L. J. 567 : 17 Lah 419, *Narinjan v. Emperor*.

('36) AIR 1936 Pat 11 (14) : 36 Cr. L. J. 235, *Emperor v. Lalji Roy*. (Statements before committing Magistrate — Witness examined in sessions — Previous statement becomes substantive evidence under S. 288, Cr. P. C. — Statement modified or resiled in Sessions Court — Conviction on previous statement is unsafe unless circumstances indicate truth of statement.)

('24) AIR 1924 Mad 379 (382) : 47 Mad 232 : 25 Cr. L. J. 715, *Peda Somadu v. Appigadu*.

('25) AIR 1925 Lah 399 (400) : 6 Lah 171 : 27 Cri L Jour 438, *Rakha v. Emperor*.

('19) AIR 1919 Lah 238 (240) : 1919 Pun Re No. 17 Cr : 20 Cri L Jour 792, *Sher Dil v. Emperor*. (When there are strong grounds, apart from the statements being retracted, for doubting truth of statements made before committing Magistrate, they should not be accepted as substantive evidence.)

('25) AIR 1925 Pat 51 (55) : 3 Pat 781 : 26 Cr. L. J. 270, *Jehal Teli v. Emperor*.

retracted confession the retracted deposition of a witness admitted under this section.⁵

The *whole* of the prior statement of a witness and not merely portions of it should be treated as evidence in the case.⁶

8. Corroboration of evidence admitted under this section.

— The prior deposition of a witness before the committing Magistrate admitted under this section stands on the same footing as any other evidence in the case (see Note 7). Hence, it is “testimony” within the meaning of S. 157 of the Evidence Act, and can be corroborated by means of prior statements of the witness of the kind mentioned in that section.¹ Thus, when the evidence of a witness in the committing Magistrate’s Court is transferred to the file of the Sessions Court under this section, a prior statement of the witness recorded under S. 164 can be used to corroborate the evidence.² But under S. 162, a statement

(‘26) AIR 1926 Pat 440 (443) : 27 Cri L Jour 594, *Bigna Kumhar v. Emperor*. (Weight to be given to previous evidence depends on facts of each case.)

(1893) Oudh Sel Cas No. 229 p. 456, *Queen-Empress v. Ahbaran Singh*.

(‘22) AIR 1922 Bom 108 (109) : 46 Bom 97 : 22 Cr. L. J. 636, *Maruti Joti v. Emperor*. (Adoption of such course should be found necessary for purposes of justice.)

(‘97) 1897 Rat 694 (894), *Queen-Empress v. Subraya*. (Conviction based on such evidence alone, specially when it was retracted before the Sessions Court, would not be justified.)

(‘98) 1898 Rat 966 (966), *Queen v. Mallaya Sau Mulhaya*.

(‘34) AIR 1934 Oudh 182 (183) : 35 Cri L Jour 797, *Pahalwan Singh v. Emperor*. (Evidence before committing Magistrate and Sessions Judge quite contrary — There must be independent corroboration to base conviction on evidence before committing Magistrate.)

(1900) 4 Cal W N 49 (55), *Bajrangi Lal v. Empress*. (It is improper to bring on the record without further inquiry the evidence of a witness before the committing Magistrate who says that his evidence in the lower Court was given under pressure and threat by the police.)

(‘85) Weir 3rd Edn. 939 (940), *In re Nukala Subbaiya*.

(‘74) 21 Suth WR Cr 49 (51) : 12 Beng LR App 15, *Queen-Empress v. Amanullah*.

(‘87) 10 Mad 295 (313, 314) : 2 Weir 407, *Queen-Empress v. Rangi*.

[See (‘37) AIR 1937 Lah 597 (597) : 38 Cri L L Jour 765, *Harnam Singh v. Emperor*. (Statement of witnesses at trial contradicted by statements made before committing Magistrate — Accused cannot be convicted.)]

[See also (‘40) AIR 1940 Pat 289 (293) : 19 Pat 369, *Nebti Mandal v. Emperor*. (There was ample corroborative material which inclined the Sessions Judge to prefer deposition in committing Court to that in Sessions Court.)]

5. (1900) 27 Cal 295 (306, 307) : 4 Cal W N 129, *Queen-Empress v. Jadub Das*. (Confession of accused before committing Magistrate not fairly obtained.)

(‘92) 2 Weir 509 (509), *In re Karreti Venkatasami*.

(‘88) 12 Mad 123 (124) : 2 Weir 376, *Queen-Empress v. Bharmappa*.

(1900) 13 C P L R Cr 107 (109, 110), *Empress v. Chutia*.

(‘17) AIR 1917 Lah 331 (333) : 18 Cri L Jour 703 (705) : 1917 Pun Re No. 37 Cr, *Pirithi v. Emperor*.

6. (‘29) AIR 1929 Nag 233 (235) : 30 Cri L Jour 333, *Musa v. Emperor*.

(‘25) AIR 1925 Mad 879 (880) : 27 Cr. L. J. 18, *Ayyam Perumal Pillai v. Emperor*.

Note 8

1. (‘24) AIR 1924 Lah 609 (610) : 5 Lah 324 : 25 Cr. L. J. 1201, *Mam Chand v. Emperor*.

(‘23) AIR 1923 Mad 20 (23) : 45 Mad 766 : 24 Cr. L. J. 417, *Velliah Kone v. Emperor*.

[See (‘34) AIR 1934 Cal 124 (125) : 60 Cal 1339 : 35 Cri L Jour 567, *Manar Ali v. Emperor*.]

[But see (‘10) 11 Cri L Jour 542 (542, 543) : 34 Bom 599 : 7 Ind Cas 933, *Emperor v. Akbar Badu*. (Only statements of witnesses made in trying Court can be corroborated in manner contemplated by S. 157, Evidence Act.)]

2. (‘23) AIR 1923 Mad 20 (23) : 45 Mad 766 : 24 Cr. L. J. 417, *Velliah Kone v. Emperor*.

(‘34) AIR 1934 Cal 124 (125) : 60 Cal 1339 : 35 Cr. L. J. 567, *Manar Ali v. Emperor*.

[See (‘29) AIR 1929 Pat 343 (344) : 8 Pat 625 : 30 Cri L Jour 1136, *Mathura Tewari v. Emperor*.]

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Notes 8-9

made to the *police* would not be admissible for such a purpose.³ Further, a statement of the witness recorded under S.164 which corroborates his deposition before the committing Magistrate admitted under this section cannot be treated as *substantive* evidence.⁴

9. Practice and procedure. — Before introducing into the record the statement of a witness made before the committing Magistrate, the Judge is bound to inform the accused and the prosecution of his intention to do so. The reason is that otherwise the parties will have no opportunity of testing the statement by cross-examination or of otherwise dealing with it as part of the material which may influence the decision of the Court.¹

When the evidence of a witness before the committing Magistrate is inconsistent with his evidence in the Sessions Court and it is proposed to use his previous statement under this section, it is the duty of the Judge to draw his attention to his previous statement and afford him an opportunity of explaining the inconsistency between his two statements.² See Evidence Act, S. 145.

See also the undermentioned cases.³

3. ('25) AIR 1925 Lah 399 (400) : 6 Lah 171 : 27 Cr.L.J. 438, *Rakha v. Emperor*.
[But see ('24) AIR 1924 Lah 609 (610) : 5 Lah 324 : 25 Cri L Jour 1201, *Mam Chand v. Emperor*. (Submitted not good law.)]

4. ('27) AIR 1927 Mad 1112 (1112) : 28 Cri L Jour 279, *In re Karuppan Pillai*.

Note 9

1. ('86) 1886 All W N 256 (256, 257), *Empress v. Jawahar*.

('21) AIR 1921 All 215 (216) : 27 Cri L Jour 813, *Nagina v. Emperor*.

('29) AIR 1929 Nag 233 (235) : 30 Cri L Jour 333, *Musa v. Emperor*. (Whole statement to be put to witness.)

2. ('81) 1881 All W N 74 (74), *Empress v. Nazzara*.

('29) AIR 1929 Lah 111 (112) : 29 Cri L Jour 1047, *Sadar v. Emperor*. (Witness was not asked explanation as to discrepancy between statements during preliminary enquiry and committal proceedings.)

('85) 7 All 862 (863), *Queen-Empress v. Dan Sahai*.

('22) AIR 1922 Pat 40 (42) : 23 Cri L Jour 218, *Lachmi Lal v. Emperor*.

('30) AIR 1930 Pat 338 (339, 344) : 32 Cr. L. J. 438, *Nanku Mahton v. Emperor*.
('04) 1 Cri L Jour 86 (88) : 31 Cal 142 (FB), *Emperor v. Zawar Rahman*. (Per Prinsep, Offg., C. J.)

('15) AIR 1915 Bom 237 (241) : 16 Cr. L. J. 754, *Lakshman Totaram v. Emperor*.
(*Seemle*: In every criminal trial, Judges cannot be too careful to conform strictly with principles of evidence.)

('97) 1897 Rat 924 (925), *Queen-Empress v. Soma Dalji*.

('92) 2 Weir 509 (509), *In re Sokkan*.

('02) 6 Cal W N cclxxvi (cclxxvi), *Emperor v. Moni Lal*.

[See also ('96) 10 C P L R App Cr 15 (15), *Empress v. Bhaddoo Ahir*. (It is the duty of the Sessions Judge to notice all important variations and discrepancies in the deposition of the witness as given before him and as given before the committing Magistrate.)]

3. ('36) AIR 1936 Sind 140 (141) : 37 Cr. L. J. 1045, *Samero v. Emperor*. (Witness resiling from statement made in committing Magistrate's Court — Notice to show cause cannot be issued when case is pending.)

('85) Weir 3rd Edn. 934 (936), *In re Subba Naik*. (Rule appears to contemplate that the witness shall first have been examined and that after that his evidence before the Magistrate may be treated as evidence.)

('87) 1887 Pun Re No. 51 Cr, p. 134 (135), *Umar v. Empress*. (Judge can treat deposition as part of the material on which he sums up to the jury — The deposition should however be known to the jury or the assessors in the same way as other documentary evidence, that is, by reading the whole or such part to the jury or assessors and if necessary showing it to them.)

10. Approver's evidence. — The section is wide enough to include the testimony of an approver. Hence, where an approver is examined as a witness in the committing Magistrate's Court and is again examined as a witness in the Sessions Court, his evidence before the committing Magistrate can be introduced under this section into the record of the sessions case, notwithstanding that he has repudiated his former statement.¹ But it would be unsafe to base a conviction on the retracted statement of an approver in the absence of any corroboration.² See also S. 337 Note 16.

Section 288
Note 10

289.* (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

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(2) If he says that he does not, the prosecutor may sum up his case; and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of

* 1882 : S. 289; 1872 : S. 251; 1861 : S. 372.

('99) 1 Bom L R 156 (157), *Queen-Empress v. Vithu Rayaji*. (Question of admissibility of previous deposition, should be determined then and there on its tender and reasons recorded for the admission.)

('92) 2 Weir 509 (509), *In re Sokkan*. (Depositions should be put in and proved in the course of examination of each witness.)

('97) 1897 Rat 924 (925), *Queen-Empress v. Soma Dalji*. (The Sessions Judge should record the statements as exhibits in his own proceedings.)

('87) 1887 Rat 343 (343), *Queen-Empress v. Govardhan*. (Sessions Judge should in his proceedings distinctly note that he has admitted the deposition and give the deposition a number in his proceedings and translate it or the material portions of it in his English minute of the proceedings.)

('22) AIR 1922 Lah 1 (12) : 3 Lah 144 : 23 Cri L Jour 513, *Mahant Narain Das v. Emperor*. (Time for transfer of depositions. Court should not allow statements of approver to be read out to the witness before the defence has had an opportunity of cross-examining him.)

Note 10

1. ('39) AIR 1939 All 567 (572) : 40 Cri L Jour 856 : 1 L R (1939) All 736, *Bhola Nath v. Emperor*. (Sessions Judge can rely on earlier statement in preference to the statement before the Sessions Court.)

('30) AIR 1930 Pat 545 (547, 548) : 9 Pat 592 : 32 Cr. L. J. 66, *Bhikari v. Emperor*.

('94) 1894 Pun Re No. 14 Cr, p. 42 (44), *Mamun v. Empress*. (It is not rule of law but it is true proposition that evidence of accomplice requires just as much, or as little, corroboration as is needed to convince mind of prudent person that facts alleged against accused are true.)

('20) AIR 1920 Mad 741 (742) : 22 Cr. L. J. 385, *Dammur Veerabhadra v. Emperor*.

('99) 21 All 175 (176, 177) : 1899 A W N 14, *Empress v. Soneju*.

('03-'04) 2 Low Bur Rul 214 (215), *Shwe Hnit v. Emperor*.

In the following cases, however, it was doubted whether this section applies to the evidence of an approver who has forfeited his pardon. It is submitted that so long as the approver is examined as witness, his evidence may be admitted under this section :—

('81) 1881 All W N 74 (74), *Empress v. Nazzara*.

('83) 13 Cal L R 326 (327), *Nanha Malla v. Empress*.

('81) 7 Cal L R 66 (68), *In the matter of Joyudee Parmanick*.

2. ('91) 1891 All W N 184 (185), *Queen-Empress v. Nagu*.

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Notes 1-2

assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. When the examination of witnesses for prosecution is concluded. 3. After the examination, if any, of the accused. 4. "The accused shall be asked whether he means to adduce evidence." 5. "The prosecutor may sum up his case"—Sub-section (2). | <ol style="list-style-type: none"> 6. Where there is no evidence that the accused committed the offence. 7. Record a finding of not guilty. 8. "Direct the jury to return a verdict of not guilty." 9. "Shall call on the accused to enter on his defence"—Sub-section (4). 10. Procedure where the witnesses for the accused are absent. 11. Effect of non-compliance with the section. |
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Other Topics (miscellaneous)

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| <p>Accused not adducing evidence — No adverse inference to be drawn. See Note 9.</p> <p>Acquittal where there is no prosecution evidence. See Note 6.</p> | <p>"Not proven"—Finding of. See Note 7.</p> <p>Re-calling of prosecution evidence. See Note 2.</p> <p>Record of the defence. See Note 9.</p> |
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1. Legislative changes.

1. The corresponding s. 372 of the Code of 1861 contained a single clause that the accused should be called upon to enter on his defence after the close of the prosecution evidence.

2. The first two clauses of s. 251 of the Code of 1872 contained similar provisions, clause (1) thereof corresponding to sub-ss. (1) and (2) and clause (2) to sub-s. (4) of the present section.

3. Section 289 of the Code of 1882 is the same as the present section.

2. When the examination of witnesses for prosecution is concluded. — The general principle is that an accused person is entitled to know what the evidence against him is before he is called

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Notes 2-3

upon to enter on his defence.¹ This section accordingly provides that he is to be called upon to enter on his defence only after the examination of the prosecution witnesses is concluded.² The closing of the case for the prosecution is thus not mere form but with certain exceptions closes the door to any further evidence against the accused; the prosecutor cannot re-open his case and make additions to it except such voluntary additions as the accused may make himself,³ and except for the purpose of contradicting any new case set up by the accused in his defence.⁴ If for any reason the Court re-calls any prosecution witness after the accused has made his defence, the accused should be given a further opportunity of calling evidence with reference to the evidence so recorded.⁵ The Court should wait before proceeding under this section till *all* the evidence on the side of the prosecution is concluded;^{5a} it cannot proceed under this section in the course of the prosecution evidence because it does not believe the evidence so far tendered.⁶

3. After the examination, if any, of the accused. — The words "*if any*" would appear to suggest that the examination of the accused is not always necessary in a sessions trial. This, however, is not so. The words are intended to cover only those cases where the accused has no circumstances to explain, as for instance, where he has admitted his guilt, and are not intended to relax the imperative provisions of S. 342 in sessions trials.¹

Consequently, before an accused person is called upon to enter on his defence, he should be examined as to whether he has anything to say regarding the evidence against him,² even if he had been examined with great care before the committing Magistrate, because it makes a considerable difference to listeners like the jurors whether a previous statement is read over to them or the accused is examined in their presence so that they may see his demeanour.³

See also S.342 Note 20.

Section 289 — Note 2

1. ('23) AIR 1923 All 322(323) : 45 All 323 : 25 Cr. L. J. 305, *Mahadeo v. Emperor*.
2. ('20) AIR 1920 Bom 339 (341) : 22 Cri L Jour 58, *Alex Pimento v. Emperor*. ('11) 12 Cri L Jour 7 (8) : 9 Ind Cas 46 (Cal), *Radha Madhab Pakra v. Emperor*. ('79) 4 Cal L R 338 (340), *In re Turibullah*.
28. AIR 1928 Lah 953 (953) : 29 Cri L Jour 844, *Karam Chand v. Emperor*.
3. ('23) AIR 1923 All 322 (323) : 45 All 323 : 25 Cr. L. J. 305, *Mahadeo v. Emperor*. See also S. 244 Note 3 and S. 256 Note 10.
4. ('71) 3 N W P H C R 271 (272), *Queen v. Chotey Lal*.
5. ('70) 13 Suth W R Cr 15 (15), *Queen v. Assanoollah*.
25. AIR 1925 Lah 531 (531) : 26 Cri L Jour 1035, *Shugan Chand v. Emperor*. (Case relating to trial before a Magistrate.) See also S. 257 Note 2 and S. 540 Note 10.
- 5a. ('92) 14 All 212 (214) : 1892 All W N 63, *Queen-Empress v. Hayfield*. See also S. 540 Note 5.
6. ('89) 2 Weir 384 (384, 385) : 20 Mad 445, *Queen-Empress v. Ramalingam*. ('98) 1 Oudh Cas 85 (87), *Queen v. Bhup Singh*.

Note 3

1. ('09) 10 Cr. L. J. 325 (339) : 3 Ind Cas 625 (Cal), *Khudiram Bose v. Emperor*. ('03-04) 2 Low Bur Rul 115 (116), *Nga Thet U v. King-Emperor*.
33. AIR 1933 All 690 (695) : 55 All 1040 : 34 Cr. L. J. 967, *S.H. Jhabwala v. Emperor*.
2. ('66) 1866 Pun Re No. 57 Cr, p. 64 (65), *Azeem v. Crown*.
3. ('26) AIR 1926 Oudh 57 (58) : 26 Cri L Jour 1576, *Emperor v. Md. Shafi*. See also S. 342 Note 20.

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Notes 4-6

4. "The accused shall be asked whether he means to adduce evidence." — After the conclusion of the prosecution evidence the Court is bound to ask the accused person if he means to adduce evidence and the accused himself cannot waive the benefit of such a provision.¹ The words "adduce evidence" in sub-s. (1) do not mean the same thing as the words "enter on his defence" in sub-s. (4). It is only where at a later stage, the Court considers that there is evidence that the accused person committed the offence that the accused is to be called upon to enter on his defence.²

5. "The prosecutor may sum up his case" — Sub-section (2). — The prosecutor may sum up his case only if the accused says he does not mean to adduce evidence. In a case where several persons are tried together the word "he" in sub-ss. (2) and (4) should be construed to apply to all the accused together and so a prosecutor may sum up only if all the accused say they do not mean to adduce evidence.¹

6. Where there is no evidence that the accused committed the offence. — The words "no evidence" in sub-s. (2) mean merely that there is not on the record any evidence which, even if true, would amount to legal proof of the offence charged against the accused; they cannot be extended to mean no satisfactory, trustworthy or conclusive evidence.¹ The real test in deciding whether there is evidence or not is to see whether a Judge, at a trial held with the aid of jurors, could say that there was no evidence which could go before the jury.² However, a mere scintilla of evidence is not enough to justify the Judge in leaving a case to the jury. There must be evidence from which they might reasonably conclude the fact to be established.³ The "evidence" referred to is the evidence let in on behalf of the prosecution. So, where the only evidence is the confession of a co-accused⁴ or the evidence of witnesses of a co-accused,⁵ it is a case of

Note 4

1. ('68) 10 Suth W R Cr 7 (7), *Bhugwan v. Doyal Gope*.
[See also ('08) 8 Cr. L. J. 152 (153) : 18 M L J 330, *In re Rangaswami Chetty*.
(An accused person in a criminal trial cannot waive the benefit of the legal provisions regulating the trial.)]
2. ('20) AIR 1920 Pat 471 (474, 478) : 21 Cr. L. J. 705 : 5 Pat L Jour 430, *Raghu Bhumi v. Emperor*.

Note 5

1. ('94) 18 Bom 364 (365), *Queen-Empress v. Sadanand Narayan*.

Note 6

1. ('88) 1888 All W N 153 (153), *Empress v. Nanha*.
('88) 10 All 414 (416, 417) : 1888 A W N 129, *Queen-Empress v. Munna Lall*.
('92) 16 Bom 414 (422), *Queen-Empress v. Vajiram*.
('83) 9 Cal 875 (877) : 12 Cal L Rep 506, *Shadulla Howladar v. Empress*.
('25) AIR 1925 Cal 1055 (1055) : 26 Cr. L. J. 1151, *Rahamali Howladar v. Emperor*.
(No evidence worth the name is under the law very different from no evidence.)
('89) 2 Weir 391 (391, 392).
('29) AIR 1929 Pat 121 (124) : 30 Cri L Jour 519, *Emperor v. Nawal Kishore*.
('94) Oudh Sel Cas No. 274, p. 607 (608), *Joga Singh v. Ganesh Singh*.
2. ('27) AIR 1927 All 90 (91) : 49 All 181 : 27 Cr. L. J. 1369, *Balchand v. Emperor*.
3. ('15) AIR 1915 Cal 773 (777) : 16 Cr. L. J. 561 (565) (F.B.), *Emperor v. Upendra*.
4. ('71-74) 7 Mad H C R App xv (xv).
- ('09) 9 Cri L Jour 404 (405) : 1 Ind Cas 867 : 33 Mad 46, *In re Giddigadu*.
5. ('09) 10 Cr. L. J. 68 (68) : 2 Ind Cas 525 (Mad), *In re Raghavaraaju*.

"no evidence" within the meaning of this section. The evidence contemplated by sub-s. (2) includes both direct and circumstantial evidence.⁶ The words "no evidence" do not, however, mean absence of evidence on behalf of the prosecution *owing to failure of witnesses to attend*. So, where the prosecution could not adduce evidence owing to failure of witnesses to attend, the Court cannot treat it as a case of "no evidence" and proceed under this section.⁷

Section 289
Notes 6-8

7. Record a finding of not guilty.—If the Court considers that there is *no evidence*, it can, in a case tried with the aid of assessors, itself record a finding of not guilty even without taking the opinions of the assessors, but if there is some evidence, though not trustworthy, satisfactory or conclusive, the Court must record the opinions of assessors before recording a finding of not guilty.¹ But the Court cannot, purporting to act under this section, record a finding of not guilty where it considers the charge itself improper.² Where there is no evidence the Judge should enter a verdict of acquittal; there is no warrant for a finding of "not proven."³

8. "Direct the jury to return a verdict of not guilty." — If in a case tried by a jury there is no legal evidence that the accused committed the offence, the Court should direct the jury to return a verdict of "not guilty." It must not leave it to the jury to express their opinion since a finding of guilty by the jury under such circumstances cannot be sustained,¹ even if there is some evidence available but not called by the prosecution.² The direction of a Judge that there is no evidence that the accused committed an offence is binding on the jury and must be followed by them and where the Judge, in such a case,

6. See ('37) AIR 1937 Pat 263 (270): 15 Pat 817: 38 Cr. L. J. 673, *Samarendra Kumar v. Emperor*. (The judgment uses the words "oral and circumstantial" but apparently what is meant is "direct and circumstantial.")

7. ('26) AIR 1926 Cal 584 (585): 27 Cri L Jour 125, *Superintendent and Remembrancer of Legal Affairs v. Sardar Saik*.

Note 7

1. ('96) 9 C P L R Cr 24 (25), *Empress v. Tularam Brahmin*.
(199) 2 Weir 776 (777), *Public Prosecutor v. Sarabu Channayya*.
(81) 2 Weir 382 (382), *Public Prosecutor v. Nalli Goundan*.
(70) 7 Bom H C R Cr 82 (82), *Reg. v. Parvati*.
(92) 16 Bom 414 (422), *Queen-Empress v. Vaji Ram*.
(88) 10 All 414 (416, 417): 1888 A W N 129, *Queen-Empress v. Munna Lall*.
See also S. 309 Note 3.
2. ('90) 12 All 551 (552): 1890 A W N 178, *Dwaraka Lall v. Mahadeo Rai*.
3. ('85) 2 Weir 381 (381), *In re Korada Gummanna*.

Note 8

1. ('67) 7 Suth W R Cr 57 (57, 58), *Queen v. Greedhary*.
(67) 8 Suth W R Cr 87 (92), *Queen v. Nobokisto Ghose*.
(71) 16 Suth W R Cr 19 (20), *Queen v. Rutton Dass*.
(71) 15 Suth W R Cr 46 (46), *Queen v. Bahar Ali*. (Conviction by a jury set aside in a case of murder in which there was total absence of all evidence to show the prisoner's guilt.)
(99) 2 Weir 515 (516), *In re Mammadi*.
(29) AIR 1929 Pat 121 (123): 30 Cr.L.J. 519, *Emperor v. Nawal Kishore*.
(20) AIR 1920 Cal 698 (698): 22 Cr.L.J. 60, *Asimuddin Sardar v. Emperor*.
2. ('71) 15 Suth W R Cr 11 (11), *In re Sheikh Tenoo*.
- (91) 2 Weir 382 (382, 383), *Public Prosecutor v. Nalli Goundan*. (It is not the duty of a Sessions Judge to supplement a defective enquiry on the part of magistry and the police.)

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Notes 8-9

directs the jury to return a verdict of "not guilty," the jury must accept that opinion whether they agree with it or not; a return of verdict of guilty in such a case cannot be accepted.³ The Court cannot forbear from directing a return of a verdict of not guilty if there is no evidence, even on the ground that the case of a co-accused is likely to be prejudiced thereby.⁴ But if there is some evidence the case must go before the jury and the Court cannot direct a verdict of not guilty because it *disbelieves* the evidence.⁵

A Court of Session, unlike a High Court, has no power to stay proceedings under S. 273 on unsustainable charges and all that it can do after hearing the evidence and coming to the conclusion that there is no evidence that the accused committed the offence, is to direct the jury to return a verdict of not guilty, but it cannot do so before the commencement of the trial. This provision is meant for remedying any suspicion of injustice under which the accused may labour in respect of what he considers to be a committal on insufficient evidence.⁶

9. "Shall call on the accused to enter on his defence" — Sub-section (4). — The calling upon an accused person to enter on his defence under this sub-section is not a mere formality but is an essential part of a criminal trial.¹ So, where there is some evidence on behalf of the prosecution which might go before a jury, the Court should call upon the accused to enter on his defence² *after* the close of the prosecution evidence and summing up by the prosecutor.³ As to whether a failure to call upon the accused to enter upon his defence is an irregularity covered by S. 537, see Note 11.

Where several persons are tried together, even if one of them offers to adduce evidence, all of them should be called upon to enter on their defence and they must follow one another in their defence, since there cannot be a summing up only in the case of accused not adducing evidence and a right of reply as against others.⁴ Since in a criminal case the burden of proof is on the prosecution and the conviction must be based on evidence which excludes the theory of innocence,⁵ the accused should be called upon to enter on his defence only if the evidence is such as to enable the Court to 'judge' rather

3. ('39) AIR 1939 All 708 (708, 709) : I L R (1939) All 871 : 41 Cri L Jour 142, *Emperor v. Qudrat*. (The question of absence of evidence is treated as a question of law and not a mere question of fact.)

4. ('26) AIR 1926 Cal 728 (729) : 27 Cri L Jour 398, *Haricharan Das v. Emperor*.

5. ('72) 16 Suth W R Cr 20 (21), *In re Huroo Shaha*.

('27) AIR 1927 Pat 370 (374) : 7 Pat 15 : 28 Cr. L. J. 692, *Ramchariter v. Emperor*.

('31) AIR 1931 Pat 172 (175) : 10 Pat 140 : 32 Cri L Jour 975, *Rup Narain v. Emperor*.

('29) AIR 1929 Pat 121 (123) : 30 Cri L Jour 519, *Emperor v. Nawal Kishore*.

('24) AIR 1924 Cal 809 (811) : 25 Cri L Jour 1048, *Emperor v. Osman Sardar*.

('25) AIR 1925 Cal 1055 (1055, 1056) : 26 Cri L Jour 1151, *Rahamali v. Emperor*.

6. ('35) AIR 1935 Nag 202 (204, 205) : 36 Cr. L. J. 1389 : 31 N L R 360, *Maroti v. Emperor*.

Note 9

1. ('96) 23 Cal 252 (253), *Queen v. Imam Ali Khan*.

2. ('92) 16 Bom 414 (423), *Queen-Empress v. Vaji Ram*.

3. ('91) 1891 Rat 581 (582), *Queen-Empress v. Dhamba*.

4. ('94) 18 Bom 364 (365), *Queen-Empress v. Sadanand Narayan*.

5. ('95) 1895 Rat 779 (783), *Queen-Empress v. Narayan Nathu*.

than conjecture.⁶ For the same reason no adverse inference can be drawn against the accused if he fails to adduce evidence even if he had, in answer to a question under the first part of this section, undertaken to adduce evidence.⁷ If the accused makes any statement in his defence, it ought to be recorded. If he does not voluntarily make any statement or declines to answer questions under S. 342, the facts should be noted. When there is nothing else to show the nature of the defence, a note of the address to the Court under S. 290, if any, should be recorded. The record is not complete unless it shows the nature of the defence set up.⁸

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Notes 9-11

Where the accused calls no witnesses, the clause means that he or his pleader is to make his final address to the Court.⁹

10. Procedure where the witnesses for the accused are absent. — Where due to a mistake the witnesses for the defence were not in attendance, not having been summoned by the Magistrate, it was held that the trial should be adjourned and the accused should be given an opportunity to examine his witnesses by summoning them if necessary,¹ after calling upon him to enter on his defence.²

11. Effect of non-compliance with the section. — The criminal proceedings are bad unless they are conducted in the manner prescribed by law and if they are substantially bad in themselves, the defect will not be cured by any consent or waiver on the part of the accused.¹ Thus, it is irregular to record the prosecution evidence after the accused has entered on his defence,² but it is only an irregularity which does not vitiate the trial if there has been no prejudice caused to the accused by reason of such irregularity.³

6. ('95) 1895 Rat 772 (773), *Queen v. Ganesh Bhikaji*.

7. ('84) 10 Cal 140 (149, 150) : 13 C L R 358, *Hurry Churn v. Empress*.

8. ('71) 15 Suth W R Cr 16 (17), *In re Gopal Hajjain*.

('86) 9 Mad 224 (244), *Queen-Empress v. Viran*.

('85) Oudh Sel Cas No. 95, p. 106 (106), *Queen-Empress v. Mt. Hardai*.

('03'04) 2 Low Bur Rul 115 (116), *Nga Thet U v. Emperor*.

9. ('36) AIR 1936 Mad 82(83) : 37 Cr. L. J. 45 : 1935 M W N 1091, *Thoppa v. Emperor*.

('27) AIR 1927 Cal 250 (251) : 28 Cr. L. J. 297 : 54 Cal 286, *Bechulal v. The Injured Lady*.

Note 10

1. ('69) 12 Suth W R Cr 22 (22), *Queen v. Mookun*.

('71) 15 Suth W R Cr 34 (35) : 6 Beng L R App 88, *Queen v. Ishan Dutt*.

2. ('75) 23 Suth W R Cr 58 (59), *Queen v. Jumiruddin*.

Note 11

1. ('76) 2 Cal 23 (30) : 25 Suth W R Cr '57, *Queen v. Bholanath Sen*.

See also S. 537 Note 33.

2. ('70) 13 Suth W R Cr 36 (37), *Queen v. Sham Kishore*. (In this case however it was held that the accused knew the evidence to be given, and anticipated the same in his defence—So no prejudice.)

('28) AIR 1928 Lah 953 (953) : 29 Cr. L. J. 844, *Karam Chand v. Emperor*. (A prosecution witness examined after the whole of defence evidence was recorded—Procedure is bad and vitiates trial.)

('70) 13 Suth W R Cr 15 (15), *Queen v. Assanoollah*. (Prosecution witness recalled after defence of the accused without giving him further opportunity—Conviction quashed.)

3. ('82) 8 Cal 154 (156) : 10 C L R 51, *Empress v. Kalichurn*.

('79) 4 Cal L R 338 (341), *In the matter of Turibullah*. (Case commencing by examination of witnesses for defence.)

See also S. 244 Note 3 and S. 256 Note 10.

Section 289
Note 11

Where the Court records a finding of not guilty or directs the jury to return a verdict of not guilty without recording the opinions of the assessors, or the verdict of the jury, as the case may be, in a case where there is enough evidence to go to the jury, the Court acts without jurisdiction and the trial is illegal.⁴ But the Calcutta High Court has held, under similar circumstances, that it is only an irregularity which does not vitiate the trial if there is no prejudice to the other accused.⁵ Where there is no evidence and the jury returns a verdict of guilty by reason of the Judge not directing them to give a verdict of not guilty, the conviction is bad in law.⁶ Entering upon defence on being called upon to do so marks a special stage in, and is an essential part of, a criminal trial. Omission to call upon the accused to enter on his defence, according to the Calcutta High Court⁷ and the Chief Court of Lower Burma,⁸ cannot but occasion failure of justice and conviction consequent thereon must be set aside. But the High Courts of Allahabad⁹ and Madras¹⁰ have taken the view that it is only an irregularity which does not vitiate the trial if there has been no prejudice to the accused. Where the accused is not asked if he means to adduce evidence, his conviction is liable to be set aside.¹¹

Section 290

290.* The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

Synopsis

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|---|---|
| 1. Defence. | 4. Summing up after evidence —
Right of. |
| 2. Accused's right to examine
witnesses. | 5. Evidence in criminal cases. |
| 3. Accused's right to cross-examine
witnesses. | 6. Written statement. |

* 1882 : S. 290; 1872 : S. 251, para. 3; 1861 : S. 374.

4. ('94) Oudh Sel Cas No. 274 p. 607 (609), *Joga Singh v. Ganesh Singh*.
(('88) 10 All 414 (417) : 1888 A W N 129, *Queen-Empress v. Munna Lal*.
(('89) 2 Weir 391 (391). (Court not taking the opinion of assessors commits an error in law.)

See also S. 309 Note 3.

5. ('25) AIR 1925 Cal 1055 (1056) : 26 Cr. L. J. 1151, *Raham Ali v. Emperor*.

6. ('67) 8 Suth W R Cr 87 (92), *Queen v. Nobokisto Ghose*.

(('71) 15 Suth W R Cr 46 (47), *Queen v. Bahar Ali Kahar*.

7. ('96) 23 Cal 252 (253), *Queen-Empress v. Imam Ali Khan*.

8. ('03-04) 2 L. B. R. 115 (117), *Nga Thet U v. King-Emperor*.

9. ('18) AIR 1918 All 298 (299) : 19 Cri L Jour 209, *Premgir v. Emperor*. (The irregularity can be covered by S. 537.)

10. ('36) AIR 1936 Mad 82 (83) : 37 Cr. L. J. 45, *In re Thoppa*.

11. ('68) 10 Suth W R Cr 7 (7), *Bhugwan v. Doyal Gope*.

See also S. 256 Note 10.

Other Topics (miscellaneous)

Adverse inferences against accused. See Note 5.

Burden of proof. See Notes 1 and 5.

Duty to explain incriminating facts. See Note 5.

Record of defence set up. See Note 1.

Witnesses for co-accused—Cross-examination. See Note 3.

**Section 290
Note 1**

1. Defence. — The last section (S. 289) provides that if after the prosecution evidence is taken in a sessions trial the Court considers that there is evidence that the accused committed the offence, he should be called upon to enter on his defence. This and the next section provide for the procedure to be followed in conducting the defence.

The accused is entitled to set up any defence, technical or otherwise.¹ There is no legal bar to his raising even inconsistent defences.² Thus, he can raise a defence of *alibi* as well as of private defence.³ But the defence will become weaker by inconsistent pleas being raised.⁴

The record of the trial should show the nature of the defence set up.⁵ The nature of the defence is to be gathered not only from the statement of the accused but also from the trend of cross-examination of the prosecution witnesses and the arguments of the defence pleader.⁶

Though under S. 105 of the Evidence Act the burden of proving that the case of the accused falls within one of the general exceptions in the Penal Code is on him, it is not necessary that he should specifically raise such a plea. A Court is bound to give effect to a plea of private defence if it is made out on the evidence, though it is not specifically raised by the accused.⁷

Section 290 — Note 1

1. ('36) AIR 1936 Nag 55 (58) : 37 Cri L Jour 474, *Dewan Singh v. Emperor*. (Under the law it is perfectly open to an accused person to raise any plea of law or fact which may make for his acquittal.)
- ('14) AIR 1914 Cal 456 (459) : 41 Cal 350 : 15 Cr. L. J. 385, *Romesh v. Emperor*.
2. ('36) AIR 1936 Rang 1 (2) : 37 Cr. L. J. 293, *Nga Ba Sein v. Emperor*. (The accused himself may on his own behalf take up one line of defence, but it is equally open to his pleader on his behalf to take up another and alternative line of defence.)
- ('23) AIR 1923 Cal 717 (718) : 25 Cr. L. J. 190, *Nagendra Chandra v. Emperor*. [But see ('10) 11 Cr. L. J. 374 (376) : 32 All 451 : 6 I. C. 589, *Emperor v. Wajid Hussain*. (Where accused has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions he cannot in appeal set up a case upon the evidence taken at his trial that his act came within such general exception.)]
3. ('18) AIR 1918 All 189 (190) : 40 All 284 : 19 Cr. L. J. 371, *Fususuf v. Emperor*. ('19) AIR 1919 Cal 439 (441) : 20 Cr. L. J. 661, *Afruddi Chakdar v. Emperor*. [See ('20) AIR 1920 Pat 843 (844) : 5 Pat L Jour 64 : 21 Cr. L. J. 799, *Faudi Keot v. Emperor*. (It is open to an accused person to plead the right of private defence either specifically or as an alternative defence.)]
4. ('23) AIR 1923 Cal 717 (718) : 25 Cr. L. J. 190, *Nagendra Chandra v. Emperor*.
5. ('71) 15 Suth W R Cr 16 (17), *In re Gopal Hajjain*.
6. ('30) AIR 1930 Cal 442 (442, 443) : 31 Cr. L. J. 1203, *Kuti v. Emperor*.
7. ('36) AIR 1936 Rang 1 (2) : 37 Cr. L. J. 293, *Nga Ba Sein v. Emperor*. ('27) AIR 1927 Mad 97 (97) : 27 Cr. L. J. 1198, *In re Jogali Bhaigo*. ('15) AIR 1915 Mad 532 (533) : 15 Cr. L. J. 710, *In re Pachai Gounden*. ('33) AIR 1933 Oudh 63 (65) : 34 Cr. L. J. 373, *Bahadur Khan v. Emperor*. ('82) 11 Cal L R 232 (233), *In the matter of Kali Charan Mookerjee*. ('30) AIR 1930 Cal 442 (443) : 31 Cri L Jour 1203, *Kuti v. Emperor*. (Charge to jury, expressly calling upon jury not to consider plea of private defence because it was not specifically pleaded though it could be, amounts to misdirection.)

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The accused is not bound to disclose the nature of his defence in the committing Magistrate's Court.⁸ Nor is he bound to disclose his defence in the Sessions Court till he is called on to enter upon his defence.⁹ But if he means to bring any charges against the prosecution (*e. g.*, a charge of fraud) as part of his defence, there is an equitable rule that he should disclose his intention during the cross-examination of the prosecution witnesses so that the prosecution may have an opportunity of explaining matters. Unless such an opportunity is given to the prosecution, the defence so far as it is based on the allegations against the prosecution, must fail.¹⁰

The accused can raise a new defence at a late stage of the case; but unless it can be said that such a defence could not have been raised earlier, the weight to be attached to it will suffer.¹¹

See also S. 256 Note 10 and S. 342 Note 29.

2. Accused's right to examine witnesses. — When a prisoner puts forward a distinct defence and cites witnesses but such witnesses on their appearance in Court say that they know nothing in prisoner's favour, it is the duty of the Judge, instead of dismissing them at once, to question them with a view to see if there is any truth in the defence.¹

It is no part of the duty of a Judge to examine a witness for the accused when his pleader has refused to do so and the accused has not raised any objection.²

See section 291 and Notes thereunder.

3. Accused's right to cross-examine witnesses. — An accused is entitled to cross-examine the witnesses of a co-accused whose case is adverse to his own.¹

Where a witness examined by the prosecution in the committing Magistrate's Court is given up by the prosecution and the accused thereafter calls him as his own witness, the accused cannot cross-examine him, the reason being that the Evidence Act gives the right of cross-

(24) AIR 1924 All 645 (651) : 26 Cr. L. J. 501, *Emperor v. Kishen Lal*.

(12) 13 Cr. L. J. 470 (471) : 15 I. C. 310 (Mad), *Veerana Nandan v. Emperor*.

See also S. 271 Note 9.

8. ('30) AIR 1930 Cal 188 (189) : 31 Cr. L. J. 695 : *Kali Bilas Hazra v. Emperor*.

9. ('27) AIR 1927 Sind 104 (107) : 27 SLR 356 : 28 Cr. L. J. 66, *Emperor v. Saran*.

10. ('27) AIR 1927 Sind 104 (107) : 27 SLR 356 : 28 Cr. L. J. 66, *Emperor v. Saran*.

(14) AIR 1914 Cal 456 (466) : 41 Cal 350 : 15 Cr. L. J. 385, *Romesh Chandra v. Emperor*.

(28) AIR 1928 All 222 (225) : 30 Cri L Jour 530, *Emperor v. Jhabbar Mal*.

11. ('33) AIR 1933 Pat 481 (483) : 34 Cri L Jour 828, *Emperor v. Kameshwar Lal*.

[See also ('36) AIR 1936 Lah 233 (233) : 37 Cr. L. J. 751, *Dilwar v. Emperor*. (Defence of alibi ought to be raised at the earliest possible opportunity and raising such a defence for the first time in the Sessions Court would be fatal to the defence.)]

Note 2

1. ('69) 11 Suth W R Cr 9 (9), *Queen v. Bhugner Putwa*.

2. ('83) 1883 All W N 189 (190), *Empress v. Harpat*.

Note 3

1. ('40) AIR 1940 Lah 210 (215) : 41 Cri L Jour 639, *Chamanlal v. Emperor*. (Evidence of witnesses of one accused is admissible against his co-accused.)

(94) 21 Cal 401 (403), *Ram Chand Chatterjee v. Hanif Sheikh*.

[But see ('69) 12 Suth W R Cr 75 (76), *Queen v. Surroop Chand Paul*.]

See also S. 257 Note 6.

examination only to the adverse party except in certain cases (Evidence Act, ss. 138 and 154.)²

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Notes 3-5

4. Summing up after evidence — Right of. — When there are more than one accused in a case, their pleaders should be allowed to sum up their respective cases after the evidence for all the accused has been taken.¹ Any arbitrary and undue curtailment by the Court of the parties' right of argument is to be deprecated.²

5. Evidence in criminal cases. — The burden of proving the guilt of the accused in all criminal cases is on the prosecution.¹ There is no obligation on the accused to produce any evidence in his defence in the first instance.² Unless and until the prosecution has established a *prima facie* case against the accused, no adverse inference can be drawn against him from the non-production of any evidence by him.³ Similarly, the accused cannot be convicted *merely* on the ground of the weakness or falsity of his defence.⁴ The prosecution

2. ('98) 20 All 155 (157) : 1897 A W N 229, *Queen-Empress v. Zawar Husen*.
[But Compare ('23) AIR 1923 Cal 717 (718) : 25 Cr. L. J. 190, *Nagendra Chandra v. Emperor*. (Witness not given up by prosecution but not examined in the Sessions Court — Accused is entitled to cross-examine such witness.)]

Note 4

1. ('32) AIR 1932 Lah 103 (110) : 33 Cri L Jour 97, *Mohinder Singh v. Emperor*.
2. ('37) AIR 1937 Pat 263 (273) : 38 Cri L Jour 673 : 15 Pat 817, *Samarendra Kumar v. Emperor*. (If the Judge has properly charged the jury, the mere fact that the case has not been adequately argued on behalf of the accused cannot by itself be a good ground for ordering a re-trial.)

Note 5

1. ('40) AIR 1940 Lah 54 (57) : 41 Cri L Jour 447, *Bhag Singh v. Emperor*. (The rule is subject to exception contained in S. 105 of the Evidence Act.)
('39) AIR 1939 Sind 209 (214) : 41 Cr. L. J. 23 : I L R (1940) Kar 249, *Shewaram Jethanand v. Emperor*. (Prosecution must fully prove guilt of accused — Merely proving *prima facie* case is not sufficient.)
('30) AIR 1930 Bom 179 (181) : 31 Cr. L. J. 1096, *Keshavji Madharji v. Emperor*. (Cheating by cheque — Burden of proof ordinarily is on prosecution to prove that non-payment was not accidental but intentional.)
2. ('40) AIR 1940 Mad 329 (335), *Rex v. V. Krishnan*.
('32) AIR 1932 Lah 243 (244) : 33 Cr. L. J. 411, *Hayat v. Emperor*. (Two persons seen together and shortly afterwards one of them found to have been murdered. No onus rests on survivor to explain how deceased met with his death.)
('94) 1894 Rat 686 (686), *Queen-Empress v. Jethmal Narayan*. (Prisoner on his trial is merely on his defensive and owes no duty to any one but himself; he could not be convicted because he had not tried to explain to the Court how the death in question occurred or by what means.)
3. ('95) 1895 Rat 779 (782), *Queen-Empress v. Narayan Mathu*.
('84) 10 Cal 140 (149) : 13 C L R 358, *Hurry Churn v. Empress*.
('82) 8 Cal 121 (125) : 10 C L R 151, *Empress v. Dhanoo Kazi*.
4. ('23) AIR 1923 Mad 365 (367) : 24 Cri L Jour 426, *Ramudu Iyer v. Emperor*.
('40) AIR 1940 Pat 365 (370) : 41 Cr. L. J. 114 (120), *Rambrichh v. Emperor*. (Even if the version put forward by the defence is wholly untrue, the prosecution must establish beyond all reasonable doubt that the case put forward by them is true.)
('40) AIR 1940 Lah 54 (57) : 41 Cr. L. J. 447, *Bhag Singh v. Emperor*.
('37) AIR 1937 Mad 968 (969) : 39 Cri L Jour 144, *Ramaswami v. Rangaswami*.
('36) AIR 1936 Rang 90 (94) : 38 Cri L Jour 927, *Emperor v. Nga Mya Maung*. (Prosecution should not improve its case by utilizing the defects in the evidence of the defence witnesses or by the false statement which the accused may make.)
('22) AIR 1922 All 24 (25) : 23 Cr. L. J. 193, *Ramhit v. Emperor*.
('21) AIR 1921 Cal 531 (532) : 23 Ori L Jour 220, *Gouri Narayan v. Tilbikram*. (If the case for the prosecution is false on the whole the accused is entitled to acquittal whether his defence be true or false.)
('68) 1868 Pun Re No. 22 Cr, p. 52 (57), *Jehangeer Khan v. Crown*.

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cannot seek to use an admission in the accused's statement to fill up a gap in the prosecution evidence.⁵ A conviction cannot be based merely on suspicion.⁶ Where the prosecution evidence is not conclusive about the guilt of the accused and there is doubt, the accused is entitled to the benefit of doubt and must be acquitted.⁷ But where the prosecution has established a *prima facie* case against the accused, it is for him to explain the incriminating circumstances appearing against him.⁸ See also S. 367 Note 6.

6. Written statement.—There is no provision for filing a written statement by the accused in sessions trials.¹ See S. 256 and Notes thereunder. See also S. 342.

Section 291

291.* The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in

Right of accused
as to examination
and summoning of
witnesses.

* 1882 : S. 291; 1872 : S. 363; 1861 : S. 375.

- (172) 1872 Pun Re No. 5 Cr, p. 6 (9), *Crown v. Gulab*.
 ('90) 1890 Pun Re No. 21 Cr, p. 47 (49), *Empress v. Harjas Rai*.
 ('67) 1867 Pun Re No. 37 Cr, p. 61 (67), *Crown v. Shah Mahomed*.
 ('25) AIR 1925 Oudh 78 (88) : 27 Oudh Cas 188 : 26 Cri L Jour 225, *Hira Lal v. Emperor*. (Weakness of defence cannot be allowed to bolster up a weak case for the prosecution.)
 5. ('37) AIR 1937 Mad 209 (210) : 38 Cri L Jour 323 : I L R (1937) Mad 358, *Seshapani Chetty v. Emperor*.
 ('04) 27 Mad 238 (240) : 2 Weir 408, *Mohideen Abdul Kadir v. Emperor*.
 See also S. 256 Note 10.
 6. ('40) AIR 1940 Pat 365 (371) : 41 Cr.L.J. 114, *Rambrichh Singh v. Emperor*.
 ('39) 52 M L W 420 (428, 429), *In re Rami Reddi*. (Utmost suspicion without the element of certainty does not justify a conviction — Benefit of doubt should be given to accused.)
 ('30) AIR 1930 Oudh 460 (463) : 32 Cr.L.J. 94, *Gendan Lal v. Emperor*. (Specially in a murder trial where the maximum punishment is death.)
 7. ('40) AIR 1940 Pat 365 (371) : 41 Cr.L.J. 114, *Rambrichh Singh v. Emperor*.
 ('36) 37 Cr. L. J. 407 (407) : 160 Ind Cas 561 (Lah), *Ghauns v. Emperor*.
 ('39) 52 M L W 420 (429), *In re Rami Reddi*.
 8. ('31) AIR 1931 Pat 384 (386) : 10 Pat 590 : 33 Cr.L.J. 111, *Leda Bhagat v. Emperor*.
 ('28) AIR 1928 Pat 100 (101) : 6 Pat 627 : 29 Cr.L.J. 239, *Ghanshyam v. Emperor*. (Merely relying on the discrepancies in the prosecution evidence is not sufficient.)
 ('19) AIR 1919 Oudh 160 (174) : 20 Cri L Jour 465, *Shusil Chandra v. Emperor*.
 ('14) AIR 1914 Sind 111 (112) : 7 S.L.R. 109 : 15 Cr.L.J. 497, *Isarsing v. Emperor*.
 ('25) AIR 1925 Oudh 78 (88) : 27 Oudh Cas 188 : 26 Cr.L.J. 225, *Hira Lal v. Emperor*.
 ('28) AIR 1928 Cal 27 (39) : 29 Cri L Jour 49, *Hari Narayan v. Emperor*. (If a *prima facie* case is made out against the accused, he should rebut it by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock.)
 ('30) AIR 1930 Lah 163 (166) : 31 Cri L Jour 131, *Jowaya v. Emperor*.
 ('16) AIR 1916 All 63 (64) : 17 Cri L Jour 23 (23), *Abdul Aziz v. Emperor*.
 ('16) AIR 1916 Cal 188 (199) : 16 Cr.L.J. 497 (518) : 42 Cal 957, *Amritlal v. Emperor*.
 See also S. 257 Note 1 and S. 342 Note 29.

Note 6

1. ('26) AIR 1926 Pat 566 (568) : 27 Cri L Jour 1041, *Emperor v. Zahir Haidar*.
 ('16) AIR 1916 Cal 633 (641) : 16 Cr. L. J. 724, *Emperor v. Dwijendra Chandra*.
 ('35) AIR 1935 Cal 687 (688, 689) : 37 Cr.L.J. 30 : 63 Cal 481, *Emperor v. Tarak Nath*.
 [See however ('33) AIR 1933 All 690 (695) : 55 All 1040 : 34 Cr.L.J. 967, *Jhabwala v. Emperor*. (If the accused has already prepared a written statement, there is no reason why he should not be allowed to file it in the Court of Session.)]

sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

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Notes 1-3

Synopsis

1. Scope of the section.
2. Examination of witnesses present in Court.
3. Right to issue of process for compelling attendance of witnesses.

Other Topics (miscellaneous)

Adjournment for summoning new witnesses. See Note 3.	Summons refused by Magistrate—Issued by Sessions Court. See Note 3.
Refusal to summon witnesses named—Delay. See Note 3.	Witness not previously named but present. See Note 2.

1. Scope of the section.— This section entitles the accused to examine in his defence in the Sessions Court all witnesses who are present whether they have been named by him previously or not. It also entitles him to the assistance of the Court in compelling the attendance of all those witnesses who were included by him in the list of witnesses delivered by him to the committing Magistrate under S. 211. As it is a frequent ground of appeal against a conviction by the Sessions Court that the Court refused or omitted to examine witnesses for the defence, the Court should be careful to note specifically in the record whether the accused elected to call any witnesses in his defence or refused to do so and whether the witnesses called by him were examined.¹

2. Examination of witnesses present in Court.— Under this section, the accused is entitled as of right to examine as a witness in his defence any person who is present in the Court notwithstanding that he was not named by him previously as his witness.¹ *A fortiori* if a witness included in the list delivered by the accused to the committing Magistrate under S. 211 is present in Court, the Court is bound to allow him to be examined.² In the undermentioned case³ it was held that if the accused insists on the examination of a witness in attendance who had been *discharged* before, the Court may, if it thinks that the interests of justice would be served, allow him to be examined.

3. Right to issue of process for compelling attendance of witnesses.— This section provides that except in certain cases the accused is not entitled as of right to the issue of summons to any witness not included in the list delivered by him to the committing Magistrate under S. 211. Nor can he insist on an adjournment being

Section 291 — Note 1

1. ('95) 17 All 524 (526) : 1895 A W N 111, *Queen-Empress v. Pirbhu*.

Note 2

1. ('75) 24 Suth W R Cr 18 (19), *Queen v. Lucky Narain*.
('89) 16 Cal 610 (618), *Bika Khan v. Queen-Empress*. (Accused is entitled to call as his witness any one who is in Court, whether summoned by him or not.)
2. ('66) 1866 Pun Re No. 118 Cr, p. (119), *Ahmud Khan v. Empress*.
3. ('23) AIR 1923 Oudh 142 (142) : 24 Cr. L. J. 518, *Nageshwar v. Emperor*.

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Note 3

granted to enable him to examine any such witness.¹ But it is open to the Sessions Court in the exercise of its *discretion* to issue summons for the attendance of such witnesses² and ordinarily, an application by an accused for summons ought not to be refused if there is time to secure the attendance of the witnesses before the conclusion of the trial.³

In the case of witnesses included in the list delivered by the accused to the committing Magistrate under section 211, Ss. 216 and 217 provide that they should be summoned to give evidence before the Sessions Court or, if they have been examined before the committing Magistrate, should be required to execute bonds binding themselves to give evidence in the Sessions Court. If any of them fail to appear in the Sessions Court, the accused is entitled as of right to the issue of process to compel their attendance⁴ or to an adjournment of the case to enable him to secure their attendance.⁵ This right of the accused

Note 3

1. (1865) 3 Suth W R Cr 29 (29), *Queen v. Boidonath Singh*.
'71) 16 Suth W R Cr 28 (30, 34): 7 Beng LR 564, *Queen v. Bholanath Mookerjee*.
(133) AIR 1933 Pat 559 (560), *Ram Sewak v. Emperor*.
(25) AIR 1925 Lah 557 (558): 27 Cr. L. J. 134, *Nazir Singh v. Emperor*.
See also S. 211 Note 6, S. 216 Note 2 and S. 540 Note 7.
2. (135) AIR 1935 Sind 216 (217): 29 S L R 302: 37 Cr. L. J. 108, *Hote v. Emperor*.
(Nothing to show that application for summons is made for delaying proceedings or other ulterior purpose—Application should be allowed.)
(197) 19 All 502 (503, 504): 1897 A W N 134, *Queen-Empress v. Shakir Ali*. (Sessions Judge is bound to summon such witnesses if he considers their evidence material.)
(34) AIR 1934 All 372 (373): 35 Cr. L. J. 591, *Misri Lal v. Emperor*. (Sessions Judge has inherent jurisdiction to summon material witnesses.)
(34) AIR 1934 Lah 250 (251): 35 Cr. L. J. 1034, *Fazal Husain v. Emperor*. (No list put in before committing Magistrate, still Sessions Judge can summon witnesses.)
3. (133) AIR 1933 Pat 559 (560), *Ram Sewak v. Emperor*. (Especially in a case where adjournments were being taken for procuring attendance of prosecution witnesses.)
(135) AIR 1935 Sind 216 (217): 37 Cr. L. J. 108: 29 S L R 302, *Hote v. Emperor*.
[See (103) 7 Cal W N 188 (190), *Brojendra Lal v. Emperor*. (It is for the accused and not for the Judge to say what amount of evidence is proper to be placed before the jury.)
(30) AIR 1930 Cal 362 (363): 31 Cr. L. J. 1077, *Muktal Hossein v. Emperor*. (In a serious case the Judge should allow every opportunity to the accused to adduce such evidence as they choose, either oral or documentary.)]
4. (131) AIR 1931 Cal 6 (7): 58 Cal 412: 32 Cr. L. J. 316 *Ram Mamud v. Emperor*.
(The examination of such witness cannot be refused on the ground that it would be inconvenient to grant an adjournment for that purpose.)
(71) 15 Suth W R Cr 34 (35): 6 Beng L R App 88, *Queen v. Ishan Dutt*.
(82) 2 Weir 383 (383), *In re Muniammal*. (Application for issue of summons should be allowed in such cases though made at a late stage.)
(75) 23 Suth W R Cr 56 (56), *Queen v. Prosunno Coomar*.
(30) AIR 1930 Cal 188 (189): 31 Cr. L. J. 695, *Kali Bilash v. Emperor*.
(1865) 2 Suth W R Cr 6 (6), *Queen v. Bhoobun Isher Gossamee*.
(66) 5 Suth W R Cr 65 (65), *Queen v. Kalce Thakoor*.
(20) AIR 1920 Cal 531 (531): 47 Cal 758: 21 Cr. L. J. 842, *Foijudi v. Emperor*.
(Application for summons made at a late stage and rejected on that ground and not on ground of the witnesses being immaterial — Held that the rejection was bad — It was open to the Sessions Judge to take steps that applications were made early.)
(71) 16 Suth W R Cr 14 (15), *Queen v. Rajcoomar Mookerjee*.
See also S. 211 Note 3, S. 216 Note 2 and S. 257 Note 3.
5. (131) AIR 1931 Cal 6 (7): 58 Cal 412: 32 Cr. L. J. 316, *Ram Mamud v. Emperor*.
(72) 18 Suth W R Cr 20 (21), *Queen v. Raj Narain Mytee*.
(75) 23 Suth W R Cr 58 (59), *In re Kali Prosunno Roy*.
(82) 2 Weir 383 (383), *In re Muniammal*.

applies not only to the witnesses included in the list which the committing Magistrate is *bound* to accept under S. 211 sub-s.(1), but also to those included in the list which he accepts in the exercise of his *discretion* under sub-s.(2) of that section.⁶

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Note 3

But the right of the accused to issue of process is one that can be waived by him. Hence, if the accused has said that he does not wish to examine any witness, but requests for process at a late stage of the case, the Court may decline to comply with his request.⁷ Similarly, where the Court directs the accused to make his application for summons early but the latter delays and applies for summons at the last moment, his application may be rejected.⁸ But the accused is not bound to apply for summons before he is called on to enter upon his defence.⁹

Where the committing Magistrate has, in the exercise of his discretion under S. 216, refused to issue summons to a certain witness and the accused applies to the Sessions Court for summons to such witness, the Sessions Court *can* issue such summons.¹⁰ The Sessions Court has power under this section to re-call a prosecution witness for cross-examination by the accused when the accused had no opportunity of cross-examining him before.¹¹

Prosecutor's
right of reply.

292.* The prosecutor shall be entitled to reply—
(a) if the accused or any of the accused adduces any oral evidence; or

Section 292

*** Code of 1898, original S. 292.**

Prosecutor's right of reply. 292. If the accused, or any of the accused, adduces any evidence, the prosecutor shall be entitled to reply.

Code of 1882 : S. 292.

Prosecutor's right of reply. 292. If the accused, or any of the accused, has stated, when asked under S. 289 that he means to adduce evidence, the prosecutor shall be entitled to reply.

Code of 1872 : S. 252.

Prosecutor's right of reply. 252. If any evidence is adduced on behalf of the accused person, the officer conducting the prosecution shall be entitled to reply.

Code of 1861 : S. 376.

Prosecutor's right of reply. 376. If any evidence is adduced on behalf of the accused person, or if he answers any question put to him by the Court, the prosecutor, or the counsel or agent for the prosecution, shall be entitled to a reply.

6. ('30) AIR 1930 Cal 188 (189) : 31 Cr. L. J. 695, *Kali Bilash v. Emperor*. See also S. 211 Note 7.

7. ('25) AIR 1925 Pat 381 (384) : 26 Cr. L. J. 713, *Jamal Momim v. Emperor*.

8. ('20) AIR 1920 Cal 531 (531, 532) : 47 Cal 758 : 21 Cr. L. J. 842, *Foijuddi v. Emperor*.

9. ('69) 12 Suth W R Cr 22 (22), *Queen v. Mookun*.

10. ('86) 8 All 668 (671, 672) : 1886 A W N 260, *In the matter of Rajah of Kantil*.

11. ('82) 2 Weir 383 (383), *In re Muniammal*. (Accused did not cross-examine because Judge failed to ask the accused at the close of evidence of each witness whether he wished to cross-examine the witness—*Held* that accused was entitled to another opportunity to cross-examine.)

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(b) with the permission of the Court, on a point of law; or

(c) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence:

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.

This section was substituted for original S. 292 by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

- | | |
|--|---|
| 1. Object of the section. | 4. Extent of right of reply. |
| 2. Prosecutor, meaning of. | 5. Production of document in cross-examination of prosecution witness — Right of reply. |
| 3. "If the accused or any of the accused." | 6. Reply wrongly allowed — Effect. |

1. Object of the section. — The object of the Legislature in enacting this section is to give each side an opportunity to comment upon the evidence let in by the other and not to give an additional advantage to the prosecutor.¹

There is no similar provision so far as the trial of warrant-cases is concerned; but it has been held that even in such cases, both the prosecutor and the accused should be allowed to address arguments to the Court after the evidence is let in.²

2. Prosecutor, meaning of. — Section 270 provides that in every trial before a Court of Session, the prosecution shall be conducted by a *Public Prosecutor*. The "Prosecutor" in this section therefore means the Public Prosecutor.

Sections 492 and 493 provide for the appointment of Public Prosecutors, the latter also providing that if a private person instructs a pleader to prosecute in any Court any person, in any such case such pleader shall act under the directions of the Public Prosecutor. See Notes to those sections.

3. "If the accused or any of the accused." — Where one of several accused persons tried *jointly* calls witnesses at the trial but the other accused call no witnesses, the prosecutor has the right of reply on the whole case. He is not to sum up as to such of the accused as do not call evidence and reply on the evidence that may have been

Section 292 — Note 1

1. ('84) 10 Cal 140 (142) : 13 C L R 358, *Hurry Churn v. Empress*. (Prosecutor should not be allowed to reply where no evidence was produced for defence.)
- ('17) AIR 1917 Cal 524 (524, 525) : 17 Cri L Jour 423 (424) : 43 Cal 426, *Emperor v. Sreenath Mahapatra*. (Do.)
- ('06) 4 Cri L Jour 1 (10, 11) : 30 Bom 421 : 8 Bom L R 421, *Emperor v. Bhaskar*.
- ('97) 1897 Rat 938 (938), *Queen-Empress v. Lapprey*.
2. ('28) AIR 1928 Bom 557 (559) : 53 Bom 119 : 30 Cri L Jour 185, *Vinayak Laxman v. Emperor*. (It is not a question of indulgence but of right.)

adduced by the others.¹ Where, however, the accused are indicted under separate counts in the same indictment, the charges are distinct and the prosecutor has a right of reply upon that prisoner only in whose behalf evidence was called.²

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4. Extent of right of reply.—If any of the accused lets in oral evidence, the prosecutor is entitled to reply; such reply need not be confined to the evidence let in by such accused, but may be as against all the accused and generally on the whole case.¹ Where under clause (c) of this section, only documents are put in and no oral evidence is let in on behalf of the accused, the prosecutor can only comment upon such documents, but cannot, except with the permission of the Court, address on the whole case.

5. Production of document in cross-examination of prosecution witness — Right of reply. — Section 292 of the Code of 1882 provided that the Prosecutor had a right of reply where the accused or any of the accused had stated, when asked under S. 289, *that he meant to adduce evidence*. It was, however, held by the Calcutta High Court¹ that where the accused *did not in fact adduce any evidence*, there was no right of reply even though he had stated when questioned under S. 289 that he meant to adduce evidence. There was also a conflict of opinions on the question whether, where the accused filed documents in *cross-examination of the prosecution witnesses*, he must be taken to have adduced evidence so as to give the Prosecutor a right of reply.²

Under the section as it stood before the amendment of 1923, the Prosecutor had a right of reply where the accused or any of the accused *adduced any evidence*. This, however, did not settle the conflict on the question whether the filing of a document in cross-examination of the prosecution witness gave the Prosecutor a right of reply.³

Note 3

1. ('94) 18 Bom 364 (365), *Queen-Empress v. Sadanand Narayan*.
2. 2 Hyde 247 (247), *Queen v. Abbas*.

Note 4

1. ('94) 18 Bom 364 (365), *Queen-Empress v. Sadanand Narayan*.

Note 5

1. ('84) 10 Cal 140 (142) : 13 Cal L R 358, *Hurry Ohurn v. Empress*.
2. ('92) 14 All 212 (219, 220) : 1892 All W N 63, *Queen-Empress v. Hayfield*. (Yes.)
('94) 16 All 88 (101) : 1894 All W N 23, *Queen-Empress v. Moss*. (Yes.)
('82) 11 Mad 339 (340) : 2 Weir 380, *Queen-Empress v. Venkatapathi*. (Yes.)
('90) 14 Bom 436 (438), *Queen-Empress v. Krishnaji Baburao*. (No.)
('84) 10 Cal 1024 (1025), *Queen-Empress v. Grees Chunder*. (No.)
('86) 14 Cal 245 (246, 247), *Empress of India v. Kali Prosanna Doss*. (No.)
('90) 17 Cal 930 (933), *Queen-Empress v. Solomon*. (No.)
('98) 2 Cal W N cci (cci), *Empress v. Fekur Kurmi*. (No.)
3. ('06) 4 Cri L Jour 1 (10) : 30 Bom 421 : 8 Bom L R 421, *Emperor v. Bhaskar*. (Yes. — The amended section is intended to give a right of reply whenever at any stage, evidence is recorded for defence which is not part of that adduced for the prosecution.)
('10) 15 Cri L Jour 241 (241, 242) : 7 Low Bur Rul 84 : 23 Ind Cas 193, *Emperor v. J. S. Birch*. (No — Because in this case the Judge remarked that matter was doubtful and gave benefit of doubt to the accused.)
('09) 9 Cri L Jour 284 (286, 291) : 1 I. C. 280 (Bom), *Emperor v. Abdul Ali*. (No.)
('06) 10 Cal W N cclxvii (cclxvii), *Emperor v. Timol*. (No.)

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Notes 5-6

The present amended section has set the conflict at rest. The right of reply now depends upon the accused adducing *oral* evidence after the close of the prosecution case, or by the production of a document *after he enters* on his defence. The filing of a document during the cross-examination of the prosecution witness will not give the Prosecutor a right of reply.⁴

6. Reply wrongly allowed — Effect. — Where the Prosecutor is wrongly allowed to reply in a case in which there is no right of reply, the irregularity is not one which will vitiate the whole proceedings or which will call for a re-trial even from the stage at which the error arose.¹

Section 293

293.* (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

1. Scope of the section: — This section provides for the local inspection of the scene of occurrence or any other material place, by

* 1882 : S. 293; 1872 : S. 253; 1861 : S. 348.

(17) AIR 1917 Cal 524 (524, 525) : 17 Cri L Jour 423 (424) : 43 Cal 426, *Emperor v. Sreenath Mahapatra*. (No — Because S. 292 must be read in connexion with S. 289 and must be construed accordingly.)

(104) 1 Cri L Jour 451 (452, 453) : 31 Cal 1050 : 8 Cal W N 528, *Emperor v. Robert Stewart*. (No.)

(108) 8 Cri L Jour 215 (220) : 1 Sind L R 91, *Emperor v. Bhuro*. (No — If the prosecution has notice of statement put in cross-examination. Yes — If the prosecution cannot be deemed to have had notice.)

(109) 10 Cri L Jour 24 (26, 27) (Kathiawar), *Emperor v. Nanji Jetha*. (No.)

(107) 6 Cri L Jour 115 (117) : 4 Low Bur Rul 5, *Emperor v. H. Manuel*. (Yes.)

(111) 12 Cri L Jour 73 (78) : 9 Ind Cas 436 (Lah), *Emperor v. Mahna Singh*. (Yes — Obiter.)

(102) 6 Cal W N cclxxvi (cclxxvi), *Emperor v. Moni Lal*. (Question not decided.)

(102) 6 Cal W N ccciii (ccciii, ccciv), *Port Trust Railway v. Satkari*. (Not decided.)

[See also article in (1900) 10 M L J (NOTES) 316 (316, 319.)]

4. (31) AIR 1931 Lah 534 (535) : 13 Lah 172 : 32 Cr.L.J. 944, *Kundan v. Emperor*.

Note 6

1. (31) AIR 1931 Lah 534 (535) : 13 Lah 172 : 32 Cr.L.J. 944, *Kundan v. Emperor*.

the *jury or assessors* in sessions cases. Section 539B provides for similar inspection by *Magistrates and Judges*.¹ See S. 539B and Notes thereunder.

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Notes 1-3

2. "**Whenever the Court thinks.**" — It is only in cases where the Court considers that an inspection would assist the jury or the assessors, in determining whether the charge is true or false, that it should be ordered. Where the charge against a prisoner was that he made certain statements on oath knowing them to be false (the statement being that one *M* threatened to cut the tree), it was held that a local inspection as to the condition of tree was not material to the case.¹ See also the undermentioned case.²

3. **Jury or assessors not to hold communication with any other person.** — It is imperative that the jury or assessors should not have any extra-judicial knowledge of the facts in the case: they are to decide the case on the legal evidence taken by the Judge. Where a Sessions Judge directed the assessors to make an inspection of the locality and also instructed them to examine witnesses if they desire to do so, the High Court condemned the procedure and held that in asking the assessors to take evidence, he was "abdicating his own high functions."¹

294.* If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

Section 294

1. **Scope and object of the section.** — The principle of this section is that no man shall be convicted except on evidence which he has had an opportunity of testing by cross-examination and of contradicting the same by rebutting evidence.¹ A juror or assessor is expected to form and give his opinion on the evidence given at the trial and not to act upon his personal knowledge of any relevant facts of the case without giving evidence of the same as a witness in the case.²

Where at the end of a trial one of the assessors expresses his opinion as to the guilt of the accused basing his opinion on his own

* 1882 : S. 294; 1872 : S. 258; 1861 — Nil.

Section 293 — Note 1

1. See ('12) 13 Cr. L. J. 156 (157) : 13 I. C. 844 : 39 Cal 476, *Alia Rai v. Jhingur Tewari*.

Note 2

1. (1865) 2 Suth W R Cr 60 (60), *Queen v. Seetanath Ghosal*.
2. ('10) 11 Cr. L. J. 121 (125) : 37 Cal 340 : 5 I. C. 365, *Babbon Sheikh v. Emperor*. (Case of Magistrate himself making local inspection.)

Note 3

1. ('66) 5 Suth W R Cr 59 (60), *Queen v. Chatterdharee Singh*.

Section 294 — Note 1

1. ('10) 11 Cr. L. J. 121 (126) : 5 I. C. 365 : 37 Cal 340, *Babbon Sheikh v. Emperor*.
2. ('01) 24 Mad 523 (543) : 11 M L J 241, *King-Emperor v. Tirumal Reddi*.

Section 294
Note 1

personal knowledge, without giving the evidence of the same as a witness, it has been held that this expression of opinion does not necessitate a *de novo* trial with the aid of other assessors and that the Judge should, in such a case, ignore the opinion of the assessor.³

Where the juror or assessor is examined as a witness, he is not disqualified from acting as a juror or assessor in the case after giving his evidence.⁴

Section 295

295.* If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

Jury or assessors to attend at adjourned sitting.

1. Adjournment of sessions case. — Where a sessions case is adjourned, the jury or assessors are bound, under this section, to attend the adjourned hearing. A failure to attend will be punishable under section 392.

As to adjournments of criminal trials, see section 344.

Section 296

296.† The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

1. Scope and object of the section. — This section touches on the undesirability of separation of the jury before their verdict is given,¹ and empowers the High Courts to make rules for "locking them up" during trial. The jury are not entitled to talk to persons connected with the accused during the progress of the trial.² Where one of the jurors during the trial of a case expressed his opinion outside Court as to the guilt of the accused person and made a fairly distinct intimation that he had formed an opinion to that effect, it was

* 1882 : S. 295; 1872 : S. 260; 1861 : S. 378.

† 1882 : S. 296; 1872 and 1861 — Nil.

3. ('89) AIR 1939 Lah 475 (479) : ILR (1939) Lah 243 : 41 Cr. L. J. 55, *Emperor v. Pahlu*.

4. ('70) 13 Suth W R Cr 60 (61) : 4 Beng L R A C 15, *Empress v. Mukhta Singh*. (Obiter.)

Section 296 — Note 1

1. ('25) AIR 1925 Pat 797 (802) : 4 Pat 626 : 27 Cr. L. J. 49, *Rupan v. Emperor*.

2. ('27) AIR 1927 Cal 628 (629) : 55 Cal 279 : 28 Cr. L. J. 783, *Bhuban Chandra v. Emperor*.

('17) AIR 1917 Cal 149 (151) : 44 Cal 723 : 18 Cr. L. J. 311 (SB), *In the matter of Bonomally Gupta*.

held that when this was brought to the notice of the trial Judge, a *de novo* trial should be ordered after discharging that jury.³ The object of this section is to see that the jury comes to a conclusion in the case on the *evidence* adduced therein, uninfluenced by anything that may be said or done outside the Court. See also the under-mentioned case.⁴

See also sections 282 and 300 and Notes thereon.

Section 296
Note 1

F. — Conclusion of Trial in Cases tried by Jury.

297.* In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

Section 297

Synopsis

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|--|---|
| 1. Legislative changes. | 10. Effect of non-observance of this provision — Laying down the law. |
| 2. Object of charge to jury. | 11. Misdirection. |
| 3. Judge, if should himself charge the jury. | 12. Non-direction. |
| 4. Charge as to part only of case. | 13. Effect of misdirection. |
| 5. "When the case for the defence ... are concluded." | 14. Duty of appellate Court in reviewing a charge. |
| 6. Summing up the evidence for the prosecution and defence. | 15. Record of charge to jury. See Note 15 to S. 367. |
| 7. Summing up where there are several accused. | 16. Effect of a juror not understanding the charge. |
| 8. Direction to recommend for mercy. | 17. Effect of a bad charge. |
| 9. "Laying down the law by which the jury are to be guided." | 18. When Judge can re-charge the jury. |

Other Topics (miscellaneous)

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|---|---|
| Abandoning — No presumption of guilt. See Note 12. | Counsel pointing out omissions in charges. See Note 12. |
| Absence of evidence for the prosecution. See Note 12. | Defence not raised by accused. See Note 6. |
| Accuracy in charging. See Note 6. | Direction to neglect part of evidence. See Note 11. |
| Approver's evidence. See Note 9. | Duty of Judge in charging the jury. See Note 6. |
| Benefit of doubt. See Note 12. | Expert evidence. See Note 9. |
| Charge as a whole. See Note 4. | Form and nature of charge. See Note 6. |
| Charges as to evidence. See Note 6. | Handing copy of Penal Code to jury. See Note 9. |
| Charge through translator. See Note 3. | Impartial charge. See Note 6. |
| Charge without reference to defence evidence. See Note 6. | Inadmissible evidence. See Note 11. |
| Circumstantial evidence. See Note 9. | |
| Confession of co-accused. See Note 9. | |

* 1882 : S. 297; 1872 : S. 255; 1861 : S. 379.

3. ('21) AIR 1921 Cal 631 (631) : 22 Cri L Jour 510, *Emperor v. Nazar Ali Beg.*
4. ('66) 3 Bom H C R Cr 20 (27), *Reg. v. Dayal Jairaj*. (Practice of supreme Court at Bombay before and after Indian Penal Code came into operation — Practice of the Courts in England was followed.)

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Notes 1-2

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| Judge not to charge too strongly for prosecution. See Note 6. | Onus of proof — Direction as to. See Note 11. |
| Lengthy arguments of counsel—Judge's charging not affected. See Notes 6 and 9. | Prior convictions — Reference to. See Note 11. |
| Mere reading of sections. See Note 9. | Reading of evidence not needed. See Note 6. |
| Non-examination of defence witnesses. See Note 9. | Recent possession of stolen property. See Note 9. |
| Non-examination of material witness for prosecution. See Note 9. | Reference to prior trials. See Note 12. |
| Omission of important points for defence. See Note 12. | Rejection of evidence. See Note 11. |
| Omission to reject irrelevant evidence. See Note 12. | Section 164 — Evidence taken under. See Note 9. |
| | Suggestions denied—Effect. See Note 9. |

1. Legislative changes.

Changes introduced in the Code of 1872 —

- (1) The words "when the case for the defence and the Prosecutor's reply, if any, are concluded the Court shall proceed to charge," etc., were introduced, thereby showing the stage at which the Court should address the jury.
- (2) The words "and laying down the law by which the jury are to be guided" were also added thereby throwing on the Judge the duty of explaining the law to the jury.

Changes introduced in the Code of 1882 —

The words "A statement of the Judge's direction to the jury shall form part of the record" which occurred in the former Code were omitted.

2. Object of charge to jury. — In a trial by jury the jurors are the sole judges of all questions of *fact*; their verdict on questions of fact cannot be set aside on appeal (ss. 418, 423). It is therefore of supreme importance that they should be given all the guidance and help that may be necessary for arriving at a correct decision on questions of fact. The object of this section is to furnish such guidance and help.¹ It is the duty of the Judge to place the case before the jury in such a way as to enable them to come to a reasonable and fair conclusion.² Jurors are ordinarily men who are not used to analyse, sift and weigh the evidence and it is quite impossible for them to retain in their memory the whole of the facts which have been detailed before them.³ In the absence of intelligent guidance and assistance from the

Section 297 — Note 2

1. ('40) AIR 1940 Nag 221 (224) : 1940 N. L. J. 264 (267), *Bapurao v. Emperor*. ('36) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cr.L.J. 366 (FB), *Puttan v. Emperor*. ('28) AIR 1928 Cal 269 (269, 270), *Abdul Rezak v. Emperor*. (The object of summing up of evidence by the Judge pointed out.) ('26) AIR 1926 Cal 139 (141) : 53 Cal 372 : 27 Cr.L.J. 266, *Khijiruddin v. Emperor*. ('66) 6 Suth W R Cr 72 (72), *Empress v. Bolakee Koormee*.
2. ('39) AIR 1939 Cal 610 (611) : 40 Cr. L. J. 880, *Mohsena Khatun v. Emperor*. (Charge to jury, if confusing and muddled, giving no assistance to jury is sufficient ground to upset verdict.) ('37) AIR 1937 Cal 321 (323) : ILR (1937) 2 Cal 345 : 39 Cr. L. J. 371, *Sikandar Mian v. Emperor*. ('36) AIR 1936 Cal 186 (187) : 37 Cri L Jour 673, *Nabi Khan v. Emperor*.
3. ('32) AIR 1932 Cal 395 (397) : 33 Cr.L.J. 486, *Akbar Sheikh v. Emperor*. (It is the duty of a Judge to analyse, sift and weigh evidence, and marshal the facts indicating the material facts on which the jury should concentrate their attention.)

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Notes 2-4

Judge, few juries, in a contested case, would be able to come to an unanimous opinion, being left in a state of great perplexity by the influence of speeches of the contending lawyers.⁴ Every party to a trial by jury has, therefore, a legal and constitutional right to have the case which he has made either in pursuit or in defence, fairly submitted to that tribunal.⁵ The section accordingly makes it incumbent upon the Judge to charge the jury before their verdict is taken.⁶

The duties of the Judge in charging the jury are laid down by this section and the next but they are not exhaustive ; they must be read together with numerous judicial decisions on the point.⁷

3. Judge, if should himself charge the jury. — The right course for the Judge is to charge the jury *himself*; but where there are difficulties in the way of doing this, as when the Judge does not happen to be sufficiently acquainted with the vernacular language so as to be understood by the jury, his delivering the charge through another person is not improper.¹

4. Charge as to part only of case. — The law does not recognize intermediate verdicts of jurors ; the Judge should address the jury on the whole case before taking their verdict ; he should not ask for their verdict on one issue reserving his address on other questions of fact.¹

(‘26) AIR 1926 Cal 235 (239) : 53 Cal 181 : 26 Cri L Jour 1577, *Abdul Gani v. Emperor*. (It is necessary to give the jury all help in estimating evidence.)

4. (‘66) 5 Suth W R Cr 80 (87) : Beng L R Sup 459 (FB), *In re Elahce Buksh*. (The accuracy of the summing up of the Judge is of utmost importance).

(‘19) AIR 1919 Cal 536 (538) : 19 Cri L Jour 830, *Ismail Sarkar v. Emperor*. (Verdict of a jury who had no sufficient assistance and guidance from the Judge must be upset.)

5. (‘09) 10 Cr. L. J. 65 (67) : 2 I. C. 517 (Bom), *Emperor v. Kesari Dayal Kanji*. (‘27) AIR 1927 Cal 631 (632) : 28 Cri L Jour 742, *Emperor v. Rajab Ali Fakir*. (Charge should not be one sided.)

(‘86) 1886 Rat 288 (288), *Queen-Empress v. Abdul Karim*. (A careful summing up may often change the hasty and superficial impression of jury.)

6. (‘36) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cr.L.J. 366 (FB), *Puttan Hasan v. Emperor*.

(‘19) AIR 1919 Cal 439 (442) : 20 Cri L Jour 661, *Afiruddi Chakdar v. Emperor*. (‘69) 11 Suth W R Cr 39 (39) : 7 Beng L R 67n, *Queen v. Jaga Poly*.

[See however (‘97) 20 Mad 445 (446) : 2 Weir 384, *Queen-Empress v. Ramalingam*. (Where, after all the prosecution evidence has been taken, and the Public Prosecutor has waived his right to summarize evidence, the jury expresses an opinion that the case should stop, it was held that the formality of summing up could be dispensed with and the opinion of the jury could be treated as verdict of not guilty.)]

7. (‘27) AIR 1927 Oudh 259 (259) : 2 Luck 597 : 28 Cri L Jour 683, *Nahru Mal v. Emperor*.

Note 3

1. (‘27) AIR 1927 All 721 (723) : 50 All 365 : 28 Cr. L. J. 950, *Surnath Bhaduri v. Emperor*. (The important thing is that the review of evidence made by the Judge should be placed before jury in a manner which they can understand.)

(‘28) AIR 1928 Cal 401 (402) : 29 Cr. L. J. 638, *Dwijapada Halder v. Emperor*. (Vernacular translation of charge was delivered by Public Prosecutor and the defence counsel was given right to object to any part of translation— *Held* accused was not prejudiced.)

(‘19) AIR 1919 Cal 439 (441, 442) : 20 Cri L Jour 661, *Afiruddi Chakdar v. Emperor*. (Assistance of Public Prosecutor not desirable.)

Note 4

1. (‘29) AIR 1929 Cal 62 (63) : 30 Cr. L. J. 434, *Government of Bengal v. Nasar*. (‘96) 2 Weir 499 (500), *In re Badava Kunhi*. (Such a course was held to be irregular although not illegal.)

Section 297
Notes 5-6

5. "When the case for the defence are concluded."

— The stage at which the Judge is to address the jury is when the prosecution and the defence have let in all their evidence and after the arguments, if any, of the prosecution and the defence : a charge before that will be premature.¹ It is illegal to allow the jury to pronounce their verdict, before the accused is called upon to enter on his defence.² After the prisoner claims to be tried, *all* the evidence, whether statements of witnesses or admissions of the prisoner, should be placed before the jury.³ It is not open to a Judge after hearing *some* of the prosecution witnesses to ask the jury whether they wish to hear any more evidence, and on their stating that they do not believe the evidence and wish to stop the case, to record a verdict of acquittal. He is bound to allow the whole evidence to be placed before the jury.⁴ Only in cases where, under s. 289, the Judge finds that there is no evidence to go to the jury, can the case be withdrawn from the jury : in all other cases the full facts should be placed before them and then the charge should be delivered.⁵

6. Summing up the evidence for the prosecution and defence. — A charge to the jury consists of :

- (1) summing up the evidence for the prosecution and defence, and
- (2) laying down the law by which the jury are to be guided.

Under this section the Judge is bound to sum up the evidence whether or not the jury desire him to do so.¹ The summing up of the evidence is the presentation to the jury of a *summary* of the evidence as it appears on the negative and affirmative sides of the case.² The summing up should not be in the nature of a judgment and the Judge should not give his opinions as definite facts.³ It is not necessary to read over to the jury all the evidence *in extenso*.⁴ In fact it will be

Note 5

1. ('14) AIR 1914 Mad 319 (321) : 36 Mad 585 : 15 Cr.L.J. 197, *Public Prosecutor v. Abdul Hameed*.
- (02) 7 Cal W N xxxi (xxxii), *Emperor v. Olu*.
- (24) AIR 1924 Lah 17 (20) : 4 Lah 382 : 25 Cri L Jour 377, *Lyme v. Emperor*.
2. ('95) 23 Cal 252 (253), *Queen-Empress v. Imam Ali Khan*. (In this case the jury were not also charged as required by law.)
- (68) 9 Suth W R Cri Letters 10 (10). (Jury not to express opinion before conclusion of trial and before hearing summing up and direction of the Judge.)
3. ('66) 2 Weir 334 (335).
- (86) 2 Weir 497 (498), *In re Doraswami Aiya Thevan*.
4. ('97) 20 Mad 445 (445, 446) : 2 Weir 384, *Queen-Empress v. Ramalingam*.
5. ('89) 2 Weir 391 (391, 392).

Note 6

1. ('36) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cr.L.J. 366 (FB), *Puttan Hasan v. Emperor*.
2. ('26) AIR 1926 All 752 (753) : 49 All 209 : 28 Cr. L. J. 15, *Enayat Hussain v. Emperor*. (Summary of only leading points should be given.)
- (17) AIR 1917 Mad 335 (335, 336) : 17 Cri L Jour 19 (19), *In re Sangam*.
[See ('09) 10 Cr. L. J. 567 (568) : 4 I. C. 391 (Mad), *In re Muthan Papayya*.
(Sessions Court must sift evidence if the counsel have not done so.)
3. ('37) AIR 1937 Nag 110 (112) : 38 Cri L Jour 589 : ILR (1937) Nag 123, *Fatch Mohammad v. Emperor*.
4. ('36) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cr. L. J. 366 (FB), *Puttan Hasan v. Emperor*. (It is not necessary for him to read his notes of the evidence to the jury, though it may often be desirable to read his notes of important parts of the evidence; nor is it necessary for him to go through the whole of the evidence.)

Section 297
Note 6

anything but helpful to the jury to take the witnesses one by one in the order of their examination and to place their disconnected statements.⁵ Though it is not necessary for a Judge to read his notes of the evidence to the jury, he is not legally prohibited from asking the jury whether they have a particular piece of evidence in mind or whether it would help them for him to read his notes.⁶ The Judge should group the depositions of the witnesses in such a way as to direct the attention of the jury to the evidence regarding each particular fact sought to be proved.⁷ He should sift, analyse and marshal the facts in order to enable the jury to weigh the evidence intelligently, to estimate the value of each part of it with the rest.⁸ But it is not possible for any Judge to bring all the important facts together in one place in the

- (1909) 9 Cri L Jour 452 (454) : 38 Cal 281 : 1 I. C. 970, *Fanindranath v. Emperor*.
 (1970) 13 Suth W R Cr 23 (24), *Queen v. Sheppard*.
 (1903) 5 Bom L R 207 (208), *Emperor v. Apunna Devappa*. (In this case even omission to read material portion of evidence was held to be no ground by itself for reversing verdict of jury.)
 (1929) AIR 1929 Cal 765 (766):57 Cal 248 : 31 Cr.L.J. 857, *Jati Mali v. Emperor*. (Only the salient points in evidence should be placed before the jury.)
 (1925) AIR 1925 Nag 154 (154) : 27 Cri L Jour 217, *Rahim Beg v. Emperor*.
The contrary view expressed in the following cases is of doubtful authority:
 (1906) 1896 Rat 850 (850), *Queen-Empress v. Fakira Venkappa*.
 (1906) 6 Suth W R Cr 92 (93), *Empress v. Kally Churan*. (Charge of false evidence — Both the depositions in full should be laid before the jury.)
 (1908) 5 Bom H C R 85 (88), *Reg. v. Fattchchand Vastachand*.
 (1907) 1897 Rat 917 (917), *Queen-Empress v. Basvantappa Lingappa*.
 (1865) 2 Suth W R Cr 63 (63), *Queen v. Sreemunt Adur*.
 (1905) 19 Bom 741 (743), *Queen-Empress v. Rego Montopoulo*.
 5. (1921) AIR 1921 Cal 697 (698) : 22 Cri L Jour 606, *Abdul Rahim v. Emperor*.
 (1935) AIR 1935 Sind 145 (166) : 28 Sind L R 397 : 36 Cri L Jour 1161, *Emperor v. Hari*. (Judge must analyse evidence and not simply read it to jury.)
 6. (1936) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB), *Puttan Hasan v. Emperor*.
 7. (1930) AIR 1930 Cal 481 (482) : 32 Cri L Jour 33, *Hachani Khan v. Emperor*.
 8. (1932) AIR 1932 Cal 395 (396) : 33 Cri L Jour 486, *Akbar v. Emperor*.
 (1939) AIR 1939 Cal 610 (611) : 40 Cri L Jour 880, *Mohsena Khatun v. Emperor*. (Charge to jury, if confusing and muddled, giving no assistance to jury, is sufficient ground for setting aside verdict of jury.)
 (1938) AIR 1938 Cal 51 (70) : 39 Cr.L.J. 161: ILR (1938) 1 Cal 290, *Goloke Behari v. Emperor*.
 (1937) AIR 1937 Cal 756 (759) : 39 Cri L Jour 182 : ILR (1937) 2 Cal 315, *Ekkabbar Mondal v. Emperor*. (Murder by poisoning — Judge should minutely analyse evidence before jury.)
 (1936) AIR 1936 Cal 186 (187) : 37 Cri L Jour 673, *Nabi Khan v. Emperor*.
 (1931) AIR 1931 Cal 184 (188) : 58 Cal 1051 : 32 Cr. L. J. 836 (FB), *Susen Behary Roy v. Emperor*.
 (1908) 2 Weir 500 (501), *In re Sugalgadu*. (Conflicting evidence on material point — Attention of jury should be specially called to it.)
 (1927) AIR 1927 Cal 631 (632) : 28 Cri L Jour 742, *Emperor v. Rajab Ali Fakir*.
 (1929) AIR 1929 Cal 742 (746) : 57 Cal 740 : 31 Cri L Jour 673, *Nagendranath v. Emperor*. (Facts must be marshalled under separate heads and distinct compartments as they affect each separate incident in the story.)
 (1934) AIR 1934 Cal 169 (171) : 35 Cri L Jour 601 (SB), *Molla Khan Kabuli v. Emperor*. (Judge should direct the attention of the jury to essential points.)
 (1934) AIR 1934 Cal 847 (849) : 62 Cal 337 : 36 Cri L Jour 358, *Ilu v. Emperor*. ("Summing up" does not mean merely giving summary of evidence.)
 (1934) AIR 1934 Cal 273 (275) : 35 Cri L Jour 1313, *Ram Sumer Ahir v. Emperor*. (No connected narrative nor any sufficient attempt to sift and marshal the evidence against each accused nor to direct jury about its relevance or value or what offence it disclosed—*Held* there was misdirection.)
 (1935) AIR 1935 Cal 534 (537) : 62 Cal 911 : 36 Cr. L. J. 1246, *Asanulla v. Emperor*.

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Note 6

charge for the benefit of the jury. Where there are a large number of important points to be discussed, it is necessary that some of those points should be separated by some considerable time from the other items of the charge.⁹

The charge should be characterised by clearness, coherence¹⁰ and sequence¹¹ and great care should be taken to place the evidence accurately and with precision.¹² It should not be colourless and should not fail to bring before the jury the main circumstances in the case.¹³ It should be delivered in direct and simple language. Involved expressions, high-flown, imaginative and fanciful language¹⁴ and slang or colloquial phrases¹⁵ should be avoided. The aim of a jury trial is not a psychological examination of the mentality of jurors; it is concerned with the definite proof of a distinct offence and the use of language tending to divert the attention of the jury from the main issue to a subsidiary point should be avoided.¹⁶ As observed in *Molla Khan v. Emperor*,¹⁷ "It is the manner of saying it, the arrangement and

9. ('38) AIR 1938 Mad 477 (478) : 39 Cri L Jour 323, *In re Thevar Servai*.

10. (67) 8 Suth W R Cr 87 (88, 93), *Queen v. Nobo Kisto Ghose*. (In charging jury Judge should avoid extraneous and unnecessary argument and discussion.)

('08) 8 Cri L Jour 35 (37, 40) : 10 Bom L R 565, *In re Shambhu Lal Jivandas*.

('70) 13 Suth W R Cr 42 (43), *Queen v. Shahabkut Sheikh*.

('05) 2 Cri L Jour 157 (159) : 1 C. L. J. 159, *Shyama Charan Chakravarti v. Emperor*. (Charge should be free from confusing and irrelevant matters.)

('20) AIR 1920 Cal 406 (406) : 21 Cri L Jour 829, *Edon Karikar v. Emperor*. (Charge confusing—Verdict set aside.)

('11) 12 Cr. L. J. 140 (140, 141) : 9 I. C. 788 (Mad), *Palavesa Tevan v. Emperor*. (The charge lacked lucidity as regards law bearing on the charges and also as regards statement of evidence.)

('28) AIR 1928 Pat 326 (334) : 29 Cri L Jour 325, *Mt. Champa Pasin v. Emperor*.

('33) AIR 1933 Pat 488 (491) : 34 Cri L Jour 892, *Sachidanand v. Emperor*.

('31) 32 Cr. L. J. 1138 (1140) : 134 I. C. 317 (Cal), *Emperor v. Javed Sikdar*. (In statement of facts in the charge relevant and irrelevant, important and unimportant facts should not be mixed together.)

11. ('34) AIR 1934 Cal 77 (78) : 35 Cr. L. J. 483, *Kamiraddi Sheikh v. Emperor*. (Some sequence is essential; chronological sequence will do; but even an alphabetical sequence is better than no sequence at all.)

('31) 1931 Mad W N 129 (131), *Manikala Ramanna v. Emperor*.

('30) 1930 Mad W N 773 (775), *Soliyan v. Emperor*.

('66) 5 Suth W R Cr 68 (69), *Queen v. Jehan Buksh*.

12. ('39) AIR 1939 Cal 610 (611) : 40 Cr. L. J. 880, *Mohsena Khatun v. Emperor*. (Judge mixing up arguments of the defence with the statement of the case for the prosecution — Charge confusing and rendering no assistance to jury — Held it was sufficient ground for setting aside verdict.)

('37) AIR 1937 Cal 266 (227) : 38 Cri L Jour 767, *Madan Tilakdas v. Emperor*. (Judge should exercise greatest care in assisting jury when it is difficult to judge which side has perjured.)

('93) 1893 Rat 644 (651), *Queen-Empress v. Yesu*.

13. ('37) AIR 1937 Cal 463 (466) : 38 Cr. L. J. 931, *Sarat Chandra v. Emperor*.

14. ('10) 11 Cri L Jour 538 (539) : 7 I. C. 915 (Cal), *Harendra Pal v. Emperor*.

('30) AIR 1930 Cal 430 (432) : 31 Cri L Jour 1115, *Manohar Mandal v. Emperor*.

[See ('40) 44 Cal W N 840 (843), *Mujaffar Sheikh v. Emperor*. (Case depending upon circumstantial evidence — Theoretical discourse on what is circumstantial evidence in unintelligible language is worthless.)]

15. ('18) AIR 1918 Cal 88 (92) : 45 Cal 557 : 19 Cr. L. J. 305, *Amiruddin Ahmed v. Emperor*. (Use of expressions which assume the guilt of the accused should be avoided.)

16. ('33) AIR 1933 Pat 488 (492, 493) : 34 Cr. L. J. 892, *Sachidanand v. Emperor*.

17. ('34) AIR 1934 Cal 169 (172) : 35 Cri L Jour 601 (SB).

structure of his charge, which will make it either of value or valueless to the jury."

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Where there is no suggestion that the summing up was open to any objection, it should be assumed that the Judge directed the jury adequately and properly as to the weight of the evidence.¹³

Charge should not be too elaborate or too meagre.—A charge should not be too summary or meagre.¹⁹ As has been observed above, it should sift and analyse the evidence.²⁰ To say to the jury "you have heard the evidence; do you find the accused guilty or not?" is no charge at all.²¹ Nor is it a sufficient compliance with the law to say that the evidence given is "very poor evidence which standing alone amounts to nothing."²² The evidence given by the witnesses should be individually discussed.²³ On the other hand, the charge should not be *too elaborate*.²⁴ It is sufficient if the main, salient and important points alone are placed before the jury.²⁵ In fact, in a case where

18. ('37) AIR 1937 P C 24 (26): 38 Cr. L. J. 281 (PC), *Alexandra Pereira Chandra Sekera v. The King*.

19. (30) AIR 1930 All 28 (28): 52 All 207: 30 Cr. L. J. 1146, *Jagmohan Singh v. Emperor*.

('29) AIR 1929 Cal 170 (171): 30 Cr. L. J. 912, *Dwarka Das Bawagi v. Emperor*.

('99) 1 Bom L R 784 (785), *Queen-Empress v. Babya*.

[Sec ('95) 1895 Rat 806 (807), *Queen-Empress v. Kallappa*.]

20. ('30) AIR 1930 Cal 136 (138): 31 Cr. L. J. 572, *Natabar Halidar v. Emperor*.

21. ('02) 1902 All W N 201 (201, 202), *Emperor v. Badal*.

22. ('99) 23 Bom 316 (317), *Queen-Empress v. Gangia*.

23. ('68) 10 Suth W R Cr 7 (9), *Queen v. Ramgopal Dhur*.

24. ('37) AIR 1937 Cal 309 (312): 38 Cri L Jour 1067: 1 L R (1937) 2 Cal 308, *Sahedali Mirdha v. Emperor*. (Charge should not be unduly long.)

(1864) 1 Suth W R Cr 22 (23), *Queen v. Madhub Mal*. (Whole evidence was read out—Omission to mention details of stolen articles did not amount to misdirection.)

('21) AIR 1921 Cal 73 (74): 23 Cri L Jour 342, *Haricharan Das v. Emperor*. (There is no misdirection because every point in favour of accused has not been put before the jury.)

('12) 13 Cri L Jour 821 (823): 40 Cal 367: 17 I. C. 565, *Samaruddin v. Emperor*.

('22) AIR 1922 Cal 107 (114): 49 Cal 573: 23 Cr. L. J. 657, *Abdul Salim v. Emperor*.

('30) AIR 1930 Cal 228 (230): 31 Cri L Jour 916, *Tafiz Pramanik v. Emperor*. (It is not the function of the Judge to repeat to the jury every argument or suggestion urged on behalf of the defence.)

('34) AIR 1934 Cal 124 (127): 60 Cal 1339: 35 Cr. L. J. 567, *Manar Ali v. Emperor*.

('16) AIR 1916 Pat 236 (238): 1 Pat L Jour 317: 17 Cr. L. J. 353, *Eknath Sahay v. Emperor*.

('31) AIR 1931 Oudh 171 (172): 6 Luck 705: 32 Cr. L. J. 858, *Mangal Singh v. Emperor*.

('29) AIR 1929 Nag 295 (297): 31 Cri L Jour 557, *Narayan Singh v. Emperor*. (Detailed discussion of each and every item of evidence is unnecessary.)

[Sec also ('37) AIR 1937 Cal 266 (268): 38 Cri L Jour 767, *Madan Tilakdas v. Emperor*.]

25. ('38) AIR 1938 Cal 625 (627): 39 Cr. L. J. 964, *Brinchipada Dafadar v. Emperor*.

('36) AIR 1936 Bom 52 (53): 60 Bom 599: 37 Cr. L. J. 366 (FB), *Puttan Hasan v. Emperor*.

('36) AIR 1936 Nag 103 (105): 37 Cri L Jour 607: 31 Nag L R (Sup) 215, *James Dowdall v. Emperor*. (It is impracticable to set forth every bit of evidence on either side to the minutest detail and dilate on the minor discrepancies or contradictions occurring in the evidence in a meticulous manner.)

('30) AIR 1930 Pat 513 (519): 9 Pat 606: 32 Cr. L. J. 72, *Ram Sarup v. Emperor*.

('30) AIR 1930 Cal 434 (436): 57 Cal 1162: 32 Cri L Jour 111, *Jabanullah v. Emperor*. (Charge should shortly state salient points, evidence adduced and points for determination with reference to law.)

('22) AIR 1922 Cal 192 (193): 24 Cri L Jour 8, *Abdul Gafur Khan v. Emperor*.

('03) 27 Bom 626 (630): 5 Bom L R 599, *Emperor v. Waman Shivram*.

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numerous points arise with a greater or less bearing on the main issue, the Judge cannot be expected to place them all before the jury; nor is it fair to criticise every phrase in his summing up.²⁶ To charge the jury at very great length may itself be an obstacle to the jury arriving at a correct decision. They are laymen and to enable them to come to a correct decision it is necessary that essentials should be clearly brought out and not overwhelmed and obscured by too great a mass of detail.²⁷

Charge should be impartial. — The summing up should be dispassionate and impartial²⁸ and should not create prejudice against the accused.²⁹ The Judge should take up neither the role of the Public

(‘16) AIR 1916 Pat 236 (238) : 17 Cri L Jour 353 (355, 356) : 1 Pat L Jour 317, *Elnath Sahay v. Emperor*. (In doing so speeches made by public prosecutor and prisoner’s counsel can be taken into consideration.)

(‘81) 7 Cal 42 (46) : 8 C L R 273, *Empress v. Rochia Mohato*.

(‘34) AIR 1934 Cal 142 (143) : 35 Cri L Jour 536, *Fajer Ali Darji v. Emperor*.

(‘14) AIR 1914 P C 116 (123, 124) : 41 Cal 1023 : 8 Low Bur R 16 : 15 Cri L Jour 309 : 41 I A 149 (PC), *Channing Arnold v. Emperor*. (Salient propositions of law should be subject of separate analysis.)

(‘35) AIR 1935 All 103 (105) : 36 Cri L Jour 612, *Azizkhan v. Emperor*.

26. (‘38) AIR 1938 Cal 658 (662) : 40 Cri L Jour 101 : I L R (1938) 1 Cal 636, *Abdul Gafur v. Emperor*.

27. (‘40) AIR 1940 Nag 221 (224) : 1940 N L J 264 (267), *Bapurao v. Emperor*.

(‘37) AIR 1937 Pat 191 (193) : 38 Cri L Jour 129, *Rajendra Nath v. Emperor*. (Held that meticulous detail which is regarded as required in charge to jury led in this case to actual misdirection on points of real importance.)

(‘33) AIR 1933 Pat 496 (497) : 35 Cri L Jour 56, *Emperor v. Ardali Mian*.

[See also (‘36) AIR 1936 Cal 186 (187) : 37 Cr. L. J. 673, *Nabi Khan v. Emperor*. (Judge should not go into unnecessary details with regard to such aspects of the case as are really of very little importance.)]

28. (‘21) AIR 1921 Cal 252 (255) : 23 Cri L Jour 244, *Emperor v. Taribulla*. (Judge should not usurp the functions of an advocate.)

(‘34) AIR 1934 Cal 273 (275) : 35 Cri L Jour 1313, *Ram Sumer Ahir v. Emperor*. (Unjustifiable remarks meant to disparage the case for the prosecution in the eyes of the jury amount to misdirection.)

[See (‘35) AIR 1935 All 928 (929) : 37 Cri L Jour 173, *Sri Kishen v. Emperor*. (Judge telling ‘there is no reason to disbelieve a particular witness’ — No evidence by the defence contradicting that witness—No misdirection.)]

[See also (‘37) AIR 1937 Nag 110 (112) : 38 Cri L Jour 589 : I L R (1937) Nag 123, *Fateh Mahomed v. Emperor*. (Judge not leaving it to the jury to consider whether they should believe the defence evidence or no—Misdirection.)]

29. (‘39) AIR 1939 Cal 497 (499) : 40 Cr. L. J. 877, *Moseladdi v. Emperor*. (Jury should be cautioned against being influenced against the accused by evidence showing or tending to show that the accused were of bad character.)

(‘37) AIR 1937 Nag 110 (112) : 38 Cri L Jour 589 : I L R (1937) Nag 123, *Fateh Mahomed v. Emperor*. (Charge vitiated by a strong bias in favour of the prosecution and a strong bias against the defence.)

(‘84) 10 Cal 140 (145) : 13 C L R 358, *Hurry Churn v. Empress*. (Weak point in prosecution evidence not pointed out.)

(‘14) AIR 1914 Cal 549 (550) : 15 Cr.L.J. 147, *Ofel Mollah v. Emperor*. (Judge’s opinion expressed in dogmatic and unqualified terms — Held, there was misdirection.)

(‘29) AIR 1929 Cal 617 (621, 626) : 30 Cri L Jour 993 (SB), *Padam Prasad v. Emperor*. (Complaint containing prejudicial matter allowed to be read — Judge omitting to warn jury not to pay attention to it.)

(‘19) AIR 1919 Cal 439 (440) : 20 Cri L Jour 661, *Affiruddi Chakdar v. Emperor*.

(‘21) AIR 1921 Cal 252 (255) : 23 Cri L Jour 244, *Emperor v. Taribullah Sheikh*.

(‘22) AIR 1922 Cal 106 (106) : 24 Cr.L.J. 143, *Superintendent & Remembrancer of Legal Affairs v. Shyam Sundar Bhumi*.

(‘27) AIR 1927 Cal 200 (201, 202) : 28 Cri L Jour 201, *Isu Sheikh v. Emperor*. (Matters not on record were put before the jury.)

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Prosecutor nor that of the defence counsel.³⁰ He should refer to important pieces of evidence both for the prosecution and against it.³¹ He should not put the case of the prosecution too strongly and fail to put the defence case as strongly as it ought to be.³² The usual way of charging the jury would be to ask them to start with the presumption of the innocence of the accused,³³ to trace the history of the case as laid before the Court by the prosecution,³⁴ placing before the jury the evidence for the prosecution³⁵ and drawing their attention to the weak points, if any, in such evidence;³⁶ then to state the case for the defence

- (28) AIR 1928 Cal 551 (552) : 30 Cr.L.J. 120, *Mahomed Segiruddin v. Emperor*. (Case based on circumstantial evidence — Failure to put it to the jury that circumstances should be such that there can be no reasonable possibility of innocence of the accused.)
- (28) AIR 1928 Pat 31 (33, 34) : 7 Pat 50 : 28 Cr.L.J. 843, *Tajali Mian v. Emperor*.
- (30) 32 Cri L Jour 416 (417) : 129 Ind Cas 676 (677) (Cal), *Upendranath Ta v. Emperor*.
- (26) AIR 1926 All 429 (430) : 27 Cri L Jour 785, *Dhiraji v. Akasi*. (Jury's attention was not drawn to contradictions in prosecution evidence.)
- (26) AIR 1926 Cal 139 (141) : 53 Cal 372 : 27 Cri L Jour 266, *Khijiruddin v. Emperor*. (Charge to jury read very much like prosecuting counsel's speech.) [See (24) AIR 1924 Cal 47 (48) : 50 Cal 658 : 24 Cr. L. J. 838, *Eran v. Emperor*. (205) 2 Cri L Jour 8 (11) : 9 C W N 69, *Yasin Sheikh v. Emperor*. (In this case the evidence was fairly put to the jury.)]
30. (37) AIR 1937 Cal 266 (267) : 38 Cr. L. J. 767, *Madan Tilakdas v. Emperor*.
- (78) 1 Cal L R 436 (437), *In the matter of Chinibash Ghose*.
- (28) AIR 1928 Cal 500 (502) : 29 Cri L Jour 497, *Samiuddin v. Emperor*.
31. (94) 1894 Rat 720 (721), *Queen-Empress v. Mahadu*.
- (37) AIR 1937 Nag 110 (112, 113) : 38 Cri L Jour 589 : 1 L R (1937) Nag 123, *Fateh Mahomed v. Emperor*. (Accepting the prosecution evidence as an established fact and not putting to jury defence evidence—Misdirection.)
- (36) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cr. L. J. 366 (FB), *Puttan Hasan v. Emperor*.
- (11) 12 Cri L Jour 537 (539) : 12 Ind Cas 513 (Oudh), *Makbul Ahmad v. Emperor*.
- (11) 12 Cri L Jour 193 (196) : 10 Ind Cas 684 (Cal), *Rashidazzaman v. Emperor*.
- (1864) 1 Suth W R Cr Letters 10 (10). (It is the Judge's duty in summing up the evidence to lay before the jury all the facts required by them to be determined.)
- (11) 12 Cri L Jour 140 (141) : 9 Ind Cas 788 (Mad), *Palavesa Tevan v. Emperor*.
- (72) 17 Suth W R Cr 58 (58), *Queen v. Kissoree Mohun Dutt*. (Charge of using forged documents—Judge was right in drawing jury's attention to palpable alteration or blot on the face of the document.)
- (25) AIR 1925 Cal 729 (734) : 26 Cri L Jour 1009, *Jessarai v. Emperor*.
- (26) 28 Cri L Jour 19 (22) : 99 Ind Cas 51 (Cal), *Mamat Ali v. Emperor*. (Omission to direct jury upon an important point in favour of the accused amounts to a misdirection.)
- [See (1865) 4 Suth W R Cr 18 (18), *Queen v. Aruj Sheikh*. (There was no summing up in this case.)]
32. (40) 1940 M W N 97 (100), *Pateyya v. Emperor*. (Failure to put before the jury points which are favourable to the accused is a misdirection which vitiates the trial.)
- (33) AIR 1933 Cal 426 (428) : 34 Cri L Jour 533 (SB), *Asraf Ali v. Emperor*. [See also (70) 14 Suth W R Cr 59 (62), *Queen v. Hurry Prosad*.]
33. (31) AIR 1931 Cal 796 (798) : 58 Cal 1095 : 33 Cri L Jour 196, *Emperor v. Tazem Ali*.
34. (05) 2 Cri L Jour 311 (313) : 1 C. L. J. 385, *Panchu Mondal v. Emperor*.
- (29) AIR 1929 Pat 34 (35) : 7 Pat 153 : 30 Cri L Jour 273, *Wajid Ali v. Emperor*. [See (66) 6 Suth W R Cr 64 (64), *Empress v. Mohabur Singh*.]
35. (07) 5 Cr.L.J. 427 (430) : 34 Cal 698 : 11 C W N 666, *Jatindra Nath v. Emperor*.
- (18) AIR 1918 Cal 314 (315, 318) : 19 Cri L Jour 81, *Asraf Ali v. Emperor*.
- (29) AIR 1929 Cal 244 (246) : 56 Cal 566 : 30 Cr. L. J. 1031, *Debendra Narayan v. Emperor*.
36. (37) AIR 1937 Cal 266 (267) : 38 Cr. L. J. 767, *Madan Tilakdas v. Emperor*. (If he feels that there is something extremely suspicious about the prosecution case, he ought to show his hand to the jury—He is not a mere judicial automaton.)

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in sufficient detail³⁷ and to draw the attention of the jury to all the points in favour of the defence³⁸ even though the accused or his pleader omitted to raise³⁹ or did not lay much stress on such points.⁴⁰ The Judge should not tell the jury that if they find that the defence case is a false one it is an element in favour of the prosecution and that the falsity of the defence may have the effect of confirming them in their belief that the prosecution story is true. But, if such language is employed, it should always be accompanied by the legal caution that the onus of proving explicit guilt is upon the prosecution alone.⁴¹ The Judge should not try to explain away points favourable to the accused⁴² or ridicule the defence.⁴³ A Judge in his charge to the jury should not make an appeal or exhortation to the jury such as "The whole Karachi is watching you. The whole commercial world is watching you." For, in doing so, the Judge passes beyond the limits of wise guidance or advice and introduces extraneous considerations in the charge which may not leave the jury to come freely to their

(³⁷) AIR 1937 Cal 269 (272) : 38 Cri L Jour 1018, *Sanyasi Gain v. Emperor*. (Charge held defective and conviction set aside.)

(³⁸) 1936 O W N 187 (190), *Behari v. Emperor*. (Case of dacoity—Guilt of accused depending entirely upon identification—Judge should point out shortcomings of prosecution witnesses in his charge to jury.)

(³⁹) 5 Suth W R Cr 13 (13), *Queen v. Choonee*.

(⁴⁰) 1929 Mad W N 946 (947, 952), *Doraiswamy v. Emperor*.

(⁴¹) AIR 1928 Cal 690 (691) : 56 Cal 145 : 30 Cr. L. J. 350, *Mokbul Khan v. Emperor*. [See (1865) 3 Suth W R Cr 29 (31), *Empress v. Baidnath Singh*.]

37. (³⁸) 1888 Rat 426 (427), *Queen-Empress v. Dattu*.

[See also (³³) AIR 1933 P C 124 (131, 133) : 34 Cri L Jour 322 (332, 333) (PC), *Dwarkanath v. Emperor*.]

38. (1900) 4 Cal W N 196 (200), *Rahamzat Ali v. Empress*.

(³⁷) AIR 1937 Cal 269 (272) : 38 Cri L Jour 1018, *Sanyasi Gain v. Emperor*.

(²⁹) 1929 Mad W N 946 (947, 948), *Doraiswamy v. Emperor*. (It is the Judge's duty to put strong as well as weak points in the prosecution case to the jury.)

(¹⁵) AIR 1915 Bom 249 (251, 252) : 40 Bom 220 : 17 Cri L Jour 133, *Fakira Appaya v. Emperor*.

(⁷¹) 15 Suth W R Cr 37 (39, 40), *Queen v. Mahima Chunder Das*.

(¹⁵) AIR 1915 Cal 773 (783) : 16 Cri L Jour 561 (570) (FB), *Emperor v. Upendra-nath Das*. (Per Mukerjee, J.)

39. (⁴⁰) AIR 1940 Nag 221 (224) : 1940 N L J 264 (267), *Bapurao v. Emperor*.

(²⁴) AIR 1924 Cal 257 (282) : 25 Cri L Jour 817 (FB), *Emperor v. Barendra Kumar*. (But there must be evidence in support of such point.)

(³⁰) AIR 1930 Cal 442 (442, 443) : 31 Cri L Jour 1203, *Kuti v. Emperor*. (There must be some evidence in support of such point.)

(³³) AIR 1933 Cal 656 (658) : 34 Cri L Jour 1078, *Golap Ali v. Emperor*. (Do.)

(²⁸) AIR 1928 Cal 700 (702) : 30 Cri L Jour 799, *Ajgar Sheikh v. Emperor*. (Do.)

(³⁰) AIR 1930 Sind 308 (309) : 32 Cri L Jour 172, *Mahomed Khan v. Emperor*. (Accused unrepresented—Likely arguments that would have been advanced by pleader if the accused had been represented should be brought to the notice of the jury.)

40. (¹⁷) AIR 1917 Mad 335 (335) : 17 Cri L Jour 19 (19), *In re Sangam*. (Evidence about defence of alibi was not summed up—Retrial ordered.)

41. (³⁷) AIR 1937 Cal 463 (465) : 38 Cri L Jour 931, *Sarat Chandra v. Emperor*.

(³⁷) AIR 1937 Cal 266 (268) : 38 Cri L Jour 767, *Madan Tilakdas v. Emperor*.

42. (⁹⁹) 2 Weir 501 (502, 503), *In re Boga Vasantgadu*.

(¹³) 14 Cri L Jour 623 (623) : 21 Ind Cas 671 (Mad), *In re Subbu Thevan*.

(⁹⁹) 2 Weir 386 (386), *Kizakedath Univam v. Empress*.

43. (²⁵) AIR 1925 Sind 116 (119) : 25 Cri L Jour 761, *Topandas v. Emperor*. (Defence ridiculed even before the discussion of evidence had been entered upon—Held this had a misleading effect on the minds of the jury.)

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conclusions.⁴⁴ Where there are discrepancies in the evidence the Judge should not merely say that there are discrepancies but should point out *what* they are.⁴⁵ It will not be proper to advise the jury to disbelieve a man who has given consistent evidence merely because there are a few minor discrepancies;⁴⁶ nor is it proper to put before the jury hypothetical or speculative cases, for which there is no foundation in evidence.⁴⁷

But, having regard to S. 298, sub-s.(2), it is proper and reasonable for the Judge to direct the jury as to the weight to be attached to the evidence called at the trial, provided that the Judge takes care to caution the jury that they are the sole judges of all questions of fact.⁴⁸

44. ('39) AIR 1939 Sind 209 (216) : 41 Cri L Jour 28 : I L R (1940) Kar 249, *Shewaram v. Emperor*.

[See ('25) AIR 1925 Sind 116 (122) : 25 Cri L Jour 761, *Topandas v. Emperor*.]

45. ('88) 2 Weir 493 (494), *In re Anchula Nallacharla Naidu*.

('36) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB), *Puttan Hasan v. Emperor*.

('66) 5 Suth W R Cr 70 (71), *Queen v. Burjo Barick*. (In summing up of a case tried with the aid of assessors.)

('27) AIR 1927 Cal 200 (202) : 28 Cri L Jour 201, *Isu Sheik v. Emperor*.

('76) 25 Suth W R Cr 54 (54), *Queen v. Chunder Kumar Muzoomdar*.

('84) 11 Cal 10 (13), *Lein Tu v. Queen-Empress*.

[See also ('38) AIR 1938 Pat 575 (576) : 40 Cr. L. J. 34, *Bulak Gope v. Emperor*. (Defence relying on omissions by witnesses before police and Court — Court should draw attention of jury to those omissions and if it thinks that omissions were due to certain circumstances, it should leave jury to decide value of such omissions—General observations however create wrong impressions on jury.)

('38) AIR 1938 Pat 579 (584) : 40 Cri L Jour 147, *Yusuf Mia v. Emperor*.]

46. ('20) AIR 1920 Pat 575 (575, 576) : 22 Cr. L. J. 1250, *Baijnath Mahton v. Emperor*.

(1864) 1 Suth W R 17 (17), *Queen v. Bustee Khan*.

47. ('36) AIR 1936 Rang 421 (425) : 37 Cr. L. J. 1050 : 14 Rang 716 (FB), *Emperor v. Nga E Pe*. (Judge not bound to enter into an irrelevant explanation on case not raised by accused—This may have the effect of misguiding the jury.)

('15) AIR 1915 Cal 773 (779, 782) : 16 Cri L Jour 561 (571) (FB), *Emperor v. Upendranath Das*.

('32) AIR 1932 Bom 279 (285) : 56 Bom 434 : 33 Cr. L. J. 613, *Vasudeo Balwant v. Emperor*.

('33) AIR 1933 Pat 481 (484, 485) : 34 Cr. L. J. 828, *Emperor v. Kameshwar Lal*.

('16) AIR 1916 Low Rur 114 (122, 123) : 17 Cr. L. J. 49 (52, 54, 58) : 8 Low Bur Rul 306 (FB), *Nga Mya v. Emperor*.

[See ('28) AIR 1928 Pat 139 (141) : 6 Pat 572 : 29 Cr. L. J. 626, *Nathuni Nonia v. Emperor*. (In this case the High Court held on facts that the Judge did not put any hypothetical case as there was evidence.)]

48. ('40) AIR 1940 Nag 221 (224), *Bapurao v. Emperor*.

('38) AIR 1938 Cal 658 (661) : 40 Cri L Jour 101 : I L R (1938) 1 Cal 636, *Abdul Gafur v. Emperor*. (Judge discussing evidence and leaving decision on every piece of evidence to jury — Mere fact that presentation of evidence to jury is coloured by opinion of Judge does not amount to misdirection.)

('37) AIR 1937 Nag 110 (112) : 38 Cri L Jour 589 : I L R (1937) Nag 123, *Fatch Mohammad v. Emperor*. (It is not enough if after giving his opinions as definite facts, the Judge merely does lip-service to his duties by stating at the end of the charge that jurors should come to their own conclusion.)

('36) AIR 1936 Oudh 164 (164) : 37 Cr. L. J. 182 : 11 Luck 687, *Satdeo v. Emperor*.

('36) 1936 O W N 201 (203), *Wajid Husain v. Emperor*.

('36) 37 Cr. L. J. 17 (18) : 158 I C 172 (Lah), *Harold H. Watson v. Emperor*.

('34) AIR 1934 All 1032 (1033) : 36 Cr. L. J. 322, *Bansi Dhar v. Emperor*.

('34) AIR 1934 All 326 (328) : 35 Cr. L. J. 688, *Sumera v. Emperor*. (Judge giving dogmatic and unqualified opinion on question of fact of cardinal importance—This amounts to misdirection.)

('34) AIR 1934 Cal 757 (757) : 35 Cri L Jour 1487, *Hossain Ali v. Emperor*. (Expression of opinion on matters of evidence is not misdirection where Judge warns that the jury are not bound to accept his opinion on questions of fact.)

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After the Judge has summarised the evidence for the prosecution and the defence, he should tell the jury that though they do not believe the defence, it does not follow that they must believe the prosecution. Giving such a direction at the end of the charge will not amount to misdirection.⁴⁹

Summing up is not rendered unnecessary by reason of counsel having addressed jury. — The sufficiency of a charge to the jury must depend largely upon the special circumstances of each case such as the constitution of the jury, their intelligence and education, the elaboration with which the case has been conducted, the skill of the defence and a variety of other circumstances.⁵⁰ But the Judge will not be relieved of the duty of placing before the jury the important facts of the case simply because the counsel have addressed long arguments to them.⁵¹ It is necessary that the jury should learn *from the Judge* what are the important points to which their attention should be directed.⁵²

Effect of omission to refer to defence case. — An omission to refer to the case of the defence or the failure to deal with it in an adequate manner will vitiate the trial.⁵³ Where, however, the defence

(1935) AIR 1935 Rang 214 (216) : 13 Rang 141 : 36 Cr. L. J. 1232, *H. W. Scott v. Emperor*. (A Judge charging the jury does not fulfil his duty if he merely reiterates the evidence given by the witnesses for the prosecution and the defence, and then leaves the jury to decide the case one way or another.)

(1935) AIR 1935 Pat 263 (265, 266) : 14 Pat 225 : 36 Cri L Jour 1026, *Harilal v. Emperor*. (Criticisms of and exposures of weak points in arguments on behalf of defence do not amount to misdirection if jury are warned that they are not bound by such expressions of opinion.)

(1935) AIR 1935 All 928 (929) : 37 Cri L Jour 173, *Sri Kishen v. Emperor*. (Judge expressing opinion on question of fact under S. 298, sub-s. (2)—It is not necessary on every occasion when he expresses such opinion to tell jury that they are sole judges of questions of fact; it is enough if this point is mentioned at the end of the charge to the jury.)

[See (1938) AIR 1938 Cal 460 (462) : 39 Cr. L. J. 674, *Ebadi Khan v. Emperor*. (Having admitted a document Judge should leave it to the jury as to what weight they would allow to the evidence—Nor should he give his reasons for admitting document in evidence.)]

49. (1938) AIR 1938 Cal 658 (662) : 40 Cr.L.J. 101 : 1 L R (1938) 1 Cal 636, *Abdul Gafur v. Emperor*.

50. (1973) 20 Suth W R Cr 41 (42), *Queen v. Nimchand Mukerjee*.

(1923) AIR 1923 Pat 238 (239) : 24 Cri L Jour 495, *Gajo Singh v. Emperor*.

(1931) AIR 1931 Oudh 171 (171, 172) : 6 Luck 705 : 32 Cr.L.J. 858, *Mangal Singh v. Emperor*.

(1903) 27 Bom 644 (651) : 4 Bom L R 683, *Emperor v. Malgowda Basgowda*.

(1918) AIR 1918 Pat 201 (208) : 19 Cri L Jour 886, *Ram Bhagwan v. Emperor*.

(1910) 11 Cr. L. J. 13 (14) : 3 Sind L R 102 : 4 I. C. 597, *Imperator v. Minhwasayo*.

51. (1928) AIR 1928 Cal 269 (270), *Abdul Razak v. Emperor*.

(1982) 10 Cal L R 4 (6), *Jugut Mohinee Dassee v. Madhu Sudhan Dutt*.

(1903) 27 Bom 644 (651) : 4 Bom L R 683, *Emperor v. Malgowda Basgowda*.

(1934) AIR 1934 Nag 94 (95, 96) : 30 NagLR 262 : 35 Cr.L.J. 957, *Abdul Aziz v. Emperor*.

(1927) AIR 1927 Oudh 259 (260) : 2 Luck 597 : 28 Cri L Jour 683, *Nahrimal v. Emperor*. (Judge ought to have repeated in some form the gist of the counsel's argument.)

52. (1919) AIR 1919 Cal 142 (144) : 20 Cri L Jour 300 (FB), *Peary v. Emperor*.

53. (1991) 1891 Rat 581 (582), *Queen-Empress v. Dhamba*. (Charge should not confine itself to case for the prosecution.)

(1926) AIR 1926 Mad 370 (370) : 27 Cri L Jour 176, *In re Ambalam*. (Defence case was not adequately put before the jury)

(1937) AIR 1937 Cal 269 (272) : 38 Cri L Jour 1018, *Sanyasi Gain v. Emperor*. (Evidence not properly put before jurors—Weaknesses in prosecution evidence not

was not specific but consisted in merely denying the charge coupled with destructive criticism of the prosecution evidence, it was held that it was enough if the Judge drew the attention of the jury to the discrepancies in the prosecution evidence and the criticisms advanced, and that no useful purpose would be served by formally charging the jury that the defence was a denial of the prosecution case.⁵⁴

Allowing jury to have experiment as to question of identification. — See the undermentioned case.⁵⁵

7. Summing up where there are several accused. — Where there are several accused the Judge should deal with the evidence relating to each of the accused,¹ that is to say, he must point out to

pointed out but points in favour of accused omitted — Charge is defective and misleading—Conviction and sentence of accused must be set aside.)

(‘36) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cr. L. J. 366 (FB), *Puttan Hasan v. Emperor*. (Judge referring generally to defence suggested in cross-examination of prosecution witnesses.)

(‘22) AIR 1922 Cal 124 (126) : 23 Cr.L.J. 567, *Emperor v. Durga Charan Bepari*. (Jury’s attention was not drawn to discrepancies.)

(‘74) 11 Bom H C R 166 (169), *Reg. v. Sakharam Mukundji*. (Evidence properly admitted was withheld from the jury.)

(‘89) 1889 Rat 484 (486), *Queen-Empress v. Ardeshtir*. (Case under S. 405, Penal Code — Omission to charge jury as to the necessity of strict proof of *mens rea*.)

(‘03) 5 Bom L R 207 (209), *Emperor v. Appunna Devappa*. (In this case it was held that there was no omission.)

(‘04) 6 Bom L R 31 (32, 33), *Emperor v. Mira Gajbar*. (Judge asked the jury to neglect all oral evidence and concentrate their attention on documentary evidence alone.)

(‘20) AIR 1920 Cal 527 (528) : 21 Cr. L. J. 670, *Abdul Gafur v. Emperor*. (Jury’s attention was not drawn to most material contradiction.)

(‘05) 18 Mad L Jour 541 (541) : 4 M L T 194, *In re Gangi Reddi Buchanna*. (Omission to refer to plea of *alibi* and to the evidence bearing thereon.)

(‘12) 13 Cr. L. J. 271 (272) : 14 Ind Cas 655 (Mad), *Venkattan v. Emperor*. (Facts favourable to accused elicited in cross-examination not brought to the notice of the jury.)

(‘24) AIR 1924 Mad 230 (230) : 25 Cr. L. J. 269, *Mayandi Thevan v. Emperor*. (In this case omission to refer to defence evidence was held immaterial.)

(‘32) AIR 1932 Oudh 23 (24, 25) : 7 Luck 390 : 33 Cri L Jour 167, *Sita Ram v. Emperor*. (Failure to draw attention of the jury to the fact that there was no corroboration of complainant’s evidence as against certain accused.)

(‘23) AIR 1923 Cal 517 (519) : 50 Cal 318 : 25 Cri L Jour 467 (470), *Mahomed Yunus v. Emperor*. (Failure to warn the jury that a statement made by a certain accused was not a confession and could not therefore be used against his co-accused.)

(‘90) 14 Bom 115 (144), *Queen-Empress v. Magan Lall*. (Omission to tell the jury that the evidence of the accomplice was uncorroborated.)

(‘33) AIR 1933 Cal 833 (834) : 35 Cri L Jour 508, *Surendra Nath Das v. Emperor*. (Rape — Failure to warn jury not to accept girl’s evidence without corroboration.)

[See (‘40) 1940 Mad W N 97 (100), *Pateyya v. Emperor*. (Improper exclusion of relevant evidence attempted to be let in on behalf of the accused and failure to lay stress on the fact that all the prosecution witnesses were interested amounts to misdirection.)

(‘39) AIR 1938 Pat 575 (576) : 40 Cri L Jour 34, *Bulak Gope v. Emperor*.]

54. (‘32) AIR 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cr. L. J. 694, *Israil v. Emperor*.

(‘35) AIR 1935 All 928 (929, 930) : 37 Cr. L. J. 173, *Sri Kishen v. Emperor*. (Where there is no evidence for the defence, a discussion of only the prosecution evidence cannot be attacked as one sided.)

55. (‘34) AIR 1934 Cal 744 (745) : 36 Cr.L.J. 129, *Sarup Ali v. Emperor*. (Evidence as to accused being identified in diffused light from electric torches—Judge while charging jury as to evidence of identification allowing jury to have experiment with such torches in absence of accused—Held that the procedure was gravely irregular.)

Note 7

1. (‘40) AIR 1940 Pat 417 (419) : 41 Cri L J 738, *Judagi Gope v. Emperor*.

(‘40) 1940 Mad W N 97 (100), *Pateyya v. Emperor*.

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the jury exactly the evidence against each of the accused separately; it is not sufficient if he simply asks the jury to consider the case of each accused separately.² But it is a wrong method of approach to summarise the evidence against each of the accused persons and ask the jury at the end of each summary if the accused has been falsely implicated, thereby putting before them a false issue which is likely to misguide them into thinking that unless they are satisfied that the case is false, they must find the accused guilty.³

The Judge should not in his charge to the jury merely use the word 'accused' leaving the jury in considerable doubt as to which accused he refers; he should make reference to each accused separately.⁴

See also the undermentioned case.⁵

8. Direction to recommend for mercy. — The jury should not be directed by the Judge to recommend the accused to mercy.¹ Where the jury returned a verdict of guilty and, at the same time, recommended the accused to mercy, it was held that the recommendation for mercy did not imply that the jury did not believe the accused to be guilty at all.²

('39) AIR 1939 Sind 209 (214): 41 Cri L Jour 28: I.L.R. (1940) Kar 249, *Shewaram v. Emperor*. (Where the Judge in his charge to the jury has not sufficiently distinguished the cases of each of the two accused who are being tried and whose cases are widely different, so as to make a difference on the admissibility of evidence, it amounts to a misdirection.)

('38) AIR 1938 Cal 475 (476): 39 Cri L Jour 751, *Katyayani Dasi v. Emperor*.

('38) AIR 1938 Pat 579 (583): 40 Cri L Jour 147, *Yusuf Mia v. Emperor*.

('37) 1937 M W N 737 (738), *Nachappa Goundan v. Emperor*. (Omission to do this is a very serious defect.)

('36) AIR 1936 Cal 186 (187): 37 Cri L Jour 673, *Nabi Khan v. Emperor*.

('36) 1936 O W N 201 (203), *Wajid Husain v. Emperor*.

('07) 5 Cri L Jour 78 (80): 30 Mad 44, *Mari Valayan v. Emperor*.

('08) 7 Cri L Jour 358 (358) (Mad), *In re Acchabha Beori*. (Jury should be warned that the confession by one accused incriminating himself cannot be used against the other accused.)

('01) 2 Weir 517 (518), *Dakshinamurthi v. Public Prosecutor*.

('94) 2 Weir 514 (514), *In re Veerappan*.

('95) 1895 Rat 748 (749), *Queen-Empress v. Menga Budhia*.

('10) 11 Cri L Jour 538 (539): 7 Ind Cas 915 (Cal), *Harendra Pal v. Emperor*.

('20) AIR 1920 Cal 966 (967): 47 Cal 46: 21 Cri L Jour 775, *Hemanta Kumar Pathak v. Emperor*. (Attention of the jury must be invited to each of the accused's statement to the charge framed against him.)

('35) AIR 1935 Cal 534 (537): 62 Cal 911: 36 Cr. L. J. 1246, *Asanulla v. Emperor*. (To hang a lot of number of witnesses round the neck of each accused without any discussion of the evidence given by the witnesses is not the way of carrying out the above rule.)

('34) AIR 1934 Cal 273 (275): 35 Cri L Jour 1313, *Ram Sumer Ahir v. Emperor*.

2. ('36) AIR 1936 Cal 186 (187): 37 Cri L Jour 673, *Nabi Khan v. Emperor*.

3. ('40) 44 Cal W N 840 (843), *Mujjaffar Sheikh v. Emperor*.

4. ('36) AIR 1936 Cal 186 (189): 37 Cri L Jour 673, *Nabi Khan v. Emperor*.

5. ('38) AIR 1938 Mad 858 (860): 40 Cri L Jour 355, *Arumugam v. Emperor*. (Charge under S. 401 of being members of gang — Evidence that big gang was committing acts of depredation all over India and that some of the accused were found associated together in crime characteristic of gang is sufficient to justify Judge, on very little proof of association, in leaving it to jury whether particular accused was member of gang.)

Note 8

1. ('70) 14 Suth W R Cr 46 (46), *Queen v. Dassee Musulmany*.

2. ('36) AIR 1936 Pat 46 (48): 37 Cri L Jour 320, *Hari Mahito v. Emperor*.

9. "Laying down the law by which the jury are to be guided." — There should be only one charge to the jury both on the facts and on the law. It is illegal to comment upon the evidence and ask the jury to consider whether the prisoner is guilty and then to explain the law and take their verdict as to what offence the prisoner is guilty of.¹ The Judge should explain to the jury his own view of the law, but should not refer it to the High Court.²

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The discussion of legal matters should be introduced in the charge in appropriate places, as and when something occurs in the discussion of the evidence which gives rise to them, and necessitates their application.^{2a}

Elements of offence should be explained. — The Judge should draw the attention of the jury to the offence with which the accused is charged and explain to them clearly and fully the various ingredients which should be proved in order to find the accused guilty of that offence.³ It should not be presumed that the jurors are aware of the necessary elements which constitute an offence or the legal distinction between one offence and another.⁴ Wherever necessary the Judge should charge the jury as to the necessity of strict proof of *mens rea*, of fraudulent intention, etc.⁵; if the evidence discloses that the accused comes under the exceptions to a particular offence or the general exceptions under chapter IV of the Penal Code, he should

Note 9

1. ('88) 2 Weir 493 (494), *In re Anchula Nallacharla Naidu*. (Accused was charged in this case with offences under Ss. 408, 881, 411, Penal Code)
2. (1865) 3 Suth W R Cr Letters 18 (18), *In re Umbica Ghurn Sircar*.
- 2a. ('35) AIR 1935 Cal 534 (536); 62 Cal 911:36 Cr.L.J. 1246 *Asanulla v. Emperor*. (A direction about reasonable doubt should appear at the end of the charge.)
3. ('40) AIR 1940 Lah 87 (88) : 41 Cri L Jour 482, *A. M. Mathews v. Emperor*. (This is particularly necessary in a case where the main charge is cheating as the definition of cheating is not exactly what an ordinary layman in the ordinary use of the English language would understand by the term.)
- ('39) AIR 1939 Bom 457 (459) : 41 Cri L Jour 176 : ILR (1939) Bom 648, *Emperor v. Jhina Soma*. (But omission to do so does not vitiate trial if it has not occasioned failure of justice.)
- ('37) AIR 1937 Cal 458 (459) : 38 Cri L Jour 966, *Mahomed Shariff Khan v. Emperor*. (Failure of Judge to explain to the jury the implication of a conspiracy to commit an offence under S. 326, *held* amounted to misdirection.)
- (1864) 1 Suth W R Cr Letters 10 (11).
- ('07) 5 Cri L Jour 168 (170) : 9 Bom L R 153, *Emperor v. Mahamad Khan*.
- ('30) AIR 1930 Cal 433 (434) : 31 Cr. L. J. 1092, *Mid. Jalal-ud-din v. Emperor*.
- ('20) AIR 1920 Cal 564 (564):47 Cal 795:31 Cr.L.J. 694, *Kassimuddin v. Emperor*.
- ('30) AIR 1930 All 24 (25) : 31 Cri L Jour 33, *Emperor v. Mohammad Israil*.
- ('07) 30 Mad 44 (45) : 5 Cri L Jour 78, *Mari Valayan v. Emperor*.
- ('24) AIR 1924 Oudh 411 (412) : 25 Cri L Jour 1129, *Nawab Ali v. Emperor*. (Omission to explain not a technical defect.)
- ('35) AIR 1935 Oudh 175 (176) : 35 Cri L Jour 507, *Jagan v. Emperor*. (What is meant by term "robbery" must be explained.)
4. ('35) AIR 1935 Oudh 175 (176) : 35 Cri L Jour 507 (508), *Jagan v. Emperor*.
5. ('37) AIR 1937 Pat 440 (444) : 38 Cr.L.J. 919 : 16 Pat 413, *Rameshwar Singh v. Emperor*. (Charge of kidnapping and abduction — Jury finding accused not guilty of kidnapping and finding girl to be over sixteen years — Story of prosecution that girl was taken away for marriage without her consent — Charge to jury not referring to such intention — *Held* non-direction amounted to serious misdirection.)
- ('89) 1889 Rat 484 (486), *Queen-Empress v. Ardeshir*.
- [*Sec* ('25) AIR 1925 Cal 494 (496) : 25 Cr. L. J. 1386, *Abdul Gani v. Emperor*. (Unlawful assembly case — Judge must mention any charges that may be in the common objects of the unlawful assembly.)]

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explain those exceptions also.⁶ See the undermentioned cases,⁷ where the various High Courts have given directions as to how particular sections should be explained.

6. ('26) AIR 1926 Cal 1107 (1108) : 27 Cr. L. J. 1402, *Jahur Shaikh v. Emperor*.
[See also ('38) AIR 1938 Cal 6 (9) : 39 Cr. L. J. 308, *Emperor v. Durga Charan*.
(Charge in murder case—Attention of jury drawn to positions that on evidence no question of exceptions to S. 300, Penal Code, arose — Held there was no misdirection.)
- ('37) AIR 1937 Bom 60 (61) : 38 Cri L Jour 327, *Emperor v. Mahomed Adam*.
(Charge to jury — Intention to cause death and actual death proved — Charge should be of culpable homicide amounting to murder—Jury to determine exceptions under S. 300, Penal Code — Judge should not prejudge nature of offence.)]
7. ('39) AIR 1939 Bom 457 (459) : 41 Cri L Jour 176 : 1 L R (1939) Bom 648, *Emperor v. Jhina Soma*. (It is incumbent upon the Judge to explain what is culpable homicide under S. 299, Penal Code, and under what circumstances culpable homicide amounts to murder, and under what circumstances it does not, under S. 300, Penal Code.)
- ('39) AIR 1939 Pat 536 (539) : 41 Cri L Jour 1 : 18 Pat 698, *Sachinder Rai v. Emperor*. (S. 366A, Penal Code — Where there is no exact evidence of age, the Judge should strongly emphasize this feature of the case and clearly direct the jury that if they are not completely satisfied that it has been established that the girl was under eighteen they are bound to acquit upon that charge.)
- ('38) AIR 1938 Cal 475 (476) : 39 Cri L Jour 751, *Katyayani Dasi v. Emperor*. (S. 366 and S. 366A, Penal Code.)
- ('37) AIR 1937 Cal 309 (312) : 38 Cr. L. J. 1067 : 1 L R (1937) 2 Cal 308, *Sahedali Mirdha v. Emperor*. (Ss. 149 and 304, Penal Code.)
- ('37) AIR 1937 Pat 191 (195) : 38 Cri L Jour 129, *Rajendra Nath v. Emperor*. (Ss. 411 and 414, Penal Code.)
- ('36) AIR 1936 Cal 675 (676) : 38 Cr. L. J. 176, *Samarali v. Emperor*. (In cases under S. 366, the Judge should put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose mal-treatment has been the subject of the charge.)
- ('73) 20 Suth W R Cr 70 (71) : 13 Beng L R App 20, *Queen v. Nobin Chunder Banerjee*. (S. 84, Penal Code — Murder committed while labouring under strong passions and feelings — Insanity cannot be presumed.)
- ('71) 16 Suth W R Cr 36 (37) : 8 Beng L R App 21, *Queen v. Zulfukar Khan*. (S. 85, Penal Code.)
- ('28) AIR 1928 Cal 269 (270), *Abdul Rezak v. Emperor*. (S. 97, Penal Code.)
- ('27) AIR 1927 Cal 257 (259) : 53 Cal 980 : 28 Cr. L. J. 273, *Aseruddin v. Emperor*. (S. 96, Penal Code.)
- ('24) AIR 1924 Cal 776 (777) : 26 Cri L Jour 48, *Baseruddi Sheikh v. Emperor*. (S. 103, Penal Code.)
- ('23) AIR 1923 Cal 517 (519) : 50 Cal 318 : 25 Cr. L. J. 467, *Muhammad Yunus v. Emperor*. (Ss. 100 and 101, Penal Code.)
- ('21) AIR 1921 Cal 697 (698) : 22 Cri L Jour 606, *Abdul Rahim Mir v. King-Emperor*. (Ss. 96 to 103, Penal Code.)
- ('11) 13 Cri L Jour 26 (26) : 13 Ind Cas 218 (Cal), *Mehar Sardar v. Emperor*. (S. 99, Penal Code.)
- ('09) 9 Cri L Jour 443 (444, 445) : 36 Cal 296 : 1 I. C. 973, *Baijnath Dhanuk v. Emperor*. (S. 99, Penal Code.)
- ('08) 7 Cr. L. J. 256 (262, 264) : 35 Cal 368, *Kabiruddin v. Emperor*. (S. 99, I. P. C.)
- ('72) 17 Suth W R Cr 45 (45), *Queen v. Mookhtaram Mundle*. (S. 100, Penal Code.)
- ('31) AIR 1931 Cal 757 (759) : 58 Cal 1228 : 33 Cri L Jour 79 (SB), *Emperor v. Amode Ali Sikdar*. (S. 109, Penal Code.)
- ('20) AIR 1920 Cal 966 (967) : 47 Cal 46 : 21 Cr. L. J. 775, *Hemanta Kumar v. Emperor*. (Do.)
- ('12) 13 Cri L Jour 715 (715) : 16 I. C. 523 (Cal), *Jamiruddi Biswas v. Emperor*. (S. 114, Penal Code.)
- ('20) AIR 1920 Cal 834 (834) : 22 Cr. L. J. 448, *Raja Khan v. Emperor*. (Do.)
- ('16) AIR 1916 Cal 355 (355) : 17 Cri L Jour 92 (93), *Abdul Sheikh v. Emperor*. (S. 141, Penal Code — It is essentially necessary to mention what an unlawful assembly is.)
- ('28) AIR 1928 Pat 139 (142) : 6 Pat 572 : 29 Cri L Jour 626, *Nathuni Nonia v. Emperor*. (S. 141, Penal Code.)

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- (125) AIR 1925 Cal 494 (497) : 25 Cri L Jour 1386, *Abdul Gani v. Emperor*. (Do.)
 (124) AIR 1924 Cal 771 (772) : 51 Cal 79 : 25 Cri L Jour 945, *Kianuddi Karikar v. Emperor*. (Do.)
 (169) 12 Suth W R Cr 51 (51), *Queen v. Rasookoolah*. (Do.)
 (186) 1 Weir 450 (451), *In re Komali Viswasam*. (Ss. 148, 397, Penal Code.)
 (194) 1894 Rat 710 (715, 716), *Queen-Empress v. Abdul Rezak*. (S. 149, I. P. C.)
 (125) AIR 1925 P O 1 (4) : 52 Cal 197 : 52 Ind App 40 : 26 Cri L Jour 431 (PC), *Barendra Kumar v. Emperor*. (S. 34, Penal Code, fully discussed.)
 (110) 11 Cri L Jour 15 (16) : 3 Sind L R 125 : 4 Ind Cas 608, *Emperor v. Murid*. (S. 34, Penal Code.)
 (127) AIR 1927 Oudh 102 (103) : 1 Luck 180 : 27 Cr. L. J. 846, *Gurdin v. Emperor*. (Ss. 149 and 34, Penal Code.)
 (126) AIR 1926 Cal 410 (412) : 26 Cri L Jour 1560, *Kasem Molla v. Emperor*. (Common object—S. 147, Penal Code.)
 (125) AIR 1925 Cal 913 (914) : 26 Cri L Jour 827, *Aniruddha Mana v. Emperor*. (Ss. 34 and 149, Penal Code.)
 (124) AIR 1924 Cal 257 (270) : 25 Cri L Jour 817 (FB), *Emperor v. Brendra Kumar Ghose*. (S. 34, Penal Code.)
 (107) 5 Cri L Jour 427 (431) : 34 Cal 698 : 11 C W N 666, *Jatindranath v. Emperor*. (S. 149, Penal Code.)
 (185) 11 Cal 106 (109, 110), *Behari Mahton v. Queen-Empress*. (Do.)
 (182) 8 Cal 739 (751, 752) : 12 Cal L R 233, *Empress v. Jhuboo Mahton*. (Do.)
 (199) 1 Bom L R 784 (785), *Queen-Empress v. Babya*. (S. 300 read with S. 34, Penal Code.)
 (1900) 2 Bom L R 304 (307-309), *Queen-Empress v. Vinayak*. (S. 124A, Penal Code.)
 (1900) 2 Bom L R 286 (298), *Queen-Empress v. Luaman Narayan*. (Do.)
 (192) 19 Cal 35 (44, 45), *Queen-Empress v. Jogendra Chunder*. (Do.)
 (167) 7 Suth W R Cr 29 (30), *Queen v. Lahai Mundul*. (S. 176, Penal Code.)
 (134) AIR 1934 Cal 144 (144, 145) : 35 Cri L Jour 535, *Nagendra Bhakta v. Emperor*. (S. 201, Penal Code.)
 (166) 6 Suth W R Cr 84 (84), *Queen v. Parbutty Churan Sirkar*. (S. 191, Penal Code.)
 (173) 20 Suth W R Cr 41 (44, 45), *Queen v. Nim Chand Mookerjee*. (Ss. 194 and 115, Penal Code.)
 (197) 1 Cal W N 301 (302), *Tomji Pramanik v. Empress*. (S. 211, Penal Code.)
 (169) 12 Suth W R Cr 66 (66) : 4 Beng L R App Cr 4, *Queen v. Kola*. (S. 193, Penal Code.)
 (169) 12 Suth W R Cr 31 (32) : 3 Beng L R App Cr 36, *Queen v. Mati Khowee*. (Do.)
 (168) 9 Suth W R Cr 52 (54), *Queen v. Denonath Bujjur*. (Do.)
 (166) 6 Suth W R Cr 15 (15), *Queen v. Pran Kissen*. (S. 211, Penal Code.)
 (117) AIR 1917 Cal 123 (126) : 18 Cri L Jour 385 (388) : 44 Cal 477 (FB), *Fateh Chand v. Emperor*. (S. 243, Penal Code.)
 (133) AIR 1933 Cal 242 (243) : 34 Cri L Jour 668, *Saheb Ali v. Emperor*. (S. 304, Penal Code.)
 (130) AIR 1930 P C 201 (204) : 31 Cri L Jour 701 (PC), *Benjamin Knowles v. Emperor*. (S. 300, Penal Code.)
 (106) 3 Cr. L. J. 1 (2) : 3 Low Bur Rul 75 (FB), *Hla Gyi v. Emperor*. (S. 300, Penal Code — Distinction between murder and culpable homicide should be explained.)
 (131) AIR 1931 Cal 345 (349) : 58 Cal 1138 : 32 Cri L Jour 598, *Ifattullah v. Emperor*. (S. 304A, Penal Code.)
 (130) AIR 1930 Cal 136 (138) : 31 Cri L Jour 572, *Natabar Haldar v. Emperor*. (Ss. 302 to 304, Penal Code.)
 (111) 11 Cri L Jour 295 (298, 300) : 6 Ind Cas 251 (Cal), *Reazuddin v. Emperor*. (S. 300, Penal Code.)
 (108) 8 Cri L Jour 6 (8) : 35 Cal 531 : 7 Cal L J 599 : 12 C W N 774, *Natabar Ghose v. Emperor*. (Intention in S. 304, Penal Code.)
 (185) 11 Cal 85 (90), *Queen-Empress v. Jacquiet*. (S. 300, Penal Code.)
 (171) 15 Suth W R Cr 17 (18) : 6 Beng L R App 86, *Queen v. Kali Charan Das*. (S. 304, Penal Code—Judge should point out the distinction between two classes of culpable homicide contemplated by S. 304.)
 (169) 12 Suth W R Cr 35 (35, 36) : 6 Beng L R App 87n, *Queen v. Ameer Khan*. (Do.)
 (168) 9 Suth W R Cr 72 (72), *Queen v. Gunesh Luskar*. (S. 300, Penal Code.)
 (168) 9 Suth W R Cr 51 (52), *Queen-Empress v. Shumshere Beg*. (S. 300, Penal Code—Judge ought to point out difference between culpable homicide and murder.)
 (195) 1895 Rat 766 (768), *Queen-Empress v. Dadubhai*. (Ss. 302, 304, Penal Code—It is the Judge's duty to explain distinctions between culpable homicide and murder.)

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- (195) 1895 Rat 735 (735), *Queen-Empress v. Poshu Hari*. (S. 304, Penal Code — Judge must point out that S. 304 is made up of two parts.)
- (190) 1890 Rat 530 (530), *Queen-Empress v. Ladkya Mahaduya*. (S. 304, Penal Code—Judge should draw the attention of the jury to both parts of the section.)
- (14) AIR 1914 Low Bur 216 (218) : 17 Cri L Jour 154 (155) : 8 Low Bur Rul 125, *Kya Nyun v. Emperor*. (Ss. 300, 304, 326, Penal Code — Jury should be asked to consider question of intention of the accused.)
- (12) 13 Cri L Jour 750 (751) : 17 Ind Cas 62 : 6 Sind LR 116, *Emperor v. Chagan Rajaram*. (S. 304 (1), Penal Code.)
- (28) 30 Cri L Jour 857 (857, 858) : 117 I. C. 862 (Cal), *Fedu Sheikh v. Emperor*. (Ss. 363 to 376, Penal Code—Notice of a charge of kidnapping is not a fair notice of a charge of abduction.)
- (32) AIR 1932 Oudh 28 (30) : 33 Cri L Jour 275, *Emperor v. Zamin*. (Meaning of "knowledge" in S. 368.)
- (27) AIR 1927 Oudh 259 (259, 260) : 2 Luck 597 : 28 Cri L Jour 683, *Nahru Mal v. Emperor*. (Age in cases of S. 366A, Penal Code.)
- (33) AIR 1933 Cal 606 (606) : 34 Cri L Jour 1161, *Abdul Khalique v. Emperor*. (Age in cases of S. 376, Penal Code — Rape.)
- (32) AIR 1932 Cal 442 (444) : 33 Cri L Jour 512, *Fulchand v. Emperor*. (S. 366, Penal Code—'Will' in the first part of the section refers to 'will' of the girl and not that of the guardian.)
- (32) AIR 1932 Cal 417 (417) : 33 Cr. L. J. 553, *Bhola Sardar v. Emperor*. (S. 373, Penal Code — Age of the girl material.)
- (30) AIR 1930 Cal 209 (210) : 57 Cal 1074 : 31 Cr. L. J. 903, *Prafulla Kumar v. Emperor*. (S. 366, Penal Code—'Forced' includes forced by stress of circumstances.)
- (26) AIR 1926 Cal 226 (227) : 26 Cr. L. J. 1021, *Gadadhar v. Emperor*. (Direction to jury must be on question of "knowledge" and not on suspicion in S. 368, Penal Code.)
- (10) 11 Cri L Jour 9 (10) : 4 I. C. 543 (Cal), *Emperor v. Nakul Kabiraj*. (S. 363, Penal Code — Judge should adhere to the words of the particular section.)
- (33) AIR 1933 Cal 718 (721, 722) : 60 Cal 1457 : 35 Cri L Jour 307, *Saheb Ali v. Emperor*. (S. 366, Penal Code—Previous intimacy is material.)
- (1864) 1 Suth W R Cr 21 (21), *Queen v. Akbar Kasee*. (S. 376, Penal Code—Consent must be free consent.)
- (1864) 1 Suth W R Cr 2 (3), *In re Bharat Chander Christian*. (Ss. 379 to 412, Penal Code.)
- (98) 25 Cal 416 (418) : 2 C W N 347, *Nabi Baksh v. Queen-Empress*. (S. 379, Penal Code—'Taking' in this case was with intent to put the owner to trouble — Accused was acquitted.)
- (10) 11 Cr. L. J. 164 (164) : 4 Ind Cas 1071 (Mad), *Kamma Aswathan v. Thimmappa*. (S. 379, Penal Code — Judge is bound to explain what is meant by theft.)
- (07) 5 Cr. L. J. 78 (79, 80) : 1 M L T 399 : 30 Mad 44, *Mari Valayan v. Emperor*. (S. 395, Penal Code—Mere reading of the definition of dacoity to the jury is not sufficient.)
- (31) AIR 1931 Mad 427 (428) : 54 Mad 588 : 32 Cr. L. J. 1212, *Raman Koravan v. Emperor*. (Jury must be directed that force must be used for the purpose of committing theft.)
- (31) AIR 1931 Mad 481 (482) : 32 Cr. L. J. 973, *Duraiswami Naicken v. Emperor*. (S. 395, Penal Code.)
- (29) 31 Cr. L. J. 451 (451) : 122 I. C. 650 (Mad), *In re Perumal Thevan*. (Five persons charged with dacoity of whom one was found not guilty—Judge must point out the effect of acquittal of one of the accused.)
- (10) 11 Cr. L. J. 249 (249) : 5 I. C. 797 (Mad), *Enumundu Garu v. Emperor*. (S. 395, Penal Code.)
- (03) 1 Weir 446 (447), *In re Mookandi Maniaganan*. (S. 395, Penal Code—Dacoity.)
- (09) 9 Cr. L. J. 311 (312) : 1 Ind Cas 546 (Mad), *Sinna Thevan v. Emperor*. (S. 395 — Judge told the jury that dacoity is robbery committed by more than five persons—Accused not prejudiced.)
- (1864) 1864 Suth W R Cr Gap No. 8 (9), *Queen v. Bono Malv Ghose*. (S. 395, Penal Code—Judge should direct the jury to convict only if they find that all the prisoners had intention of causing wrongful loss to the prosecutor.)
- (31) AIR 1931 Cal 414 (416) : 59 Cal 8 : 32 Cr. L. J. 892, *Meher Sheikh v. Emperor*. (S. 395, Penal Code.)
- (33) AIR 1933 Cal 294 (294, 295) : 34 Cr. L. J. 524 (SB), *Madhu Singh v. Emperor*. (S. 396, Penal Code.)

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Section not to be merely read. — It is not a sufficient compliance with the law if the Judge merely reads the relevant section or sections under which the accused stands charged.⁸ Mere references to sections

- (12) 13 Cr. L. J. 42 (42) : 13 I. C. 282 (Mad), *In re Arunachala Thevan*. (S. 397, Penal Code — Persons not actually causing grievous hurt cannot be convicted under the section.)
- (81) AIR 1931 Pat 49 (50) : 32 Cr. L. J. 476, *Labadan Sain v. Emperor*. (S. 397, Penal Code—S. 34, Penal Code, has no application to provisions of S. 397.)
- (11) 12 Cr. L. J. 97 (98) : 9 I. C. 555 : 38 Cal 408, *Bonai v. Emperor*. (S. 400, Penal Code.)
- (70) 6 Mad H C R 120 (121) : 1 Weir 452, *In re Sri Ram Venkatswami*. (S. 401, Penal Code.)
- (27) AIR 1927 Mad 243(244) : 27 Cr. L. J. 1368, *In re Muniyan*. (S. 404, Penal Code.)
- (82) 6 Bom 731 (733), *Empress v. Mulhari*. (S. 411, Penal Code — Jury must be told of the necessity of their being satisfied that the possession of the stolen property was clearly traceable to the accused.)
- (73) 18 Suth W R Cr 25 (26), *Queen v. Samiruddin*. (S. 412, Penal Code.)
- (67) 8 Suth W R Cr 16 (17), *Queen v. Mt. Joomnee*, (S. 411, Penal Code—Guilty knowledge that the article retained by the accused was stolen must be proved.)
- (67) 7 Suth W R Cr 73 (74, 75), *Queen v. Jogeshur*. (S. 412, Penal Code—Guilty knowledge must be proved.)
- (91) 15 Bom 369 (370), *Empress v. Balja Soniya*. (S. 411, Penal Code—Guilty knowledge that the property was stolen must be found before conviction under this section.)
- (30) 1930 Mad W N 249 (284), *Sundaresa Iyer v. Emperor*. (S. 415, Penal Code.)
- (24) AIR 1924 Cal 502 (507) : 25 Cri L Jour 1034, *Charu Chandra v. Emperor*. (S. 415, Penal Code—Decree is not a valuable security.)
- (15) AIR 1915 Cal 292 (294) : 41 Cal 662 : 15 Cri L Jour 155, *Emperor v. Madan Mondal*. (S. 441, Penal Code—In this case there was a failure by the Judge to point out the distinction between civil and a criminal trespass.)
- (97) 2 Cal W N xci (xci), *Dinabandu Bysak v. Empress*. (Ss. 464 and 471, Penal Code.)
- (18) AIR 1918 Cal 140 (141, 142) : 19 Cr. L. J. 649, *Emperor v. Asimoddi*. (S. 465, Penal Code—The Judge should direct the jury explicitly with regard to fraudulent or dishonest intention of the accused.)
- (91) 16 Bom 165 (168, 170), *Empress v. Abaji Ramchandra*. (Ss. 474 and 475, Penal Code.)
- (67) 8 Suth W R Cr 81 (82), *Queen v. Jaha Buz*. (S. 471, Penal Code.)
- (04) 8 Cal W N 278 (283) : 1 Cr. L. J. 124, *Hurjee Mull v. Imam Ali*. (Intention in S. 465, Penal Code.)
- (33) AIR 1933 P C 124 (133) : 34 Cr. L. J. 322 : 32 S L R 716 (P C), *Dwarakanath v. Emperor*. (Ss. 120B and 194, Penal Code.)
- (31) AIR 1931 Cal 184 (188) : 58 Cal 1051 : 32 Cr. L. J. 836 (F B), *Emperor v. Susen Behari*. (S. 477, Penal Code.)
- (81) 8 Cal L R 542 (545, 546), *Khorshed Kazi v. Empress*. (Fraudulent or dishonest use of documents must be proved in cases under S. 471, Penal Code.)
- (15) AIR 1915 All 134 (134) : 37 All 187 : 16 Cri L Jour 322, *Emperor v. Paras Ram Dube*. (Presumption of English law against the possibility of the offence of rape by a boy under fourteen does not apply to India and the question is one of fact only.)
- (35) 1935 Mad W N 1288 (1288), *Chakala Narasa v. Emperor*. (Charge of dacoity and robbery.)
- [See (21) AIR 1921 Cal 269 (270) : 23 Cr. L. J. 41, *Gangadhar Goala v. R. W. L. Recd.* (S. 80, Penal Code.)
- (85) 11 Cal 410 (412), *Netai Luskar v. Queen-Empress*. (S. 300, Penal Code.)]
8. (39) AIR 1939 Pat 536 (539) : 41 Cri L Jour 1 : 18 Pat 698, *Sachinder Rai v. Emperor*. (Charge under S. 366 depends entirely on proof of force or deceit—Judge should explain this to jury.)
- (87) AIR 1937 Cal 266 (268) : 38 Cri L Jour 767, *Madan Tilakdas v. Emperor*. (Sections of law merely read out and explained to jury—What exposition of law actually was, not stated—*Held*, there was serious misdirection of charge to jury.)
- (1900) 4 Cal W N 193 (196), *Sri Prasad Misser v. Empress*. (The Judge must explain the law.)
- (98) 25 Cal 711 (713) : 2 C W N 369, *Taju Pramanik v. Queen-Empress*.

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unless the jurors are trained men cannot be of much assistance to them to apply the law to the facts; it is always desirable that in charges to the jury the law should be *sufficiently* explained.⁹ Their attention should also be drawn to the evidence in the case and the method of applying the law to the facts found on such evidence explained.¹⁰ The Judge should not explain the law which does not arise on the facts of the case or the pleadings of the parties. Only so much law as is necessary to find whether the accused is guilty or not of the offence charged should be explained.¹¹ Digressions into questions of first principles¹² or about the proposed amendments of the law¹³ and other extraneous arguments unnecessary to the facts of the case should be avoided.

The explanation of the law should be in the shortest and simplest terms possible without reference to the numbers of the Acts and sections of which the jury have never heard.¹⁴ Similarly, though there

(133) 1933 Mad W N 320 (321), *Arumuga Goundan v. Emperor*.

9. (137) 41 C W N 575 (576), *Nanda Mallik v. Emperor*. (Charge under second part of S. 304, read with S. 34, Penal Code — Matter must be thoroughly explained to jury and evidence bearing on intention and knowledge must be carefully put before them.)

(137) 1937 M W N 737 (738), *Nachappa Goundan v. Emperor*. (Offence of robbery — Law not explained properly — Misdirection.)

(98) 25 Cal 736 (738): 2 C W N 484, *Abbas Peada v. Queen-Empress*.

(22) AIR 1922 Cal 124 (125): 23 Cri L Jour 567, *Emperor v. Durga Charan*. (Meaning of the section should be explained if necessary.)

(26) AIR 1926 Mad 1121 (1122): 27 Cri L Jour 1191, *Venkatigadu v. Emperor*. (In offence of theft the word 'dishonestly' must be explained to the jury.)

[See (139) AIR 1939 Com 457 (459): 41 Cri L Jour 176: I L R (1939) Bom 648, *Emperor v. Jhina Soma*. (The mere reading of the sections to the jury does not amount to an explanation of the law.)]

10. (137) AIR 1937 Cal 756 (759): 39 Cri L Jour 182: ILR (1937) 2 Cal 315, *Ekkabbar Mondal v. Emperor*. (Murder by poisoning — Judge should minutely analyse evidence before jury.)

(25) AIR 1925 Pat 797 (805): 4 Pat 626: 27 Cr. L. J. 49, *Rupan Singh v. Emperor*. (In other words where the facts are complicated Judge should explain what are the points which the jury ought to take into consideration in arriving at their verdict.)

(133) 1933 Mad W N 320 (321, 322), *Arumuga v. Emperor*.

(133) AIR 1933 Cal 509 (510, 511): 34 Cr. L. J. 841, *Chittya Ranjan v. Emperor*.

(130) AIR 1930 Cal 434 (435): 57 Cal 1162: 32 Cri L Jour 111, *Jabanullah v. Emperor*. (Evidence voluminous — Charge should state salient points, evidence adduced and points for determination with reference to law.)

(130) AIR 1930 Cal 370 (375): 58 Cal 96: 32 Cri L Jour 10, *Government of Bengal v. Santiram Mondal*.

(25) AIR 1925 Cal 926 (927): 26 Cri L Jour 1279, *Abdul Rahim v. Emperor*.

[See (130) AIR 1930 All 534 (536): 32 Cr. L. J. 158, *Suraj Prasad v. Emperor*. (Sessions Judge should start taking interest in the case at the very beginning of trial and not when the time comes for writing or dictating the judgment.)]

11. (115) AIR 1915 Cal 773 (777, 779): 16 Cr. L. J. 561 (569, 570) (FB), *Emperor v. Upendranath Das*.

(27) AIR 1927 Cal 324 (326): 28 Cr. L. J. 334, *Adam Ali v. Emperor*. (No plea of private defence — Law relating to private defence rightly not explained.)

(134) AIR 1934 Cal 142 (144): 35 Cri L Jour 536, *Fajer Ali Darji v. Emperor*.

(118) AIR 1918 Pat 201 (205): 19 Cri L Jour 886, *Ram Bhaguan v. Emperor*.

12. (133) AIR 1933 Cal 722 (723): 34 Cr. L. J. 1231, *Garibulla Sheikh v. Emperor*.

(14) AIR 1914 Low Bur 34 (35): 15 Cri L Jour 257, *C. H. Browne v. Emperor*.

13. (22) AIR 1922 Cal 505 (506): 24 Cr. L. J. 76, *Abdul Gohur Sikdar v. Emperor*.

14. (29) AIR 1929 Cal 742 (746): 57 Cal 740: 31 Cri L Jour 673, *Nagendranath v. Emperor*. (Spreading of fine language and lofty homilies before the jury deprecated.)

is no prohibition in law forbidding a Judge to read to the jury cases from law reports,¹⁵ generally it is very undesirable to refer them to many cases, often conflicting, which would tend to confuse their minds.¹⁶ It is also improper for a Judge to leave a copy of the Penal Code with the jury so that they may find out for themselves under what section the offence against the accused falls.¹⁷

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Explanation of the law is not rendered unnecessary by the fact that counsel have addressed the jury. — As has been stated in Note 6, the fact that the prosecuting and defence counsel have explained the law to the jury, does not relieve the Judge of his duty in that respect. The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge and it is immaterial how much or how often jury have been addressed by pleaders on both sides.¹⁸ The reason for this may be stated in the words of a recent pronouncement of the Privy Council¹⁹: "Jurors are apt to be suspicious of the law as propounded by the defence; they look to the Judge for an authoritative statement of it."

When the jurors state that they do not understand the law, it is the duty of the Judge to explain the same to them again.²⁰

The heads of charge should also show how the law was explained to the jury. See section 367 Note 15.

Besides explaining the particular section or sections of the Penal Code or other Acts under which the accused is charged, it is the duty of the Judge to advise and direct the jury on other questions of law and procedure which may arise in the case.²¹

(A) *Charge for major offence.* — The Judge can direct that it is open to the jury to convict the accused of a minor offence though the charge is in respect of a major offence.²²

15. ('27) AIR 1927 Rang 68 (70) : 4 Rang 488 : 28 Cr. L. J. 213 (FB), *Emperor v. Nga Tin Gyi*.

('30) AIR 1930 Cal 434 (435) : 57 Cal 1162 : 32 Cri L Jour 111, *Jabanullah v. Emperor*. (Page, J., contra.)

16. ('12) 13 Cri L Jour 26 (27); 13 Ind Cas 218 (Cal), *Mehar Sardar v. Emperor*. ('05) 2 Cri L Jour 157 (158, 159) : 1 C L J 159, *Shyama Charan v. Emperor*.

17. ('86) 14 Cal 164 (168), *Jaspath Singh v. Queen-Empress*.

('95) 1895 Rat 736 (737), *Queen-Empress v. Bharmia*.

('26) AIR 1926 Cal 895 (896, 897) : 27 Cri L Jour 926, *Emperor v. G. C. Wilson*. See also S. 299 Note 2 and S. 300 Note 1.

18. ('02) 29 Cal 379 (381) : 6 C W N 292, *Mangan Das v. Emperor*.

('39) AIR 1939 Bom 457 (459) : 41 Cri L Jour 176; ILR (1939) Bom 648, *Emperor v. Jhina Soma*.

('26) AIR 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ram Prasad v. Emperor*.

19. ('33) AIR 1933 P C 218 (221) : 34 Cr. L. J. 886 (PC), *Basil Ranger Lawrance v. Emperor*.

20. ('11) 12 Cr. L. J. 140 (141) : 9 I. C. 788 (Mad), *Palavesa Tevan v. Emperor*.

('26) AIR 1926 Cal 895 (897) : 27 Cri L Jour 926, *Emperor v. G. C. Wilson*.

('23) AIR 1923 Cal 647 (648); 25 Cr. L. J. 343, *Bilaschandra Banerjee v. Emperor*.

[See ('32) AIR 1932 Cal 118 (119) : 58 Cal 1335 : 33 Cr. L. J. 135, *Girischandra Namadas v. Emperor*.]

21. [See ('25) AIR 1925 Cal 494 (496); 25 Cr. L. J. 1386, *Abdul Gani v. Emperor*. (Charges under Ss. 147 and 353, Penal Code — Reference to the Calcutta Police Act by the Judge held necessary though the Act was not invoked by the accused.) ('77) 2 Bom 61 (64), *Imperatrix v. Pitamber Jina*.]

22. ('40) AIR 1940 Pat 417 (418) : 41 Cri L Jour 738, *Judagi Gope v. Emperor*. (Judge should tell the jury that even if they believe that the accused jointly killed

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(B) *Approver's evidence—Value of.* — The Judge should direct the jury to consider whether a particular witness in the case is or is not an accomplice.²³ He can direct that there is no prohibition under the law to convict an accused on the uncorroborated testimony of an accomplice, but that, considering the fact that it is tainted evidence and that the accomplice is giving evidence on a tender of pardon which is liable to be revoked, it should be received with caution and may be treated as unworthy of credit. He can also inform the jury that as a doctrine of expediency and prudence, Judges in India and England have laid down that it is always unsafe to convict an accused on the uncorroborated testimony of an approver alone.²⁴ See also the

the deceased, still it is open to them to convict, not under S. 302, Penal Code, but merely under S. 304 or even under S. 326 or S. 325, if necessary intention or knowledge is not established.)

('80) 5 Cal 871 (873), *Government of Bengal v. Mahaddi*.

('95) 20 Bom 215 (217, 225), *Queen-Empress v. Devji Govindji*.

(1900) 2 Bom L R 334 (334), *Queen-Empress v. Pandukul Patil*.

('26) AIR 1926 Cal 1059 (1060):53 Cal 599:27 Cr.L.J. 1314, *Torap Ali v. Emperor*.

('14) AIR 1914 Mad 425 (428):13 Cr. L. J. 739 (741) : 37 Mad 236, *In re Adabala Muthiyalu*.

[See ('22) AIR 1922 Pat 321 (322) : 23 Cr.L.J. 47, *Emperor v. Bhimlal Chamar*. (Omission to direct is immaterial where offence was either murder or nothing at all.)

('29) AIR 1929 Nag 295 (296) : 31 Cr.L.J. 557, *Narayan Singh v. Emperor*. (Jury can convict for a minor offence without any separate charge for such offence.)]

23. ('27) AIR 1927 Cal 460 (461) : 28 Cri L Jour 278, *St. Moss v. Emperor*.

('20) AIR 1920 Cal 980 (986) : 21 Cr.L.J. 802, *Suryakanta Bhattacharya v. Emperor*.

('25) AIR 1925 Cal 666 (668) : 52 Cal 223 : 26 Cri L Jour 1155, *Satya Charan v. Emperor*.

(1900) 27 Cal 144 (152, 154), *Queen-Empress v. Deodhar Singh*.

('03) 26 Mad 1 (6, 7, 13) : 2 Weir 521, *Emperor v. Edward William Smither*.

[See ('23) AIR 1923 Lah 345 (346) : 24 Cr. L. J. 618, *Jehana v. Emperor*. (Witness deposing that he only helped the accused in disposing of the body of the deceased after he was killed by the accused — *Held* witness was not an accomplice.)]

24. ('40) 1940 Mad W N 940 (943) : (1940) 2 M L J 468 : 52 M L W 492, *In re Kesava Reddi*. (Evidence of approver not corroborated in material particulars— Jury not told that such testimony must be corroborated — Conviction cannot be sustained.)

('37) AIR 1937 Rang 209 (210) : 1937 R L R 110 : 38 Cr. L. J. 785, *Nga Aung Po v. Emperor*.

('37) AIR 1937 Sind 162 (166) : 38 Cr. L. J. 808 : 31 S L R 82, *Khadim v. Emperor*.

(Where the Judge directs the jury to rely upon the evidence of the approver only if after considering the other evidence on the record, there is sufficient material to corroborate his evidence and to satisfy them that they can rely upon his evidence as the basis of their verdict, there is no misdirection.)

('86) AIR 1936 Nag 103 (107) : 31 Nag L R (Sup) 215 : 37 Cri L Jour 607, *James Dowdall v. Emperor*. (Where the Judge has warned the jury about the danger of convicting on the uncorroborated testimony of an accomplice in clear and unequivocal terms, it cannot be held that there was any error in his charge to the jury.)

('36) 37 Cr. L. J. 999 (1002) : 164 I. C. 779 (FB) (Cal), *Moti Lal Roy v. Emperor*. (Case which was tried before a Special Tribunal who were judges of fact and law.)

(1908) 2 K B 680 (682, 683) : 77 L J K B 1043 : 99 L T 620 : 72 J. P. 391 : 21 Cox C C 693 : 52 S J 699, *Rex v. Tate*. (When a person is convicted on the uncorroborated evidence of an accomplice the Court of appeal may quash the conviction if the trial Judge omitted to caution the jury against convicting on such evidence.)

('66) 5 Suth W R Cr 80 (83, 86, 87) : Beng L R Sup Vol 459, *Queen v. Elahce Buksh*.

('78) 1 Mad 394 (395) : 2 Weir 799, *Reg. v. Ramaswami*. (If the jury, however, credits the evidence of accomplice a conviction proceeding upon it is not illegal.)

('90) 14 Bom 331 (336), *Queen-Empress v. Chagan*.

('28) AIR 1928 Pat 630 (631):8 Pat 235 : 30 Cr.L.J. 137, *Rattan Dhanuk v. Emperor*.

('68) 4 Mad H C R App vii (vii) : 2 Weir 798.

undermentioned cases.²⁵

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- ('14) AIR 1914 Bom 305 (311) : 14 Cri L Jour 625 (630) : 38 Bom 156, *Gangapa Kardepa v. Emperor*.
(1863) 2 Weir 796 (797, 798), *In re Palavasam*.
25. ('38) AIR 1938 Mad 464 (464) : 39 Cri L Jour 580, *In re Kalli Koravan*. (Accused charged with theft — Only evidence against accused being of a person receiving stolen property — Judge while charging jury not pointing out unsafety of relying on such evidence, with sufficient force—This amounts to misdirection.)
(36) AIR 1936 All 337 (353, 354) : 37 Cri L Jour 794 : 58 All 695, *Emperor v. Mathuri*. (An accused person should not be convicted solely upon the evidence of an approver.)
(26) AIR 1926 All 377 (377) : 48 All 409 : 27 Cr. L. J. 746, *Kalwa v. Emperor*.
(87) 9 All 528 (554, 555) : 1887 A W N 156, *Queen-Empress v. Gobardhan*. (Advice to jury not to act on the uncorroborated evidence of an accomplice is not a direction on law.)
(67) 3 Bom H C R Cr 57 (58), *Reg. v. Imam*.
(69) 6 Bom H C R Cr 57 (58, 59), *Reg. v. Ganu*. (Simply telling the jury that it is unusual to convict on uncorroborated testimony of accomplice is not enough.)
(90) 14 Bom 115 (119, 143), *Queen-Empress v. Magan Lall*. (A Judge who combines functions of Judge and jury is equally bound to scrutinise accomplice's evidence.)
(89) 1889 Rat 466 (466), *Queen-Empress v. Rama*. (Omission of such a direction is an error in law.)
(95) 1895 Rat 750 (752), *Queen-Empress v. Bhagya*.
(96) 1896 Rat 848 (848, 849), *Queen-Empress v. Dhondi*.
(02) 4 Bom L R 431 (432), *Emperor v. Kotal Khan*.
(66) 6 Suth W R Cr 17 (17), *Queen v. Khotub Sheikh*.
(66) 6 Suth W R Cr 44 (45), *Queen v. Karoo*. (Judge telling the jury that it was for them to consider whether the evidence of the accomplice was strongly corroborated — *Held*, this was a misdirection.)
(66) 6 Suth W R Cr 91 (91), *Queen v. Ashruff Ali Sheikh*.
(67) 8 Suth W R Cr 19 (25), *Queen v. Nawabjan*.
(68) 10 Suth W R Cr 17 (17), *Queen v. Bykunt Nath Banerjee*.
(71) 15 Suth W R Cr 37 (38) : 6 Beng L R App 108, *Queen v. Mahima Chandra*.
(72) 18 Suth W R Cr 45 (45), *Queen v. Nidheeram*.
(73) 19 Suth W R Cr 16 (20, 21) : 10 Beng L R 455n, *Queen v. Mohesh Biswas*.
(73) 19 Suth W R Cr 43 (43), *Queen v. Luchmee Pershad*.
(73) 19 Suth W R Cr 48 (48), *Queen v. Koa*.
(73) 19 Suth W R Cr 68 (69), *Queen v. Uddhan Bind*.
(73) 20 Suth W R Cr 19 (20, 21), *Queen v. Ramsodoy*.
(74) 21 Suth W R Cr 69 (70, 71), *Queen v. Sadhu Mundul*.
(75) 24 Suth W R Cr 55 (56), *Queen v. Chando Chandaline*.
(75) 25 Suth W R Cr 43 (43), *Queen v. Baijoo Chowdhuri*.
(90) 17 Cal 642 (667), *Queen-Empress v. O'Hara*.
(94) 21 Cal 328 (336), *Ishan Chandra v. Queen-Empress*.
(96) 23 Cal 361 (366), *Alimuddin v. Queen-Empress*.
(02) 29 Cal 782 (787) : 6 C W N 553, *Jamiruddi Masalli v. Emperor*. (Nature of corroborative evidence—It must be confirmatory of some of the leading circumstances of the story of the approver as against the particular prisoner.)
(98) 2 Cal W N 55 (56), *Jogendranath Bhawmik v. Sangapgaro*.
(98) 2 Cal W N 672 (674), *Rajoni Kant Bose v. Asan Mullick*.
(15) AIR 1915 Cal 73 (74) : 15 Cri L Jour 438, *Munassar Ahir v. Emperor*. (Corroboration should be in material particular pointing not only to the crime but to the participation of the accused in the crime.)
(24) AIR 1924 Cal 701 (702, 703) : 51 Cal 160 : 25 Cri L Jour 1000, *Emperor v. Jamalddi Fakir*.
(25) AIR 1925 Cal 161 (163) : 26 Cr. L. J. 307, *Harendra Nath v. Emperor*.
(29) AIR 1929 Cal 57 (60) : 56 Cal 150 : 30 Cr. L. J. 435, *Rebati Mohan v. Emperor*. (But the Judge must not tell the jury that such or such witness does in fact corroborate the witness.)
(29) AIR 1929 Cal 822 (824) : 31 Cr. L. J. 809, *Emperor v. Mathews*. (Evidence of accomplice stands on the same footing as any other evidence.)
(32) AIR 1932 Cal 295 (296) : 33 Cri L Jour 477, *Golan Asphia v. Emperor*. (Accomplice includes one who poses as an accomplice.)
(34) AIR 1934 Cal 114 (116) : 35 Cr. L. J. 551, *Shibadas Daw v. Emperor*. (Judge sitting without a jury—Same rule applies.)

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He must also tell the jury that the corroboration of the approver's evidence "must be independent testimony which affects the accused by connecting or tending to connect him with the crime; in other words, it must be evidence which implicates him, that is, which confirms

- ('02) 1902 Pun Re No. 5 Cr, p. 16 : 1902 P L R No. 57, *Wazir Khan v. Emperor*.
 ('11) 12 Cr. L. J. 5 (5) : 9 I. C. 39 (Lah), *Hira v. Emperor*.
 ('12) 13 Cr. L. J. 182 (182) : 13 I. C. 998 (Lah), *Lad Khan v. Emperor*.
 ('15) AIR 1915 Lah 16 (21) : 1915 Pun Re No. 17 Cr : 16 Cr.L.J. 354, *Balmokand v. Emperor*.
 ('22) AIR 1922 Lah 1 (22) : 3 Lah 144 : 23 Cr.L.J. 513, *Narain Das v. Emperor*. (Confession by one of the accused cannot be used to corroborate the accomplice witnesses.)
 ('24) AIR 1924 Lah 357 (358) : 23 Cr. L. J. 734, *Tota Singh v. Emperor*.
 ('24) AIR 1924 Lah 481 (482) : 25 Cri L Jour 979, *Khushi Md. v. Emperor*.
 ('25) AIR 1925 Lah 432 (434) : 6 Lah 183 : 26 Cr. L.J. 1238, *Bahawala v. Emperor*.
 ('89) 12 Mad 196 (197) : 2 Weir 519, *Empress v. Arumuga*.
 ('02) 25 Mad 143 (147) : 2 Weir 800, *Emperor v. Mohiuddin*.
 ('03) 2 Weir 803 (806, 813, 814) : 14 M L J 226 : 27 Mad 271, *In re Ramaswamy Goundan*.
 ('63) 2 Weir 796 (797, 798), *In re Palavasam*.
 ('91) 1 Mad L Jour 397 (403, 404) (FB), *Queen-Empress v. Kunjan Menon*. (Corroboration need not extend to every part of accomplice's statement.)
 ('11) 12 Cri L Jour 150 (158) : 9 Ind Cas 897 (Mad), *In re Vasa Rao*.
 ('11) 12 Cri L Jour 170 (174) : 9 Ind Cas 978 (Mad), *In re Talari Narainaswamy*. (Evidence of accomplice should not be accepted except for special reasons.)
 ('11) 12 Cri L Jour 240 (240) : 10 Ind Cas 284 (Mad), *Nanjigadu v. Emperor*.
 ('12) 13 Cr. L. J. 305 (314, 315) : 14 I. C. 849 : 35 Mad 247, *Emperor v. Nilakanta*.
 ('12) 13 Cri L Jour 352 (357, 366, 372, 381, 397, 404) : 35 Mad 397 : 14 I. C. 896 (FB), *Muthukumaraswami v. Emperor*. (The Judge should also tell the jury at the same time that if they believe such evidence they should convict.)
 ('91) 4 C P L R Cr 1 (6), *Empress v. Tania Bhil*.
 ('21) AIR 1921 Nag 39 (41) : 17 Nag L R 113 : 23 Cr. L. J. 673, *Govinda v. Emperor*.
 ('10) 11 Cri L Jour 71 (74, 75) : 4 I. C. 884 : 12 Oudh Cas 418, *Hubba v. Emperor*.
 ('28) AIR 1928 Oudh 207 (208) : 29 Cri L Jour 311, *Mani Ram v. Emperor*.
 ('29) AIR 1929 Oudh 321 (326) : 30 Cr. L. J. 922, *Lale v. Emperor*. (Corroborative evidence need not be direct.)
 ('26) AIR 1926 Pat 232 (235) : 5 Pat 63 : 27 Cr. L. J. 484, *Jagwa Dhanuk v. Emperor*.
 ('30) AIR 1930 Pat 513 (515) : 9 Pat 606 : 32 Cr.L.J. 72, *Ram Sarup Singh v. Emperor*.
 ('31) AIR 1931 Pat 105 (109, 110) : 32 Cri L Jour 383, *Kailash Misser v. Emperor*.
 ('33) AIR 1933 Pat 96 (100) : 34 Cri L Jour 421, *Raghunath Pande v. Emperor*.
 ('33) AIR 1933 Pat 500 (502, 503), *Emperor v. Wajid Sheikh*. (It is pointed out in this case that head-note to 33 Cri L Jour 19 is misleading.)
 ('12) 13 Cri L Jour 424 (426) : 14 I. C. 968 : 1 Upp Bur Rul 96, *Ah Tat v. Emperor*. (Especially in excise case corroboration is necessary.)
 ('11) 12 Cri L Jour 132 (137) : 9 I. C. 778 : 6 L. B. R. 4, *Nga Po Chit v. Emperor*.
 ('24) AIR 1924 Rang 173 (174) : 1 Rang 609 : 25 Cr.L.J. 381, *Maung Lay v. Emperor*.
 ('25) AIR 1925 Sind 105 (108) : 19 Sind L R 183 : 25 Cri L Jour 1057, *Faizullah v. Emperor*.
 ('26) 27 Cr. L. J. 1011 (1012, 1013) : 96 I. C. 867 (Cal), *Umed Sheikh v. Emperor*.
 ('76) 1 Bom 475 (476), *Reg v. Budhu*. (Confessions of co-prisoners cannot be accepted as corroborative evidence.)
 ('11) 12 Cri L Jour 286 (289) : 10 Ind Cas 582 : 38 Cal 559 (FB), *Emperor v. Noni Gopal*. (There must be corroboration not only as to crime but as to the identity of each one of the accused and it must proceed from an untainted source.)
 ('31) AIR 1931 Oudh 172 (176) : 6 Luck 668 : 32 Cri L Jour 860, *Bhuneshwari Pershad v. Emperor*. (Evidence of a spy or a detective.)
 ('11) 12 Cri L Jour 537 (539) : 12 Ind Cas 513 (Oudh), *Makbul Ahmad v. Emperor*. (Corroboration required is not the corroboration of the narrative of the offence committed but must be as to the identity of the accused.)
 ('34) AIR 1934 Cal 651 (653) : 36 Cri L Jour 70, *Kashim Ali v. Emperor*. (Saying that statements of two accomplices might be used to corroborate each other if independent was held to be misdirection.)
 [See ('03) 27 Bom 626 (635) : 5 Bom L R 599, *Emperor v. Waman Shivram*.
 ('94) 1894 Rat 720 (721), *Queen-Empress v. Mahadhu*.]

in some material particular, not only the evidence that the crime has been committed but also that the prisoner committed it."²⁶ See also the undermentioned cases.²⁷

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(C) *Confessions of prisoner.*—The question as to the admissibility of a confession with reference to its being voluntary or otherwise is one for the Judge to decide and he cannot leave it to the jury.^{27a} See also Note 4 to S. 299.

The Judge should instruct the jury that a confession of an accused is legally sufficient to convict him, without any other corroborative evidence.²⁸ In cases, where the confession has been retracted, the jury should be advised as to the weight to be given to the same; (some decisions²⁹ lay down that without independent corroboration, retracted

26. ('37) AIR 1937 Sind 162 (167) : 38 Cr. L. J. 808 : 31 S. L. R. 82, *Khadim v. Emperor*. ('34) AIR 1934 Cal 7 (9) : 62 Cal 527 : 36 Cr. L. J. 796, *Nur Ahmad v. Emperor*. [See observations in (1916) 2 K B 658 (667) : 86 L J K B 28 : 115 L T 453 : 80 J P 446 : 25 Cox C C 524 : 60 S J 696, *Reg. v. Baskerville*.]

27. ('37) AIR 1937 Cal 269 (272) : 38 Cr. L. J. 1018, *Sanyashi Gain v. Emperor*. (Judge assuming the statement of approver that he intentionally refrained from identifying the accused to be true and directing jury accordingly, while it is for the jury to decide what construction they should put on the apparent failure of approver to identify — This is misdirection.)

('86) 8 All 509 (513) : 1886 All W N 176, *Queen-Empress v. Baldeo*.

('96) 1896 Rat 840 (841), *Queen-Empress v. Genu Gopal*.

('67) 8 Suth W R Cr 19 (23, 26), *Queen v. Nawab Jan*.

('73) 19 Suth W R Cr 57 (58, 61), *Queen v. Jaffir Ali*.

('84) 10 Cal 970 (973), *Queen-Empress v. Bepin Biswas*.

('01) 28 Cal 339 (343) : 5 Cal W N 517, *Kamala Prasad v. Sital Prasad*.

('25) AIR 1925 Cal 872 (874) : 52 Cal 595 : 26 Cri L Jour 1037, *Ledu Molla v. Emperor*. (It is not necessary that every single statement of the approver should be corroborated.)

('30) AIR 1930 Cal 481 (485) : 32 Cri L Jour 33, *Hachuni Khan v. Emperor*.

('23) AIR 1923 Lah 666 (667) : 25 Cri L Jour 520, *Emperor v. Darya Singh*. (Statement of one approver can be regarded as corroborating that made by another approver.)

('24) AIR 1924 Lah 727 (728) : 25 Cri L Jour 1347, *Hazara Singh v. Emperor*.

('22) AIR 1922 Nag 172 (173) : 23 Cri L Jour 391, *Kisan v. Emperor*.

('21) AIR 1921 Lah 215 (216) : 23 Cri L Jour 158, *Lala v. Emperor*.

('29) AIR 1929 Cal 57 (59) : 56 Cal 150 : 30 Cri L Jour 435, *Rebati Mohan v. Emperor*. (Judge must tell the jury that such and such evidence corroborates the approver.)

27a. ('36) AIR 1936 Cal 227 (229) : 37 Cri L Jour 676 : 63 Cal 1089, *Bhakta Bhusan v. Emperor*. (Where a Judge directs the jury to decide whether certain confessions are admissible in evidence or not he commits an error in law. But unless there is consequent failure of justice the trial is not vitiated.)

('34) AIR 1934 Cal 717 (718) : 36 Cri L Jour 135, *Ramlal Ghose v. Emperor*. (Not to state whether confession was voluntary or not is to commit error of law.)

('34) AIR 1934 Cal 651 (652) : 36 Cri L Jour 70, *Kashim Ali v. Emperor*.

28. ('67) 7 Suth W R Cr 39 (39), *Queen v. Greedhary Munjee*.

('30) AIR 1930 Cal 633 (635) : 57 Cal 488, *Emperor v. Kutub Bux*. (This is so even where the confession has been retracted, provided the jury believe that the confession contains the true account of prisoner's connexion with the crime.)

('76) 25 Suth W R Cr 25 (26), *Queen v. Wuzir Mundal*.

('73) 20 Suth W R Cr 33 (35), *Queen v. Ramchurn Ghose*.

29. ('86) 2 Weir 507 (508), *In re Cholakel*.

('93) 2 Weir 510 (511, 513), *In re Chinna Chengadu*. (This is a general and not an absolute rule—The question in such a case is whether the withdrawal of the confession raises doubt as to the truth of the confession.)

('91) 2 Weir 509 (509), *In re Sokkan*.

('30) AIR 1930 Lah 257 (258) : 11 Lah 106 : 30 Cri L Jour 1046, *Arjun Singh v. Emperor*. (Retraction in this case though very prompt and early, confession was acted upon as there was corroboration.)

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confessions should not be acted upon; others³⁰ hold that there is no such absolute rule of law and that a conviction can be based upon it if the reasons for its retraction appear on the face to be false). See also the undermentioned cases.^{30a}

(D) *Confessions of co-accused.* — The Judge should tell the jury that a statement of an accused person which does not amount to a confession cannot be considered at all as evidence against a co-accused;³¹

- (‘29) AIR 1929 Lah 597 (599) : 30 Cri L Jour 640, *Mt. Miran v. Emperor*.
 (‘21) AIR 1921 Pat 337 (338) : 22 Cri L Jour 200, *Maksud Ali v. Emperor*.
 (‘29) AIR 1929 Pat 212 (213) : 8 Pat 262 : 30 Cr. L. J. 716, *Sheo Narain Singh v. Emperor*. (If however the tribunal comes to the conclusion that the confession as a whole is a truthful statement it can act upon the confession.)
 (‘34) AIR 1934 Cal 651 (653) : 36 Cri L Jour 70, *Kashim Ali v. Emperor*.
 (‘86) 10 Mad 295 (309, 310), *Queen-Empress v. Rangji*.
 (‘96) 18 All 78 (81) : 1895 A W N 227, *Queen-Empress v. Mahabir*.
 (‘78) 2 Cal L R 132 (133), *In re Sofruddin*.
 30. (‘29) AIR 1929 Mad 837 (839) : 53 Mad 160 : 31 Cr. L. J. 768, *Kesava Pillai v. Emperor*.
 (‘93) 2 Weir 510 (511, 512), *In re Chinna Chengadu*. (10 Mad 295, explained.)
 (‘29) AIR 1929 Oudh 381 (382) : 30 Cr. L. J. 967, *Nawab v. Emperor*. (Retracted confession though not found to be true in certain parts is sufficient for conviction.)
 (‘98) 23 Bom 316 (317, 318), *Queen v. Gangia*.
 (‘95) 19 Bom 728 (730), *Queen-Empress v. Gharya*.
 (‘29) AIR 1929 Sind 253 (254) : 31 Cri L Jour 753, *Sanwal Das v. Emperor*. (Extra judicial confession retracted.)
 (‘98) 21 Mad 83 (88), *Public Prosecutor v. Raman*. (But the weight to be attached to such confessions depends upon circumstances.)
 (‘21) AIR 1921 Sind 129 (130) : 25 Cr. L. J. 574 : 16 Sind L R 67, *Mahamud v. Emperor*. (Question of corroboration is really beside the matter—The Judge has only to decide whether the confession tendered in evidence has been voluntarily made.)
 See also S. 164 Note 18.
 30a. (‘40) AIR 1940 Mad 699 (700), *In re Bangaru Reddi*. (Confession — Mere fact that accused has given wrong description of way in which he killed deceased is no ground for acquitting him.)
 (‘40) AIR 1940 Pat 541 (545) : 41 Cri L Jour 472, *Emperor v. Jate Uraon*. (Court is not bound to accept whole confession—It can accept part of it found to be true and reject rest as false—*Obiter*.)
 (‘36) 37 Cri L Jour 976 (976) : 164 Ind Cas 721 (Cal), *Daud Sheikh v. Emperor*. (It is no good telling the jury first that the accused has made a confession and then sending them out of Court while the question is discussed whether the confession ought to be admitted or not.)
 (‘86) 1886 Rat 242 (243, 244), *Queen-Empress v. Bhagi*. (Retracted confession — Judge should satisfy himself as to falsity of any allegations as to improper pressure by police and should use every reasonable effort to ascertain to what extent details of confession are corroborated.)
 (‘34) AIR 1934 Cal 853 (857) : 62 Cal 312 : 36 Cri L Jour 485, *Kasimuddin v. Emperor*. (Even after a confession is once admitted in evidence, the Judge can withdraw it from the jury where he finds on the subsequent evidence that it is inadmissible.)
 31. (‘25) AIR 1925 Sind 116 (119) : 25 Cri L Jour 761, *Topan Das v. Emperor*.
 (‘30) AIR 1930 Cal 139 (141) : 57 Cal 801 : 31 Cr. L. J. 610, *Bikram Ali v. Emperor*. (Confession proved by a reply of a witness to a leading question—Judge should tell the jury as to how such evidence should be treated and what weight should be attached to it.)
 (‘28) AIR 1928 Cal 416 (417) : 29 Cri L Jour 527, *Bhadreswar Sardar v. Emperor*. (If the statement of the accused merely amounts to admission, it cannot be used against the co-accused.)
 (‘25) AIR 1925 Cal 926 (927) : 26 Cri L Jour 1279, *Abdul Rahim v. Emperor*.
 (‘23) AIR 1923 Cal 517 (519) : 50 Cal 318 : 25 Cr. L. J. 467, *Md. Yunus v. Emperor*.
 (‘20) AIR 1920 Cal 980 (986) : 21 Cr. L. J. 802, *Surya Kanta v. Emperor*. (Each accused throwing blame on another; jury told that statement of one accused may be taken for what it is worth against the co-accused — *Held*, this was a misdirection.)

that a confession of a co-accused may, under S. 30 of the Evidence Act, be considered against a co-accused, but such confession, without corroboration will be insufficient to sustain a conviction of the co-accused³² and a retracted confession of a co-accused is practically useless and that without the fullest corroboration by untainted evidence, there can be no conviction.³³ He should also point out that the evidence given by a prisoner jointly charged with others, after he is

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- (18) AIR 1918 Cal 88 (90):45 Cal 557:19 Cr. L. J. 305, *Amiruddin Ahmed v. Emperor*.
 (81) 6 Cal 279 (282, 283) : 7 C L R 385, *Noor Bux Kazi v. Empress*.
 (80) 2 All 444 (446), *Empress of India v. Ganaraj*.
 (73) 10 Bom H C R 497 (500, 501), *Reg. v. Amrita Govinda*.
 (67) 7 Suth W R Cr 72 (72), *Queen v. Bhekoo Singh*.
 (06) 3 Cri L Jour 144 (147) : 10 C W N 153, *Surendranath Mitra v. Emperor*.
 (Failure to warn the jury is a material error.)
 (69) 6 Bom H C R 10 (11, 12), *Reg. v. Sheikh Miya*. (One of the accused acknowledged his presence at the scene of occurrence and declared that the co-accused was the instigator of, and principal actor in the commission of offence — Held, jury ought to have been told that the statement was no evidence against co-accused.)
 32. (40) AIR 1940 Nag 230 (233):1940 N L J 210 (215):41 Cri L Jour 553, *Maroti Jago v. Emperor*.
 (40) 52 Mad L W 420 (426, 427), *In re Rami Reddi*.
 (34) AIR 1934 Pesh 11 (12) : 35 Cri L Jour 719, *Nizam Din v. Emperor*.
 (34) AIR 1934 Cal 853 (858):36 Cr. L. J. 485 : 62 Cal 312, *Kasimuddin v. Emperor*.
 (29) AIR 1929 Pat 275 (279) : 8 Pat 289 : 30 Cri L Jour 675, *Kunja Subudhi v. Emperor*. (Confession to be of any value must implicate the maker of it to the same extent as it implicates the co-accused.)
 (09) 9 Cri L Jour 308 (309) : 1 Ind Cas 547 (Mad), *Kuppan v. Emperor*.
 (96) 2 Weir 745 (745) : 19 Mad 482, *Queen-Empress v. Raru Nayar*. (Confession need not have been made in the presence of the co-accused.)
 (86) 2 Weir 742 (744), *In re Alagappan Bali*.
 (83) 2 Weir 741 (742), *In re Kaliyappa Goundan*.
 (76) 1 Mad 163 (164) : 2 Weir 740, *Reg v. Ambigara Hulagu*.
 (73) 7 Mad H C R App xv (xv).
 (84) 10 Cal 1970 (974, 975), *Queen-Empress v. Bepin Biswas*. (Confession in absence of co-accused—Jury should be cautioned not to attach any weight at all to such confession except as against the maker of it.)
 (89) 1889 Rat 436 (439), *Queen-Empress v. Jhinavali*. (Such confession is evidence of the weakest kind.)
 (98) 2 Cal W N 749 (750), *Manki Tewari v. Amir Hossein*.
 (79) 4 Cal 483 (490) : 3 C L R 270 (FB), *Empress v. Ashootosh Chuckerbutty*.
 (Sufficiency of corroborative evidence depends upon circumstances of each case.)
 (75) 23 Suth W R Cr 24 (24, 25), *Queen v. Naga*.
 (74) 21 Suth W R Cr 69 (71), *Queen v. Sadhu Mundul*.
 (95-1900) 1895-1900 Low Bur Rul 368 (368, 369), *Nga Tha Nyan v. Queen-Empress*.
 (09) 9 Cri L Jour 404 (405) : 33 Mad 46 : 1 I C 867, *In re Giddigadu*.
 (73) 19 Suth W R Cr 67 (67) : 10 Beng L R 453, *Queen v. Belat Ali*. (Confession to be of any value must implicate the maker to the same extent as it implicates the co-accused.)
 (73) 19 Suth W R Cr 16 (23, 25) : 10 Beng L R 455n, *Queen v. Mohesh Biswas*. (Confession can be considered so far only as that particular statement of fact itself extends.)
 33. (01) 28 Cal 689 (690, 691) : 5 C W N 670, *Yasin v. King-Emperor*.
 (25) AIR 1925 Cal 406 (407) : 26 Cri L Jour 360, *Moyez Sardar v. Emperor*.
 (26) AIR 1926 Cal 374 (375) : 26 Cri L Jour 1146, *In re Ibrahim*.
 (33) AIR 1933 Cal 6 (8) : 34 Cri L Jour 23, *Kashem Ali v. Emperor*. (Jury must be directed as to the circumstances under which retracted confession of co-accused can be acted upon—Omission amounts to serious non-direction.)
 (10) 11 Cri L Jour 538 (539) : 7 Ind Cas 915 (Cal), *Harendra Pal v. Emperor*.
 (20) AIR 1920 Cal 966 (967) : 47 Cal 46 : 21 Cr. L. J. 775, *Hemanta Kumar v. Emperor*. (Judge must advise the jury as to the attitude to be taken by it towards retracted confessions against co-accused.)
 (34) AIR 1934 Cal 853 (858) : 36 Cr. L. J. 485 : 62 Cal 312, *Kasimuddin v. Emperor*.

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convicted and sentenced, as a witness in a subsequent trial of his co-prisoners stands on a different footing and can be good corroborative evidence of an accomplice.³⁴

(E) *Presumption arising out of recent possession of stolen property.* — It is a misdirection to ask the jury to make a positive presumption of guilt from mere possession of stolen property after theft. Such a presumption may be made, but it is a matter for the jury if they will make it or not.³⁵ See the undermentioned cases³⁶ where the proper mode of charging in such a case is laid down. The jury should be told that the question whether the possession of the article was recent enough to attract the presumption of law under S. 114, Illustration (a) of the Evidence Act, is a matter to be decided by them from all the circumstances of the case.³⁷

(F) *Circumstantial evidence.* — In cases where there is only circumstantial evidence against the accused, the Judge should direct the jury to find (i) whether the circumstances from which an adverse inference is sought to be drawn against the accused have been proved

34. ('92) 2 Weir 520 (520, 521), *In re Marudaimuthu Kavirayan*.

35. ('36) AIR 1936 Cal 796 (800) : 37 Cri L Jour 701 : 62 Cal 956, *Ishtahar Khondkar v. Emperor*. (11 Cr App Rep 45, Followed.)

('33) 1933 Mad W N 320 (321), *Arumuga Goundan v. Emperor*.

('25) AIR 1925 Cal 666 (667, 668) : 52 Cal 223 : 26 Cri L Jour 1155, *Satya Charan v. Emperor*.

36. ('37) AIR 1937 Pat 191 (195) : 38 Cr. L. J. 129, *Rajendra Nath v. Emperor*. (Case under Ss. 411 and 414, Penal Code—Presumption under S. 114, Evidence Act, not arising—Judge must tell jury that there is no evidence of guilty knowledge—Omission to so direct amounts to serious error vitiating trial.)

('36) 1936 O W N 187 (190), *Behari v. Emperor*. (Wrong statement of the law—Judge asking jury to presume that accused put stolen property deliberately in a certain place.)

('36) 37 Cri L Jour 976 (977):164 I. C. 721 (Cal), *Daud Sheikh v. Emperor*. (Judgment of Lord Reading in the case of *Isaac Scheme and Jacob Abramovitch*, 11 Cr App Rep 45, Relied on.)

('31) AIR 1931 Cal 617 (617) : 33 Cri L Jour 40, *Bhutanath Mondal v. Emperor*.

('25) AIR 1925 Cal 1241 (1242) : 53 Cal 157 : 26 Cr. L. J. 1582, *Kabatulla v. Emperor*.

('20) AIR 1920 Cal 342 (343) : 21 Cri L Jour 545, *Hathim Mondal v. Emperor*.

('84) 2 Weir 489 (492), *In re Puthenvittil*. (Property found five years after the theft in possession of accused — Judge ought to have drawn attention of the jury to this lapse of time.)

('99) 2 Weir 515 (516), *In re Mammadi*. (Charge should make reference to the lapse of time between dacoity and finding of property.)

('29) 1929 Mad W N 577 (578), *Mayandi Thevan v. Emperor*. (Judge must draw attention of the jury to the time elapsed between theft and finding of property.)

('82) 1882 Rat 184 (184, 185), *Empress v. Mulhari*. (In order to raise the presumption the possession of the stolen property should be exclusive as well as recent.)

('66) 5 Suth W R Cr 3 (3, 4), *Queen v. Narain Bagdec*. (Direction to convict if accused failed to explain his possession satisfactorily—Held there was no misdirection.)

('75) 23 Suth W R Cr 16 (17), *Queen v. Jctoo*. (Considerable lapse of time between date of theft and finding of property—No presumption should be drawn.)

('95) 2 Weir 493 (493), *In re Muppidi Krishnamoorthy*. (Direction that the jury should convict the prisoner if they believed that the prisoner had shown the stolen property to the police is open to exception.)

37. ('29) 30 Cr. L. J. 542 (543) : 115 I. C. 831 (Mad), *In re Muthu Virà Velan*.

('08) 26 Mad 467 (468) : 2 Weir 517, *Guzzala Hanuman v. Emperor*.

('12) 13 Cri L Jour 140 (140, 141) : 13 I. C. 828 (Mad), *In re Gorle Kandungadu*.

('10) 11 Cri L Jour 187 (188) : 4 Ind Cas 1103 (Mad), *In re Manjunnath*.

('32) 1932 Mad W N 862 (863), *Aziz Khan v. Emperor*.

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beyond all reasonable doubt and those circumstances are clearly connected with the fact sought to be inferred therefrom and (ii) whether the circumstances are incompatible with the innocence of the accused and incapable of an explanation upon any other reasonable hypothesis than that of his guilt.³⁸ A theoretical discourse on what is circumstantial evidence couched in a language which would be unintelligible to the jury is quite worthless.^{38a} The Judge should tell the jury that testimony of eye-witnesses is not necessary to the establishment of a charge of murder and, if from the circumstances of the case they had no doubt as to the guilt of the accused, they must give effect to that decision.³⁹ In a case depending on circumstantial evidence the question of motive is of great importance and it is the duty of the Judge to lay emphasis in his charge to the jury on the absence of motive which is a circumstance in favour of the accused.⁴⁰

See also the undermentioned case.⁴¹

(G) *Inferences to be drawn from non-examination of witnesses.*—The jury ought to be told that no adverse inference can be drawn against the accused from his non-examination of witnesses.⁴² But the inference to be drawn from the non-examination of prosecution witnesses is a matter to be considered with reference to the circumstances of each particular case; and the Judge should direct the jury to consider the question in the light of the circumstances and facts of each case.⁴³ Thus, where it is proved that the prosecution had material witnesses who could have given relevant evidence and that they had

38. ('40) AIR 1940 Mad 1 (3, 4) : 41 Cri L Jour 369, *In re Kanakasabai Pillai*. (Case tried with assessors.)

('40) 44 C W N 840 (843), *Muzaffar Sheikh v. Emperor*.

('39) AIR 1939 Sind 209 (215, 216) : 41 Cr. L. J. 28 : ILR (1940) Kar 249, *Shewa Ram Jethanand v. Emperor*.

('37) AIR 1937 Cal 458 (459) : 38 Cr. L. J. 966, *Md. Shari ff Khan v. Emperor*.

('31) AIR 1931 Cal 11 (13) : 32 Cri L Jour 418, *Jahura Bibi v. Emperor*.

('28) AIR 1928 Cal 551 (552) : 30 Cri L Jour 120, *M. D. Sagiruddin v. Emperor*.

('18) AIR 1918 Cal 314 (318) : 19 Cri L Jour 81, *Ashraf Ali v. Emperor*.

('34) AIR 1934 Cal 124 (126) : 60 Cal 1339 : 35 Cr. L. J. 567, *Manar Ali v. Emperor*.

('30) AIR 1930 Cal 370 (374) : 58 Cal 96 : 32 Cri L Jour 10, *Government of Bengal v. Santi Ram Mondal*.

('33) AIR 1933 Pesh 94 (96) : 35 Cri L Jour 476, *Nawab Khan v. Emperor*.

('03) 8 Cal W N 278 (286) : 1 Cri L Jour 124 (FB), *Hurjee Mull v. Imam Ali*.

[See ('26) 30 Cal W N 376 (379) : 27 Cri L Jour 1254 : 98 Ind Cas 102, *Arajali v. Emperor*.]

38a. ('40) 44 Cal W N 840 (843), *Muzaffar Sheikh v. Emperor*.

39. ('76) 25 Suth W R Cr 36 (36), *Queen v. Golcool Kahar*.

[See ('37) AIR 1937 P C 179 (180) : 64 I A 134 : 38 Cr. L. J. 573 : ILR (1937) Lah 371 : 31 S L R 300 (PC), *Mangal Singh v. Emperor*.]

40. ('40) AIR 1940 Cal 561 (563) : 71 C L J 597 (600), *Upendra Nath v. Emperor*.

41. ('37) AIR 1937 Cal 756 (757) : 39 Cr. L. J. 182 : ILR (1937) 2 Cal 315, *Ekkabbar Mondal v. Emperor*. (In conspiracy cases, the inferences which are to be drawn by the jury and which the jury should be directed to consider with regard to their conspiracy verdict must be, even if they are mere inferences, supported by solid evidence.)

42. ('82) 8 Cal 121 (125) : 10 C L R 151, *Empress v. Dhunno Kazi*.

('84) 10 Cal 140 (149) : 13 C L R 358, *Hurry Churn v. Empress*.

43. ('38) AIR 1938 Pat 579 (581) : 40 Cr. L. J. 147, *Yusuf Mia v. Emperor*, (*Held*, that Judge should not have invited the jury to assume that the witnesses who had not been examined had been gained over.)

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been deliberately kept back, the Judge should direct the jury to draw an adverse inference against the prosecution.⁴⁴

(H) *Warning in cases arising out of sexual matters.* — The Judge should warn the jury that in charges made by a woman in cases arising out of sexual matters, it is unsafe to rely solely upon the testimony of the woman⁴⁵ and also direct the jury as to whether there is any evidence corroborating the testimony of the woman.⁴⁶ At the same time, the Judge should point out to the jury that they are entitled to convict the accused upon the uncorroborated testimony of the woman, if, after proper scrutiny and considering the warning, they are satisfied with the uncorroborated evidence.⁴⁷

44. ('38) AIR 1938 Cal 625 (626) : 39 Cr. L. J. 964, *Brinchipada v. Emperor*.

('16) AIR 1916 Mad 582 (583) : 16 Cr. L. J. 615 (616), *In re Kotaigadu*.

('32) AIR 1932 Cal 474 (477) : 59 Cal 1361 : 33 Cr. L. J. 854, *Saroj v. Emperor*.

('32) AIR 1932 Cal 118 (119, 120) : 58 Cal 1335 : 33 Cr. L. J. 135, *Girish Chandra v. Emperor*.

('31) AIR 1931 Cal 752 (755) : 33 Cr. L. J. 85, *Sali Skeikh v. Emperor*. (Merely asking the jury to give their due consideration to the absence of material witnesses is not sufficient direction — Jury must be specifically told what is the presumption that they are entitled to draw.)

('30) AIR 1930 Cal 708 (709) : 58 Cal 580 : 32 Cr. L. J. 228, *Nababali v. Emperor*.

('30) AIR 1930 Cal 481 (484) : 32 Cr. L. J. 33, *Hachani Khan v. Emperor*.

('30) AIR 1930 Cal 134 (135, 136) : 31 Cr. L. J. 918, *Nayan Mandal v. Emperor*.

('26) AIR 1928 Cal 728 (729, 730) : 27 Cr. L. J. 398, *Hari Charan v. Emperor*.

('25) AIR 1925 Cal 872 (873) : 52 Cal 595 : 26 Cr. L. J. 1037, *Ledu Molla v. Emperor*.

('23) AIR 1923 Cal 517 (519) : 50 Cal 318 : 25 Cr. L. J. 467, *Md. Yunus v. Emperor*.

('18) AIR 1918 Cal 314 (317) : 19 Cr. L. J. 81, *Ashraf Ali v. Emperor*.

('16) AIR 1916 Cal 355 (355) : 17 Cr. L. J. 92, *Abdul Sheik v. Emperor*.

('33) AIR 1933 Pat 481 (484) : 34 Cr. L. J. 828, *Emperor v. Kameshwar Lal*.

('29) AIR 1929 Pat 651 (654) : 9 Pat 647 : 31 Cr. L. J. 306, *Krishna v. Emperor*.

('28) AIR 1928 Pat 31 (32) : 7 Pat 50 : 28 Cr. L. J. 843, *Tajali Mian v. Emperor*.

('24) AIR 1924 Cal 771 (772, 773) : 51 Cal 79 : 25 Cr. L. J. 945, *Kianuddi v. Emperor*.

('22) AIR 1922 Cal 192 (192) : 24 Cr. L. J. 8, *Abdul Gafur Khan v. Emperor*.

('21) AIR 1921 Cal 257 (257) : 22 Cr. L. J. 475, *Tenaram Mondal v. Emperor*.

('27) AIR 1927 Mad 475 (476, 477) : 28 Cri L Jour 307, *In re Muthaya Thevan*. (No adverse inference should be directed to be drawn unless in evidence it appears that no satisfactory reasons for not examining are forthcoming.)

('82) 8 Cal 121 (124, 125) : 10 C L R 151, *Empress v. Dhunno*.

45. ('34) AIR 1934 Cal 7 (9) : 62 Cal 527 : 36 Cr. L. J. 796, *Emperor v. Nur Ahmed*. (Corroboration necessary.)

('40) AIR 1940 Cal 391 (392), *Taser Pramanik v. Emperor*.

('40) AIR 1940 Cal 461 (462) : I L R (1940) 2 Cal 180 : 44 C W N 830 (832), *Harendra Prasad v. Emperor*. (But see the observations of Sen, J.)

('39) AIR 1939 Pat 536 (538) : 41 Cr. L. J. 1 : 18 Pat 698, *Sachinder Rai v. Emperor*.

('38) AIR 1938 Cal 658 (661) : 40 Cr. L. J. 101 : I L R (1938) 1 Cal 636, *Abdul Gafur v. Emperor*.

('37) AIR 1937 Cal 321 (321, 322) : 39 Cri L Jour 371 : I L R (1937) 2 Cal 345, *Sikandar Mian v. Emperor*. (The Judge usually adds a rider to the effect that nevertheless if after proper scrutinising and considering the caution delivered by the Judge the jurors are satisfied by the uncorroborated evidence, they may accept it.)

('37) AIR 1937 Cal 463 (465) : 38 Cr. L. J. 931, *Sarat Chandra v. Emperor*.

('36) AIR 1936 Cal 18 (19, 20) : 37 Cr. L. J. 359, *Chamuddin Sardar v. Emperor*.

('22) 23 Cr. L. J. 475 (475) : 67 I. C. 827 (827) (Lah), *Kanshi Ram v. Emperor*.

('33) AIR 1933 Cal 833 (834, 835) : 35 Cr. L. J. 508, *Surendra Nath v. Emperor*. (Corroboration in material particulars is essential.)

46. ('36) AIR 1936 Cal 18 (20) : 37 Cr. L. J. 359, *Chamuddin Sardar v. Emperor*.

47. ('40) AIR 1940 Cal 461 (462) : 44 Cal W N 830 (832) : I L R (1940) 2 Cal 180, *Harendra Prasad v. Emperor*.

('36) AIR 1936 Cal 18 (19) : 37 Cri L Jour 359, *Chamuddin Sardar v. Emperor*.

('37) AIR 1937 Cal 321 (322) : 39 Cr. L. J. 371 : I L R (1937) 2 Cal 345, *Sikandar Mian v. Emperor*.

The failure to warn the jury of the danger of convicting the accused on the woman's evidence amounts to a non-direction which vitiates the trial.⁴⁸ Where, however, a part of the woman's evidence, which is the crucial part, and which, if believed, establishes the guilt of the accused, is corroborated, the failure to give warning cannot be said to have affected the verdict of the jury and is, therefore, no ground on which the conviction should be set aside.⁴⁹

Where a woman is alleged to be of a bad character, the Judge should point out to the jury that the alleged bad character is relevant only so far as it affects the credit of the woman or supports the defence suggestion that the case is not a true one.⁵⁰

See also the undermentioned cases.⁵¹

(I) *Other cases of warning.* — The Judge should also warn the jury that the evidence of an expert should be approached with caution,⁵² that suggestions of pleaders do not amount to evidence unless they are partly or wholly accepted by the prosecution witnesses,⁵³ that evidence of witnesses taken under S. 164 must be accepted with a great deal of caution,⁵⁴ that they are not to draw an adverse inference against the accused from the fact that they were subjects of a proceeding under S. 110 of the Code⁵⁵ and that they should be cautious in acting on a statement of a witness made before the committing Magistrate but denied before the Sessions Judge.⁵⁶

(37) AIR 1937 Cal 463 (465) : 38 Cri L Jour 931, *Sarat Chandra v. Emperor*.

48. ('39) AIR 1939 Pat 536 (538) : 41 Cr.L.J. 1:18 Pat 698, *Sachinder Rai v. Emperor*.

(36) AIR 1936 Cal 18 (19) : 37 Cri L Jour 359, *Chamuddin Sardar v. Emperor*.

[See also ('40) AIR 1940 Cal 461 (461, 462) : I L R (1940) 2 Cal 180, *Harendra Prosad v. Emperor*. (Judge warning jury that it was unsafe to convict accused on prosecutrix's uncorroborated testimony — Omission to add that if they believed prosecutrix they could convict on her sole testimony is not misdirection resulting in prejudice to accused.)]

49. ('38) AIR 1938 Cal 658 (661) : I L R (1938) 1 Cal 636 : 40 Cri L Jour 101, *Abdul Gafur v. Emperor*.

50. ('37) AIR 1937 Cal 266 (268) : 38 Cr.L.J. 767, *Madan Tilakdas v. Emperor*.

51. ('39) AIR 1939 Pat 536 (539) : 18 Pat 698 : 41 Cr. L. J. 1, *Sachinder Rai v. Emperor*. (In case of sexual offences like abduction, Judge should tell jury that if girl was immoral it made her story of abduction less probable — Failure to do this amounts to misdirection.)

(33) AIR 1933 Cal 718 (722) : 35 Cr.L.J. 307 : 60 Cal 1457, *Shaheba v. Emperor*. (Trial for offence under S. 366, Penal Code—Judge telling jury that fact of accused's previous intimacy with the girl was immaterial, amounts to misdirection.)

52. ('05) 2 Cri L Jour 311 (313) : 1 C L J 385, *Panchu Mandal v. Emperor*.

[See also ('36) AIR 1936 P C 289 (299) : 37 Cri L Jour 963 (P C), *Seneviratne v. The King*. (Evidence of medical experts conflicting—Judge should not ask jury on matters involving medical knowledge and skill to come to a conclusion for themselves.)]

53. ('32) AIR 1932 Cal 375 (377) : 33 Cr.L.J. 725, *Emperor v. Karimuddi Sheikh*.

54. ('08) 7 Cri L Jour 315 (316) : 7 C L J 246, *Kali Singh v. Emperor*.

[See ('12) 13 Cr. L. J. 283 (284) : 14 I. C. 667 (Cal), *Tufani Sheikh v. Emperor*. (S. 364, Cr. P. C. — Questions eliciting confessional statement — Jury must be told that such statement is inadmissible.)]

55. ('39) AIR 1939 Cal 497 (499) : 40 Cri L Jour 877, *Moseladdi v. Emperor*.

56. ('38) AIR 1938 Cal 364 (365) : 39 Cri L Jour 625, *Ram Gobinda v. Emperor*. (Witness in Sessions Court denying truth of his statement made before committing Magistrate — Judge should warn jury to be cautious in acting on such statement.)

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10. Effect of non-observance of this provision — Laying down the law. — It has been held in the undernoted cases¹ that the failure of the Judge to explain properly the law to the jury is not a mere misdirection, but is a failure to comply with an express provision of law vitiating the whole trial; it is a defect which cannot be cured by section 537. In other cases, however, it has been held that such an omission is not a material misdirection and where the offence charged is a simple one (like theft) and where the jury have understood fully the constituent factors of the offence, an omission to explain the law may not of itself justify a reversal of the verdict,² though, where such an omission to explain the law occasions a failure of justice, the verdict will be set aside.³

The cases cited below⁴ show how it is a question depending on the circumstances of each case whether the Judge has failed to lay down the law for the guidance of the jury.

11. Misdirection. — Sub-section (2) of S. 423 provides that the verdict of a jury cannot be altered or reversed “unless . . . such verdict is erroneous owing to a *misdirection* by the Judge or to a

Note 10

1. ('07) 5 Cri L Jour 78 (80) : 30 Mad 44, *Mari Valayan v. Emperor*.
 ('10) 11 Cri L Jour 482 (483) : 7 Ind Cas 401 (Mad), *In re Suruttai*.
 ('31) AIR 1931 Mad 427 (428) : 54 Mad 588 : 32 Cri L Jour 1212, *Raman Koravan v. Emperor*. (Charge of dacoity — Judge should point out when theft becomes a robbery.)
 ('24) AIR 1924 Oudh 411 (412, 413) : 25 Cri L Jour 1129, *Nawab Ali v. Emperor*.
 ('10) 11 Cri L Jour 340 (341, 342) : 5 Low Bur Rul 149 : 5 Ind Cas 981, *Briscoe Birch v. Emperor*.
 ('35) AIR 1935 Oudh 175 (176) : 35 Cri L Jour 507, *Jagan v. Emperor*.
 [See ('14) AIR 1914 Low Bur 216 (218) : 17 Cri L Jour 154 : 8 Low Bur Rul 125, *Kya Nyun v. Emperor*.]
2. ('39) AIR 1939 Bom 457 (459) : 1 L R (1939) Bom 618 : 41 Cri L Jour 176, *Emperor v. Jhina Soma*.
 ('23) AIR 1923 Mad 329 (330), *In re Rangare Ramudu*.
 ('25) AIR 1925 Oudh 69 (69) : 25 Cri L Jour 1032, *Jindar Singh v. Emperor*.
 [See ('25) AIR 1925 Cal 494 (497) : 25 Cri L Jour 1386, *Abdul Gani v. Emperor*. (Describing common object of unlawful assembly as “disturbing public peace, resisting, obstructing and overawing the police by criminal force and of assaulting police” was held not likely to prejudice the accused.)]
3. ('97) 25 Cal 561 (564), *Biru Mandal v. Queen-Empress*.
 ('26) AIR 1926 Mad 1121 (1122) : 27 Cri L Jour 1191, *Venkatigadu v. Emperor*. (Case of theft — Word ‘dishonestly’ ought to have been explained but not explained — *Held*, there was no miscarriage of justice in this particular case.)
 ('25) AIR 1925 Cal 1235 (1236) : 26 Cri L Jour 946, *Ahed Fakir v. Emperor*. (Question of title important in the case — Direction to ignore title is misdirection occasioning failure of justice.)
4. ('36) AIR 1936 Rang 421 (425) : 37 Cri L Jour 1050 (FB), *Emperor v. Nga E Pe*. (*Held* that failure to explain what was the intention necessary to constitute the offence of murder was not, in the circumstances of the case, a misdirection.)
 ('16) AIR 1916 Low Bur 114 (116) : 17 Cri L Jour 49 : 8 Low Bur Rul 306 (FB), *Nga Mya v. Emperor*. (In performing the duty of laying down the law by which the jury are to be guided, it is not incumbent on the Judge to explain a part of the law which if they had acted on they would have done wrong — *Held* in circumstances of the case Judge need not explain the distinction between the intention necessary to constitute murder and the intention necessary to constitute culpable homicide not amounting to murder.)
 ('14) AIR 1914 Low Bur 216 (218) : 8 Low Bur Rul 125 : 17 Cri L Jour 154, *Kya Nyun v. Emperor*. (Murder — Charge *held* defective in law as it did not sufficiently ask the jury to consider the intention of the accused.)

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misunderstanding on the part of the jury of the law as laid down by him." There is no definition of the word "misdirection" in the Code. Technically, a "misdirection" is an error of law made by a Judge in charging a jury.¹ But the expression as used in the Code includes not only an error in laying down the law by which the jury are to be guided, but also a defect in summing up the evidence.² In *Sundaresa Iyer v. Emperor*³ it was observed that a misdirection "includes also a defect in summing up the evidence or in not summing it up, or summing it up erroneously which may often prejudice the accused more than *not* summing it up at all. Such error and defect are in all cases an infringement of the law as laid down in S. 297." A mere *non-direction* is not necessarily a misdirection; those who allege misdirection must show that something wrong was said or something was said which would make wrong that which was left to be understood.⁴

The proper way of viewing a charge by a Judge to the jury has been laid down by their Lordships of the Privy Council in *Channing Arnold v. Emperor*⁵:

"A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province."^{5a}

It is not enough for the purpose of establishing a misdirection to show that the Judge might have laid much *more stress* than he has

Note 11

1. Wharton's Law Lexicon.
2. ('10) 11 Cri L Jour 13 (13, 15) : 3 Sind L R 102 : 4 Ind Cas 597, *Imperator v. Minhwasyo*. (Per Crouch, A. J. C. — Omission in summing up is not "misdirection" unless it be on point of substantial importance.)
3. ('30) 1930 Mad W N 249 (280).
4. ('16) AIR 1916 Pat 236(243) : 1 Pat L J 317 : 17 Cri L Jour 353(360), *Elknath Sahay v. Emperor*. ('15) AIR 1915 Cal 773 (783) : 16 Cri L Jour 561 (571)(FB), *Emperor v. Upendra Nath*. (No evidence of grave and sudden provocation—Omission to lay down the law as to grave and sudden provocation was held not to amount to misdirection.) See also Note 12.
5. ('14) AIR 1914 P C 116 (124) : 41 Cal 1023 : 8 Low Bur Rul 16 : 15 Cri L Jour 309 : 41 I A 149 : 1914 A C 644 : 83 L J P C 299 : 111 L T 324 (PC).
- 5a. See also ('40) AIR 1940 Nag 221 (224) : 1940 N L J 264 (267, 268), *Bapurao Maroti v. Emperor*. (The principal test to determine the character of the charge is to see whether or not the Judge directed the attention of the jury to the essential points and the charge read as a whole is sound.) ('40) AIR 1940 Oudh 337 (340) : 41 Cri L Jour 545, *Jagdish Dutt v. Emperor*. ('39) AIR 1939 Cal 682 (686) : 1 L R (1939) 1 Cal 187 : 41 Cr. L. J. 59, *C. B. Plucknett v. Emperor*. ('37) AIR 1937 Pat 191 (193) : 38 Cri L Jour 129, *Rajendra Nath v. Emperor*. (Summing up of case to jury after lengthy addresses by counsel — High Court should not be too critical in dealing with the summing up.) ('34) AIR 1934 Cal 757 (758) : 35 Cri L Jour 1487, *Hossein Ali v. Emperor*. (The charge must be taken as a whole, and not selected passages on which criticisms might be levelled, to decide whether in the light of the evidence there has been any misdirection or non-direction.) See also S. 298 Note 9.

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laid on the defects in the prosecution case.⁶

The following may be given as instances of misdirection :

- (1) Instead of asking the jury to find if the case has been legally proved, to tell them that if they are morally convinced, they may find the accused guilty.^{6a}
- (2) Misreading or misquoting the evidence.⁷ It is of the greatest importance that whatever the Judge says to the jury must be true, and must be a correct representation of facts appearing from the evidence.⁸ The Judge should not make suggestions which are absolutely without foundation on the record.⁹
- (3) Grave omissions and vague over-statements.¹⁰ But the omission to mention before the jury some small items of corroborative or discrepant evidence may be comparatively unimportant, particularly in a case where the jury had been addressed by advocates on each side.^{10a}
- (4) Stressing too much on unimportant points.¹¹
- (5) Asking the jury to neglect any portion of the evidence¹² or telling them that "if juries were to throw up a case on account of contradictions and falsehoods, there would be an end to the criminal law of the land."¹³

6. ('26) AIR 1926 Mad 370 (370) : 27 Cri L Jour 176, *In re Ambalam*. (Charge as a whole was distinctly favourable to the accused in this case.)

[See also ('25) AIR 1925 Cal 980 (981) : 26 Cr.L.J. 572, *Sham Lal v. Emperor*.]

6a. ('26) AIR 1926 All 752 (753) : 28 Cri L Jour 15 : 49 All 209, *Enayat Husain v. Emperor*.

7. ('30) AIR 1930 All 28 (28) : 52 All 207 : 30 Cr. L. J. 1146, *Jagmohan v. Emperor*.

('27) AIR 1927 Cal 200 (202) : 28 Cri L Jour 201, *Isu Sheikh v. Emperor*.

('24) AIR 1924 Cal 435 (435, 436) : 24 Cri L Jour 305, *Mofezuddin v. Emperor*.

('30) AIR 1930 Cal 756 (756) : 32 Cri L Jour 233, *Mokshed Sheikh v. Emperor*.

('10) 11 Cri L Jour 187 (188) : 4 Ind Cas 1103 (Mad), *In re Manjunath*.

('12) 13 Cri L Jour 271 (271, 272) : 14 Ind Cas 655 (Mad), *Venkatan v. Emperor*.

('15) AIR 1915 Mad 1036 (1038) : 16 Cr.L.J. 717 (718), *In re Sennimalai Goundan*.

('23) AIR 1923 Pat 158 (159) : 23 Cr. L. J. 406, *Dasrath Singh v. Emperor*. (Judge making a reference to statement not on record.)

('29) 1929 Mad W N 946 (947, 948), *Doraiswamy Pillay v. Emperor*.

('08) 8 Cri L Jour 361 (372, 374) : 1 Sind L R 104, *Imperator v. Vilaitali Shah*.

8. ('36) 1936 O W N 187 (189), *Behari v. Emperor*. (Judge wrongly asserting that witnesses who identified the accused in jail committed no mistakes at the time of their identification—*Held*, it was a serious misdirection.)

('27) AIR 1927 Oudh 259 (259) : 2 Luck 597 : 28 Cri L Jour 683, *Nahrimal v. Emperor*. (Judge is not justified in stating that there is definite evidence against the accused which as a matter of fact is not on record.)

('20) AIR 1920 Cal 527 (528) : 21 Cri L Jour 670, *Abdul Gafur v. Emperor*.

9. ('34) AIR 1934 Cal 77 (80) : 35 Cri L Jour 483, *Kamireddi Sheikh v. Emperor*.

('83) 9 Cal 455 (459) : 11 Cal L R 569 : 5 Shome L R 47, *Roghuni Singh v. Empress*.

10. ('37) AIR 1937 Pat 191 (195) : 38 Cri L Jour 129, *Rajendra Nath v. Emperor*. (Omission to tell jury exact point for determination—Charge given in misleading manner—It amounts to misdirection.)

('36) 1936 O W N 187 (189), *Behari v. Emperor*. (Omission to point out that a witness had made a mistake at the time of identification of the accused in jail by identifying a wrong person—Mistake cannot be rectified by appellate Court.)

('95) 1895 Rat 806 (816), *Queen-Empress v. Kallappa*.

10a. ('37) AIR 1937 Pat 191 (195) : 38 Cr. L. J. 129, *Rajendra Nath v. Emperor*.

11. ('75) 23 Suth W R Cr 21 (21), *Queen v. Gunga Govind*.

12. ('03) 6 Bom L R 31 (33), *Emperor v. Mira Gajbar*.

13. ('08) 12 Cal W N cxi (cxli) (PC), *Loku Nona v. The King*. (Accomplice's evidence was discrepant in this case.)

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- (6) Suggesting that the *onus* of proof lies on the accused to show that he is innocent¹⁴ or that the *onus* changes or shifts on the accused.¹⁵
- (7) Telling the jury that in capital cases stronger evidence or higher degree of certainty is required than in other cases.¹⁶
- (8) Saying that there is a presumption of veracity in favour of a witness as there is the presumption of innocence in favour of the accused.¹⁷
- (9) Submission of inadmissible evidence to jury.¹⁸ If inadmissible

14. ('39) AIR 1939 Sind 209 (212, 214) : 41 Cr. L. J. 28 : I L R (1940) Kar 249, *Shewaram Jelhanand v. Emperor*.

('37) AIR 1937 Pat 191 (195) : 38 Cr. L. Jour 129, *Rajendra v. Emperor*. (Charge vitiated throughout by the assumption that accused had to prove their innocence.)

('36) AIR 1936 P C 169 (170) : 37 Cr. L. Jour 628 : 1936 A C 338 : 105 L J P C 79 : 154 L T 620 (PC), *Attigalle v. The King*. (Judge stating that burden of proving certain facts within special knowledge of accused is on accused — Jury likely to think from direction that burden is on accused to prove that no crime has been committed—It amounts to misdirection.)

('36) AIR 1936 P C 289 (300) : 37 Cr. L. J. 963 (PC), *Stephen Seneviratne v. The King*.

('36) AIR 1936 Cal 73 (79, 80) : 37 Cr. L. J. 394 : 63 Cal 929, *Benoyendra v. Emperor*. (Where, the Judge in his charge to the jury, repeatedly draws the jury's attention to the fact that the accused have failed to give any explanation of facts adduced in evidence against them, his remarks amount to misdirection. In any case if the Judge intends to make such remarks, it is his duty first to give the accused an opportunity of explanation by drawing their attention specifically to the evidence upon which the Judge relies.)

('35) 1935 A C 462 : 104 L J K B 433 : 51 T L R 446 (450) : 25 Cr App Rep 72 : 153 L T 232 : 79 S. J. 401, *Woolmington v. Director of Public Prosecutions*. (It is sufficient for accused to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.)

('36) 37 Cr. L. Jour 976 (977) : 164 I. C. 721 (Cal), *Daud Sheikh v. Emperor*. (In cases of receiving stolen property, onus never shifts to the accused. All that the accused is required to do is to give an account of his possession and if that account may reasonably be true, though nevertheless the jury may not be convinced that it is true he must be acquitted because the Crown has failed to satisfy the onus to prove his guilty knowledge.)

('81) 8 Cal L R 542 (546, 547), *Khorsheed v. Empress*.

(1900) 4 Cal W N 576 (581), *Sadhu Sheikh v. Empress*.

('10) 11 Cr. L. Jour 557 (558) : 8 Ind Cas 52 (Cal), *Asfar Sheikh v. Emperor*. (The charge in this case ended with the words 'no evidence adduced for the accused'.)

('22) AIR 1922 Cal 505 (505, 506) : 24 Cr. L. J. 76, *Abdul v. Emperor*. (Judge directing that if the prosecution has supplied better hypothesis than the defence, it must be held to have discharged the onus of proof—Held, this was a misdirection.)

('81) 8 Cal 121 (124, 125) : 10 Cal L R 151, *Empress v. Dhumno Kazi*.

('16) AIR 1916 Mad 582 (583) : 16 Cr. L. J. 615, *In re Kotaigadu*. (Murder—Defence not bound to explain presence of mammalian blood on a knife found in accused's house.)

('06) 3 Cr. L. Jour 1 (3) : 3 Low Bur Rul 75 (FB), *Hla Gyi v. Emperor*.

15. ('25) AIR 1925 Cal 666 (667) : 52 Cal 223 : 26 Cr. L. J. 1155, *Satya Charan v. Emperor*.

('20) AIR 1920 Cal 342 (343) : 21 Cr. L. J. 545 : 24 Cal W N 619 (621), *Hathim Mondal v. Emperor*. (Offence under S. 411, Penal Code.)

('29) AIR 1929 Cal 726 (728) : 31 Cr. L. Jour 909 : 57 Cal 649, *Khiro Mondal v. Emperor*. (Direction that the burden of proving non-voluntary nature of confession is on the accused is a misdirection.)

[See ('37) AIR 1937 Cal 463 (465) : 38 Cr. L. J. 931, *Sarat Chandra v. Emperor*. (Onus of proof in criminal cases never shifts.)]

16. ('22) AIR 1922 Cal 342 (345) : 49 Cal 167 : 22 Cr. L. J. 562, *Legal Remembrancer, Bengal v. Lalit Mohan Singh Roy*.

17. ('28) AIR 1928 Cal 769 (770) : 30 Cr. L. Jour 825, *Ambar Ali v. Emperor*.

('39) 43 C W N 695 (695, 696), *Tarkal v. Emperor*.

('32) AIR 1932 Cal 474 (477, 478) : 59 Cal 1361 : 33 Cr. L. J. 854, *Saroj v. Emperor*.

('31) AIR 1931 Cal 796 (799) : 33 Cr. L. J. 196 : 58 Cal 1095, *Emperor v. Tazem Ali*.

[See also ('28) AIR 1928 Cal 551 (552, 553) : 30 Cr. L. J. 120, *Md. Sagiruddin v. Emperor*. (Direction that untrue witness must be believed so far as he deposes to facts spoken to by other witnesses—Misdirection.)]

18. ('81) 6 Bom 34 (37), *Imperatrix v. Pandarinath*. (Improper submission of inadmissible evidence to the consideration of jury — Conviction set aside.)

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evidence has crept into the case, it is the duty of the Judge to warn the jury to exclude that evidence and caution them against being influenced by such evidence.¹⁹ In the undermentioned cases²⁰ the Courts have held that a subsequent exhortation not to rely upon the inadmissible evidence is useless, since the mischief of introducing inadmissible evidence has been already done. See also the undermentioned cases²¹ where the effect of admitting various kinds of inadmissible evidence has been considered.

- { '31 } AIR 1931 Cal 65 (66) : 32 Cr L Jour 421, *Obedali Sheikh v. Emperor*. (Jury influenced by the inadmissible evidence referred to in the charge — Conviction set aside.)
- { '25 } AIR 1925 Cal 161 (163, 164) : 26 Cr. L. J. 307, *Harendra Nath v. Emperor*. (Reference to inadmissible evidence in the charge did not influence the mind of jury so as to cause failure of justice there being other sufficient evidence to justify the jury's verdict — Conviction was upheld.)
- { '19 } AIR 1919 Cal 514 (518) : 46 Cal 895 : 20 Cri L Jour 324, *Romesh Chandra v. Emperor*. (In this case the jury were warned not to take certain inadmissible evidence into consideration, yet it was held that jury's verdict was influenced by it and conviction was set aside.)
- { '69 } 3 Ben L R App Cr 43 (43, 44), *Queen v. Gajraj*.
- { '38 } AIR 1938 Cal 364 (365) : 39 Cri L Jour 625, *Ram Gobinda v. Emperor*.
- { '37 } AIR 1937 Cal 309 (311) : ILR (1937) 2 Cal 308 : 38 Cr. L. J. 1067, *Sahedali Mirdha v. Emperor*. (Improper admission of evidence may turn the scale against the accused — Retrial ordered.)
- { '36 } AIR 1936 Cal 73 (79) : 63 Cal 929 : 37 Cr. L. J. 394, *Benoyendra Chandra v. Emperor*.
- { '69 } 6 Bom H C R Cr 47 (49, 50, 51), *Reg. v. Ramaswami Mudaliar*.
- { '03 } 27 Bom 626 (632) : 5 Bom L R 599, *Emperor v. Waman*.
- { '73 } 10 Bom H C R 497 (501, 502), *Reg. v. Anrita Govinda*.
- { '14 } AIR 1914 P C 155 (164) : 15 Cr. L. J. 326 (PC), *Ibrahim v. King-Emperor*.
- { '90 } 15 Bom 189 (193), *Queen-Empress v. Abaji Ramchandra*.
- { '67 } 7 Suth W R Cr 7 (7), *Queen v. Beharee Dosadh*.
- { '68 } 10 Suth W R Cr 57 (58), *Queen v. Ramgopal Dhur*.
- { '82 } 10 Cal L R 4 (6), *Jugut Mohinice v. Madhu Sudhan*.
- { '26 } AIR 1926 Mad 370 (370) : 27 Cri L Jour 176, *In re Ambalam*.
- { '18 } AIR 1918 Pat 201 (209) : 19 Cri L Jour 886, *Ram Bhagwan v. Emperor*.
- { '72 } 9 Bom H C R 358 (376, 397), *Reg. v. Navroji Dadabhai*.
19. { '29 } 30 Cr.L.J. 57 (58): 113 Ind Cas 73 (Cal), *Kailash Chandra v. Emperor*.
- { '06 } 4 Cri L Jour 412 (414) (Cal), *Sheikh Fakir v. Emperor*.
- { '26 } AIR 1926 Bom 238 (240, 241): 27 Cr.L.J. 481, *Kutubuddin Khan v. Emperor*.
- { '16 } AIR 1916 Mad 851 (852): 16 Cri L Jour 294 (295, 297): 39 Mad 449, *Annari Muthiriyar v. Emperor*.
- [See { '19 } AIR 1919 Mad 222 (222): 20 Cr.L.J. 790, *In re Subba Reddi*. (Omission to caution not an important misdirection.)]
- [See also { '39 } AIR 1939 Cal 497 (499) : 40 Cr. L. J. 877, *Moseladdi v. Emperor*. (Jury should be cautioned against being influenced by evidence of bad character.)]
20. { '26 } AIR 1926 Cal 320 (322): 27 Cr.L.J. 263, *Keramat Mandal v. Emperor*.
- { '67 } 7 Suth W R Cr 25 (25), *Queen v. Pitambur Sirdar*.
- { '03 } 27 Bom 626 (631, 633): 5 Bom L R 599, *Emperor v. Waman Shivaram*.
- { '19 } AIR 1919 Cal 514 (518): 46 Cal 895:20 Cr.L.J. 324, *Romesh Chandra v. Emperor*.
- { '23 } AIR 1923 Pat 142 (142): 23 Cr.L.J. 141, *Madodar Ram v. Emperor*.
21. { '39 } AIR 1939 Cal 610 (611): 40 Cr.L.J. 880, *Mohsena Khatun v. Emperor*. (Inadmissible confessions admitted—*Held*, verdict should be set aside.)
- { '38 } AIR 1938 Cal 399 (401): 39 Cri L Jour 601, *Asabuddin v. Emperor*. (Prosecution for forging entry in birth register—Direction to jury that they must reach conclusion that entry was false is beside the point—Evidence about real age of person about whom entry was made admitted—Jury not satisfied with it, returning verdict of guilty—There is no misdirection.)
- { '39 } 43 C W N 782 (783, 784), *Sh. Idris v. Emperor*. (Two statements made to police by complainant—Judge pointing out to jury that second statement could be used only for contradicting prosecution witnesses and he himself making no reference to it in elucidating prosecution case — *Held*, introduction of second statement did not amount to reception of inadmissible evidence.)

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- (1906) 4 Cr. L. Jour 412 (414): 11 C. W. N. 51, *Sheikh Fakir v. Emperor*. (Hearsay.)
- (1922) AIR 1922 Cal 342 (345): 49 Cal 167: 22 Cr. L. J. 562, *Legal Remembrancer, Bengal v. Lalit Mohan*. (Do.)
- (1922) AIR 1922 Cal 106 (106): 24 Cr. L. Jour 143, *Superintendent and Remembrancer of Legal Affairs v. Shyam Sunder Bhumij*. (Do.)
- (1925) AIR 1925 Cal 887 (889): 26 Cr. L. J. 606, *Sheikh Abdul v. Emperor*. (Do.)
- (1931) 2 Weir 762 (762), *In re Vaithilinga Pillai*. (Do.)
- (1908) 7 Cr. L. J. 358 (358): 18 M. L. J. 250: 3 M. L. T. 263, *In re Acchabba Beori*. (Do.)
- (1975) 24 Suth. W. R. Cr. 77 (78), *Queen v. Chunder Kumar*.
- (1983) 9 Cal 455 (458): 11 Cal. L. Rep. 569: 5 Shome L. R. 47, *Roghuni Singh v. Empress*. (S. 162 statement.)
- (1929) AIR 1929 Pat 268 (270, 271): 8 Pat 279: 30 Cr. L. J. 858, *Jhari Gope v. Emperor*.
- (1923) AIR 1923 Pat 158 (159): 23 Cr. L. J. 406, *Dasrath v. Emperor*. (S. 162 statement.)
- (1912) 13 Cr. L. J. 244 (245): 14 I. C. 596 (Mad), *Vallaya Rowther v. Emperor*. (Do.)
- (1931) AIR 1931 Cal 189 (190): 32 Cr. L. J. 841: 58 Cal 1009, *Rahjaddi v. Emperor*. (Do.)
- (1929) AIR 1929 Cal 448 (448): 31 Cr. L. J. 127, *Fulbash Sheikh v. Emperor*. (Do.)
- (1926) AIR 1926 Cal 550 (551): 27 Cr. L. J. 222, *Bhagirathi v. Emperor*. (Do.)
- (1925) AIR 1925 Cal 959 (960, 961): 26 Cr. L. Jour 579, *Kalia v. Emperor*. (S. 162 statement admitted — Accused not prejudiced — Conviction not liable to be set aside.)
- (1967) 8 Suth. W. R. Cr. 68 (69), *Queen v. Hurdut Surma*. (Irrelevant evidence.)
- (1966) 6 Suth. W. R. Cr. 2 (3), *Queen v. Shobrattee*. (Opinion of Judge and jury in a former case.)
- (1980) 5 Cal 768 (769): 6 Cal. L. R. 219, *Roshun Dosadh v. Empress*. (Evidence as to bad character of the accused.)
- (1909) 10 Cr. L. J. 498 (499): 4 I. C. 120 (Cal), *Keshab Pal v. Emperor*. (Reference to previous trial.)
- (1921) AIR 1921 Bom 70 (71): 45 Bom 1086: 22 Cr. L. J. 318, *Dinanath Sunderaji v. Emperor*. (Confession made under inducement — Evidence apart from confession available — Retrial ordered.)
- (1910) 11 Cr. L. J. 96 (96): 5 Ind. Cas 315 (Cal), *Hazir Ali v. Emperor*. (Admission by one accused was admitted against the other.)
- (1974) 11 Bom. H. C. R. 146 (148), *Reg. v. Kalu Patil*. (Confession of co-accused.)
- (1916) AIR 1916 Cal 352 (352, 353): 17 Cr. L. J. 188 (189), *Emperor v. Aushi Bibi*. (Confession made to the President of Panchayat under inducement.)
- (1903) 26 Mad 38 (40): 2 Weir 733, *Thandraya Mudaly v. Emperor*. (Confession made under inducement.)
- (1908) 7 Cr. L. J. 325 (327, 328): 31 Mad 127: 18 M. L. J. 66, *In re Sankappa Rai*.
- (1923) AIR 1923 Pat 103 (104): 23 Cr. L. J. 91, *Sumeshwar Jha v. Emperor*. (Statement of the accused to the police.)
- (1981) 6 Cal 247 (248): 7 Cal. L. R. 74: 3 Shome L. R. Cr. 31, *Gogun Chunder Ghose v. Empress*. (Judgment not *inter partes*.)
- (1969) 12 Suth. W. R. Cr. 3 (5): 3 Beng. L. R. App. Cr. 20, *Queen v. Bishonath*. (Evidence taken in the absence of accused.)
- (1968) 9 Suth. W. R. Cr. 58 (61), *Queen v. Kartick Chunder*. (Unproved documents.)
- (1932) AIR 1932 Cal 293 (294, 295): 59 Cal 136: 32 Cr. L. J. 441, *Trailokyanath Das v. Emperor*. (Judge telling the jury that they are not bound by the judgment passed in civil litigation between the parties—No misdirection.)
- (1932) 1932 Mad. W. N. 862 (863), *Aziz Khan Sahib v. Emperor*. (It is wrong to tell the jury that the decision of the Court in other case was relevant.)
- (1926) AIR 1926 Cal 139 (146): 53 Cal 372: 27 Cr. L. Jour 266, *Khijiruddin v. Emperor*. (Admission of documents without legal proof.)
- (1999) 26 Cal 49 (50), *Basanta Kumar Ghattak v. Queen-Empress*. (Do.)
- (1990) 17 Cal 642 (667), *Queen-Empress v. O'hara*. (Statements of the accomplice which had not been admitted in evidence.)
- (1930) AIR 1930 Cal 706 (707): 57 Cal 940: 32 Cr. L. J. 180, *Khadem v. Emperor*. (Evidence not formally tendered.)
- (1910) 11 Cr. L. Jour 538 (539): 7 Ind. Cas 915 (Cal), *Harendra Pal v. Emperor*. (Opinion of the Session Judge who had directed commitment of the accused who had been previously discharged.)
- (1920) AIR 1920 Cal 90 (91): 21 Cr. L. J. 183, *Emperor v. Abdul Sheikh*. (Evidence in contravention of S. 11, Evidence Act.)
- (1930) AIR 1930 Cal 756 (757): 32 Cr. L. Jour 233, *Mokshed Sheikh v. Emperor*. (Evidence in contravention of S. 33, Evidence Act.)
- (1971) 15 Suth. W. R. Cr. 37 (39, 40): 6 Beng. L. R. App. 108, *Queen v. Mahima Chandra Das*. (Evidence of character contrary to S. 54, Evidence Act.)

Section 297
Note 11

- (10) Referring to prior conviction of the accused contrary to the provisions contained in S. 310.²²
- (11) Improper rejection of evidence.²³
- (12) Putting forward new explanation on behalf of the prosecution.²⁴
- (13) Saying that admissions by accused's pleader are binding on the accused.²⁵
- (14) Directing the jury to accept the statement in the first information report in preference to the evidence given before the Court.²⁶
- (15) Erroneous explanation of the law : see Note 6.
- (16) Dogmatic expression of opinion by the Judge so as to take the case out of the hands of the jury : see S. 298 Note 9.
- (17) Omission to put before the jury important facts : see Notes below.
- (18) Telling jury that they are bound by his (the Judge's) decision as to the voluntary character of the accused's confession arrived at when admitting in evidence such confession and that they are only to find out the truth or otherwise of the confession on the basis of its being voluntary.^{26a}

('68) 10 Suth W R Cr 39 (39), *Queen v. Kulum Sheikh*. (Do.)

('68) 10 Suth W R Cr 17 (19), *Queen v. Bykunt Nath Banerjee*. (Do.)

('67) 8 Suth W R Cr 11 (11), *Queen v. Phoolchand*. (Do.)

('66) 6 Suth W R Cr 72 (73), *Queen v. Gopal Thakoor*. (Do.)

('28) 30 Cr. L. J. 57 (58) : 113 Ind Cas 73 (Cal), *Kailash Chandra v. Emperor*. (Do.)

('27) AIR 1927 Cal 17 (20) : 54 Cal 237 : 28 Cr. L. J. 99, *Azimaddy v. Emperor*. (Previous conduct.)

[See ('27) AIR 1927 Cal 257 (257, 258) : 53 Cal 980 : 28 Cr. L. J. 273, *Aseruddin v. Emperor*. (S. 162 statement—Overruled in AIR 1939 PC 47 on another point.)

('24) AIR 1924 Cal 1029 (1030) : 52 Cal 172 : 26 Cri L Jour 350, *Emperor v. Abinash Chandra Bose*. (Investigation — Particulars derived from witnesses examined on the spot should not be noted on the body of the map.)

('06) 3 Cri L Jour 41 (42) : 7 Bom L R 978, *Emperor v. Moti Dongarshet Gujar*. (*Panchnama* does not prove itself and must be legally proved if it is to be put in evidence.)]

22. ('01) 2 Weir 393 (393), *In re Chundi Perugadu*.

('20) AIR 1920 Cal 698 (701) : 22 Cri L Jour 60, *Asimuddin Sardar v. Emperor*. (1900) 27 Cal 139 (143) : 4 C W N 97, *Mankura Pasi v. Queen-Empress*.

23. ('40) 1940 Mad W N 97 (100), *Balan Patcyya v. Emperor*.

('30) AIR 1930 Cal 370 (375) : 58 Cal 96 : 32 Cr. L. J. 10, *Government of Bengal v. Santiram Mondal*.

('28) AIR 1928 Cal 771 (772) : 30 Cri L Jour 803, *Momin Talukdar v. Emperor*. (Two reports about the crime— Not treating the actual and proper first information report as such — Serious misdirection.)

('32) AIR 1932 Cal 523 (523) : 33 Cri L Jour 604, *Wahid Ali v. Emperor*. (Judge asking jury to reject evidence of hostile witness.)

('07) 5 Cr. L. J. 427 (429) : 34 Cal 698 : 11 C W N 666, *Jatindranath v. Emperor*.

24. ('32) 1932 M W N 862 (864), *Aziz Khan Sahib v. Emperor*.

[See ('39) AIR 1939 Cal 321 (322) : 40 Cr. L. J. 649, *Nanda Ghosh v. Emperor*. (*Held* it was unnecessary to put forward any new theory about the case.)]

25. (1900) 2 Bom L R 751 (752), *Queen-Empress v. Sangaya*. (In this case the pleader was appointed by the Court—Their Lordships observed: "The position of a pleader appointed by the Court to defend a prisoner accused of murder is not the same that of a pleader whom the accused has authorized to act for him.")

26. ('10) 11 Cri L Jour 557 (557) : 8 Ind Cas 52 (Cal), *Asfar Sheikh v. Emperor*. See also S. 154 Note 10.

26a. ('35) AIR 1935 Cal 308 (309):36 Cr. L. J. 921, *Kishori Kishore v. Emperor*. (Judge can decide question of voluntariness of confession in its bearing on admissibility — Jury are also entitled to decide independently of the Judge whether confession was voluntary when considering truth of confession.)

- (19) Telling jury that if they think an exculpatory statement in a dying declaration to be untrue, they should not believe the rest of the dying declaration.²⁷

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Note 11

See also the undermentioned cases²⁸ for further illustrations of what is and what is not misdirection.

- (134) AIR 1934 Cal 853 (855, 856) : 62 Cal 312 : 36 Cri L Jour 485, *Kasimuddin v. Emperor*.
27. ('36) AIR 1936 Cal 793 (795) : 38 Cri L Jour 243 : ILR (1937) 1 Cal 475, *Naimuddin Biswas v. Emperor*. (Part of dying declaration found untrue—Rest of it corroborated by evidence — Judge telling jury to consider value of declaration in view of misstatement—*Held* there was no misdirection.)
28. ('40) AIR 1940 Cal 561 (564) : 71 Cal L Jour 597 (602), *Upendra Nath v. Emperor*. (Charge under S. 364, Penal Code—Telling jury that it was sufficient if prosecution established that the accused placed the deceased in such circumstances that she was in danger of being murdered — This is misdirection.)
- ('38) AIR 1938 Cal 51 (58) : ILR (1938) 1 Cal 290 : 39 Cr.L.J. 161, *Goloke Behari v. Emperor*. (Failing to marshal evidence relating to each element of the charge.)
- ('39) AIR 1939 Cal 290 (291) : 40 Cr. L. J. 660, *Ekkari Das v. Emperor*. (Trial for offence under S. 9, Bengal Suppression of Immoral Traffic Act — Judge failing to point out to jury that prosecution must prove that the girl was taken to a house for prostitution — Judge telling jury that offence would be committed even if house was not brothel—It amounts to serious misdirection.)
- ('39) AIR 1939 Pat 536 (539) : 41 Cri L Jour 1 : 18 Pat 698, *Sachinder Rai v. Emperor*. (In case of sexual offences like abduction Judge should tell jury that if girl was immoral it made her story of abduction less probable — Failure to do this amounts to misdirection.)
- ('39) ILR (1939) 1 Cal 337 (344), *Nitai Koley v. Emperor*. (Omission by the Judge to caution the jury against the evidence of a witness brought on record of the sessions trial under S. 33 of the Evidence Act, that the witness was not cross-examined before the committing Magistrate, does not amount to misdirection, when the defence had an opportunity of cross-examining that witness in the committing Magistrate's Court but they did not avail themselves of it.)
- ('38) AIR 1938 Cal 6 (10) : 39 Cri L Jour 308, *Emperor v. Durga Charan*. (Court charging jury in murder case — Explaining evidence with its discrepancies — Confessional statements placed before jury—Judge expressing opinion on injuries and dealing with motive, intention and exceptions to S. 300, Penal Code — Charge *held* good.)
- ('38) AIR 1938 Cal 399 (401) : 39 Cr. L. J. 601, *Asabuddin v. Emperor*. (Accused prosecuted for forging entry in birth register — Direction that jury must decide about the real age of person about whom entry is made is beside point—Evidence about real age is admitted — Jury not convinced by it and returning verdict of guilty—There is no misdirection and verdict must be sustained.)
- ('38) AIR 1938 Cal 625 (627) : 39 Cr.L.J. 964, *Brinchipada v. Emperor*. (Where the entire evidence is summarized before the jurors by the Judge, in which all the main features of the case are exhaustively dealt with, non-reference to minor matters of detail does not amount to misdirection or non-direction.)
- ('38) AIR 1938 Cal 658 (662):ILR (1938) 1 Cal 636 : 40 Cr.L.J. 101, *Emperor v. Emperor*. (Abduction case—Judge opening charge to jury by saying "you have before you a simple case of abduction of married girl for immoral purpose" — Words *held* did not amount to misdirection.)
- ('38) AIR 1938 Mad 464 (464) : 39 Cri L Jour 580, *In re Kalli Koravan*. (Judge pointing out to jury that the absconding of the accused is a point against him when it is doubtful whether he was absconding even before offence was committed.)
- ('38) AIR 1938 Pat 579 (582) : 40 Cri L Jour 147, *Yusuf Mia v. Emperor*. (Judge should not ask jury to treat all kinds of statements to police as of one level of unreliability—Whether discrepancy or omission is effective to contradict witness in any particular case depends upon nature of the fact in question as well as the fullness with which statement has been recorded — Judge should draw attention of jury to the distinction between important and immaterial omissions — Per Rowland, J.)
- ('37) AIR 1937 Bom 60 (62) : 38 Cri L Jour 327, *Emperor v. Mahomed Adam Chohan*. (Police alleged to have tampered with statements of witnesses made to them—Jury to determine allegations —Telling of facts by Judge and his opinion on allegation amounts to misdirection.)

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- (137) AIR 1937 Cal 309 (311, 312) : ILR (1937) 2 Cal 308 : 38 Cri L Jour 1067, *Sahed Ali v. Emperor*. (On dispute over property, number of armed men attacking others who were unarmed—Death of some men resulting—Judge instead of directing trial of accused for murder, directing jury to consider accused's cases under S. 304/149, Penal Code — *Held* there was grave misdirection.)
- (137) AIR 1937 Cal 463 (466) : 38 Cri L Jour 931, *Sarat Chandra v. Emperor*. (It is a misdirection to tell jury to estimate value of evidence by considering whether it appears to be tutored or to be true.)
- (137) AIR 1937 Cal 756 (758):ILR (1937) 2 Cal 315:39 Cr.L.J. 182, *Ekkabbar Mondal v. Emperor*. (In a conspiracy case, if there is no evidence of conspiracy, but merely that of motive, the Judge should direct the jury to return a verdict of not guilty.)
- (137) AIR 1937 Pat 191 (195) : 38 Cri L Jour 129, *Rajendra Nath v. Emperor*. (Case under Ss. 411 and 414, Penal Code—Omission to tell jury that there was no evidence of guilty knowledge was held in the circumstances of case to be misdirection.)
- (136) AIR 1936 Cal 429 (430):38 Cr. L. J. 68, *Alkasulla v. Emperor*. (Committing Magistrate charging accused with common object to take possession — Trial Judge adding common object of assaulting—It is wrong to include contradictory cases at the same trial and in one charge.)
- (136) AIR 1936 Cal 793 (794) : ILR (1937) 1 Cal 475:38 Cr. L. J. 243, *Naimuddin Biswas v. Emperor*. (Jury told that they must be satisfied as to place of occurrence — No misdirection.)
- (136) AIR 1936 Cal 796 (800) : 62 Cal 956 : 37 Cri L Jour 701, *Istahar Khondkar v. Emperor*. (Accused charged under S. 395, Penal Code — Facts proved that dacoity was committed by accused and that they were in possession of stolen goods — No charge framed under S. 412, Penal Code—Judge directing jury that if they thought that there was not sufficient evidence of dacoity and that there was evidence that accused were in possession of stolen property, knowing it to have been stolen, they might find accused guilty under S. 412 although not charged under it—Accused convicted under S. 412, Penal Code—Conviction held bad — Direction to jury both upon S. 412, Penal Code, and S. 114, Illus. (a), Evidence Act, *held* contrary to law.)
- (136) AIR 1936 Pat 46 (47) : 37 Cri L Jour 320, *Hari Mahto v. Emperor*. (Case under S. 366—Father of a girl lodging information to police—He not suspecting till then that daughter taken away for illicit intercourse as girl serving as maid-servant at accused's—Hence suspecting no foul play — Court asking jury during direction to consider this explanation in arriving at conclusion — Court's statement *held* no misdirection.)
- (136) AIR 1936 Rang 421 (425) : 37 Cri L Jour 1050 (FB), *Emperor v. Nga E Pe*. (Stab wound penetrating abdominal wall—No evidence to show that accused had any other than normal intention—Judge while charging jury did not raise a case not raised before him for accused—No misdirection held in charge.)
- (133) AIR 1933 P C 124 (133) : 34 Cri L Jour 322 (P C), *Dwarka Nath Varma v. Emperor*. (Several offences of making false entries in diaries charged separately — Judge directing jury that if any one item was established against accused, they could give a general verdict of guilty — Charge amounts to misdirection.)
- (125) AIR 1925 Cal 1235 (1236) : 26 Cri L Jour 946, *Ahmed Fakir v. Emperor*. (Question of title important in a case — Direction to ignore that question is a misdirection.)
- (134) AIR 1934 Bom 200 (201) : 58 Bom 498 : 35 Cri L Jour 1437, *Bhagchand Jasraj v. Emperor*. (What amounts to possession under S. 273, Penal Code, is a question of fact, but Judge giving jury guidance as to what constitutes possession is not misdirection.)
- (134) AIR 1934 Cal 766 (768) : 36 Cri L Jour 364, *Superintendent, Legal Affairs, Bengal v. Forhad*. (Comment on importance of entries as to age in vaccination and school registers, *held* in the circumstances, not to amount to misdirection.)
- (134) AIR 1934 Cal 651 (653) : 36 Cr. L. J. 70, *Kashim Ali v. Emperor*. (Corroborating confessional statements of accused by referring to statements made by them to the police is misdirection as it is a contravention of S. 162.)
- (134) AIR 1934 Cal 717 (718) : 36 Cri L Jour 135, *Ram Lal Ghose v. Emperor*. (Saying something which conveyed the impression that evidence of witnesses was corroborated by statements made before police amounts to misdirection as it contravenes S. 162.)
- (134) AIR 1934 Cal 610 (614) : 61 Cal 991 : 35 Cri L Jour 1367, *Superintendent, Legal Affairs, Bengal v. Bagirath Mahto*. (Judge entirely misconceiving the legal position — There is misdirection.)

The above instances are only illustrative and not exhaustive. The question in each case will depend upon its own facts and circumstances. The test will be whether the jury were misled and whether they were put on the "wrong track and made to arrive at a wrong conclusion" by reason of what the Judge said.²⁰

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Notes 11-12.

12. Non-direction. — As has been seen in the previous Note, non-direction is not necessarily misdirection in every case so as to vitiate the trial.¹ Where, however, the non-direction is with regard to a point of *vital* importance² especially when it is favourable to the accused,³ and when such non-direction has misled the jury,⁴ the trial will be held to

('34) AIR 1934 Cal 557 (558, 559) : 36 Cri L Jour 619, *Inayet Ali v. Emperor*. (Bringing to notice of jury statement of person not examined as witness but warning jury that failure to examine him may give rise to presumption that, if examined, his evidence would be against the party failing to examine him — No misdirection.)

('35) AIR 1935 All 103 (105) : 36 Cri L Jour 612, *Aziz Khan v. Emperor*. (Judge should emphasize that the burden of proving the guilt of the accused is on the prosecution. But where the whole trend of the charge shows that the Judge warned the jury on this point, the mere fact that the warning was not mentioned in express terms does not amount to misdirection.)

('35) AIR 1935 All 928 (929) : 37 Cri L Jour 173, *Sri Kishan v. Emperor*. (Telling jury that there was no reason to disbelieve certain prosecution witnesses was held not to be misdirection.)

('35) AIR 1935 All 665 (665) : 36 Cri L Jour 826, *Narain v. Emperor*. (Jury likely to be misled as to the point on which they should come to a finding — There is misdirection.)

('88) 1888 Rat 428 (428), *In re Shanker Shobag*. (High Court interfered with acquittals when the lower Court erroneously treated a witness as an accomplice requiring corroboration.)

29. ('28) AIR 1928 Pat 120 (122) : 6 Pat 817 : 29 Cr. L. J. 81, *Bajit Mian v. Emperor*.
Note 12

1. ('40) AIR 1940 Nag 221 (224) : 1940 N L J 264 (267), *Bapurao Maroti v. Emperor*.

('16) AIR 1916 Pat 236 (243) : 17 Cr. L. J. 353 : 1 Pat L Jour 317, *Ekknath Sahay v. Emperor*. (Special attention was not directed to a particular witness' evidence.)

('19) AIR 1919 Cal 142 (144) : 20 Cri L Jour 300 (FB), *Peary v. Emperor*.

('15) AIR 1915 Cal 773 (783) : 16 Cr. L. J. 561 (571) (FB), *Emperor v. Upendranath*.

('93) 1893 Rat 644 (652), *Queen-Empress v. Yesu*.

('17) AIR 1917 Cal 123 (129) : 18 Cri L Jour 385 (391) : 44 Cal 477 (FB), *Fateh Chand v. Emperor*.

2. ('39) AIR 1939 Bom 457 (459) : 1 L R (1939) Bom 648 : 41 Cri L Jour 176, *Emperor v. Jhina Soma*.

('37) AIR 1937 Pat 440 (444) : 16 Pat 413 : 38 Cri L Jour 919, *Rameshwar Singh v. Emperor*. (Omission to direct jury on one of vital ingredients of S. 366, Penal Code, held amounted to misdirection amounting to miscarriage of justice.)

('25) AIR 1925 Cal 887 (889) : 26 Cri L Jour 606, *Abdul Sheikh v. Emperor*. (The fact that none of the accused was recognised was not mentioned to the jury.)

('26) AIR 1926 Cal 439 (441) : 26 Cri L Jour 567, *Chhakari v. Emperor*.

('10) 11 Cr. L. J. 13 (14, 15) : 3 Sind L R 102 : 4 I. C. 597, *Imperator v. Minhwasayo*.

3. ('03) 27 Bom 626 (635) : 5 Bom L R 599, *Emperor v. Vaman Shivram*.

('03) 27 Bom 644 (651) : 4 Bom L R 683, *Emperor v. Malgowda*.

('26) 28 Cri L Jour 19 (22) : 99 Ind Cas 51 (Cal), *Mamat Ali v. Emperor*.

('29) 1929 Mad W N 946 (950), *Doraiswamy Pillay v. Emperor*. (Motive for prosecution.)

4. ('28) AIR 1928 Pat 326 (334) : 29 Cr. L. J. 325, *Mt. Champa Pasin v. Emperor*. (A non-direction is not a misdirection unless the jury has been misled or such non-direction is of primary importance.)

('27) AIR 1927 Nag 117 (118) : 28 Cr. L. J. 177, *Sonia Koshli v. Emperor*.

[Sec ('40) AIR 1940 Cal 561 (564) : 71 Cal L J 597 (601, 602), *Upendra Nath v. Emperor*. (Telling jury that even if they were not satisfied that the deceased was murdered, they could still find the accused guilty under S. 364, Penal Code, was, under the circumstances of the case, held to misled jury on a most vital part of the case.)

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Note 12

be illegal. A mere failure on the part of the Judge to point out to the jury all the matters which may be considered by them in evidence, does not necessarily amount to misdirection.⁵ If a case is substantially put to the jury, a mere omission to refer to this or that circumstance or suggestion will not make such omission a misdirection.⁶ The test, as to whether an omission in the summing up of the Judge to the jury amounts to a misdirection or not, is whether the omission, in the opinion of the appellate or revisional Court, is of such importance as to have led to an erroneous verdict by the jury.⁷ A grave omission by the Judge to direct the jury on a vital point cannot be made good by the accused's counsel calling attention to it at the termination of the summing up.⁸

The following are some of the instances of non-direction which may amount to misdirection :

(1) Failure to explain the law arising in the case.⁹

- (26) AIR 1926 Bom 238 (240) : 27 Cr. L. J. 481, *Kutubuddin Khan v. Emperor*. (Serious omissions in a charge amount to misdirection.)]
- 5. ('22) AIR 1922 Pat 321 (321) : 23 Cr. L. J. 47, *Emperor v. Bhim Lal Chamar*. (Failure by the Judge to point out what the prosecution considered to be evidence of motive.)
- 6. ('24) AIR 1924 Cal 257 (301) : 25 Cri L Jour 817 (FB), *Emperor v. Barendra Kumar Ghose*.
- 7. ('32) AIR 1932 Oudh 23 (25) : 7 Luck 390 : 33 Cr. L. J. 167, *Sita Ram v. Emperor*. (Failure by the Judge to point out that there was no corroboration of approver's evidence as against particular accused — Misdirection.)
- 8. ('29) AIR 1929 Cal 617 (626) : 30 Cr.L.J. 993 (SB), *Padam Prasad v. Emperor*. (Omission to point out that certain evidence which showed that the accused was of depraved character was irrelevant and inadmissible.)
- 9. ('40) AIR 1940 Pat 417 (418) : 41 Cri L Jour 738, *Judagi Gope v. Emperor*. (Principles of S. 34 and S. 149, Penal Code, not explained.)
- (40) AIR 1940 Lah 87 (88) : 41 Cri L Jour 482, *A. M. Mathews v. Emperor*. (Cheating—Failure of Judge to explain to jury necessary ingredients which constitute cheating in law amounts to misdirection.)
- (40) 1940 Mad W N 97 (102), *Patteyya v. Emperor*. (Failure to point out difference between vandalism and dacoity or theft in case of dacoity and theft.)
- (39) AIR 1939 Bom 457 (460) : ILR (1939) Bom 648 : 41 Cr. L. J. 176, *Emperor v. Jhina Soma*.
- (37) AIR 1937 Nag 110 (112) : ILR (1937) Nag 123 : 38 Cri L Jour 589, *Fateh Mahomed v. Emperor*. (Case under S. 304, Penal Code — Judge not giving an explanation of what constitutes an offence under the section but only explaining about private defence — Misdirection.)
- (37) AIR 1937 Pat 440 (444) : 16 Pat 413 : 38 Cri L Jour 919, *Rameshwar Singh v. Emperor*. (Accused charged with kidnapping and abduction — Jury finding accused not guilty of kidnapping and thus finding girl over sixteen years—Story of prosecution that girl was taken away for marriage without her consent — Not a word in charge to jury by Court if accused has such intention—Non-direction to jury by Court on such vital ingredient of S. 366, Penal Code, held amounted to serious misdirection and occasioned miscarriage of justice.)
- (27) AIR 1927 Cal 257 (258, 259) : 53 Cal 980 : 28 Cri L Jour 273, *Aseruddin v. Emperor*. (The law with regard to the right of private defence as bearing on the facts set up not explained.)
- (30) AIR 1930 All 24 (25, 26) : 31 Cri L Jour 33, *Emperor v. Mahommed Israil*. (Necessary ingredients of offences under Ss. 380 and 467, Penal Code, not explained.)
- (13) 14 Cri L Jour 556 (558) : 21 Ind Cas 156 (Cal), *Emperor v. Neamatullah*. (Recent possession of stolen goods.)
- (31) AIR 1931 Cal 184 (186, 187, 188) : 58 Cal 1051 : 32 Cr.L.J. 836 (F B), *Susen Behari Roy v. Emperor*. (S. 477, Penal Code—'Secreting' meaning explained by the High Court.)
- (24) AIR 1924 Cal 1031 (1033) : 52 Cal 112 : 26 Cri L Jour 11, *Umadasi Dasi v. Emperor*. (In this case jury were not properly directed as to the application of S. 94, Penal Code.)

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- (2) Omission of the Judge to direct the jury in cases where several accused are tried together, to consider the case of each accused individually.¹⁰ "It is desirable and indeed obligatory that a Judge in summing up to the jury should divide up the evidence as it affects each individual accused."¹¹
- (3) Omission to remind the jury that the statement attributed to individual accused is not evidence against the other accused in the event of the jury finding that individual not guilty.^{11a}
- (4) Failure to tell the jury that the accused should be acquitted if they had any reasonable doubt about his guilt.¹² But see the

- (20) AIR 1920 Cal 834 (834): 22 Cr.L.J. 448, *Raja Khan v. Emperor*. (Omission to inform the jury that there could be no conviction for abetment of offence when the offence itself was not proved.)
- (29) 1929 Mad W N 577 (578), *Mayandi Tevan v. Emperor*.
- (21) AIR 1921 Cal 64 (65): 23 Cri L Jour 344, *Ainuddi Chowkidar v. Emperor*. (Explanation to S. 299, Penal Code, was not fully explained.)
10. (40) AIR 1940 Pat 417 (419): 41 Cri L Jour 738, *Judagi Gope v. Emperor*.
- (40) 1940 Mad W N 97 (100), *Pattayya v. Emperor*.
- (39) AIR 1939 Sind 209 (214): 41 Cr. L. J. 28: I L R (1940) Kar 249, *Shewaram Jetthanand v. Emperor*.
- (37) 1937 Mad W N 737 (738), *Nachappa Goundan v. Emperor*. (If there is no substantial difference between the case as against the different accused it is the duty of the Judge to say so.)
- (26) AIR 1926 Cal 139 (147): 53 Cal 372: 27 Cri L Jour 266, *Khijiruddin v. Emperor*. (Accused's defences were different in this case.)
- (33) AIR 1933 Cal 5 (6): 34 Cr.L.J. 622, *Miajan Biswas v. Emperor*. (Evidence against each accused was different.)
- (33) AIR 1933 Cal 718 (720): 60 Cal 1457: 35 Cr.L.J. 307, *Shakebali v. Emperor*.
- (17) AIR 1917 Mad 335 (336): 17 Cri L Jour 19 (20), *In re Sangam*. (Case where several accused were concerned and question was purely one of identification.)
- (27) AIR 1927 Mad 56 (58): 27 Cri L Jour 1164, *Thangaya Nadar v. Emperor*.
- (34) AIR 1934 Nag 94 (95): 35 Cr.L.J. 957: 30 N L R 262, *Abdul Aziz v. Emperor*.
- (28) AIR 1928 Pat 326 (333,335): 29 Cr.L.J. 325, *Mt. Champa Pasin v. Emperor*.
- (10) 11 Cri L Jour 15 (16): 4 Ind Cas 608: 3 Sind L R 125, *Emperor v. Murid*.
- (12) 13 Cr.L.J. 750 (751): 17 Ind Cas 62: 6 Sind L R 116, *Emperor v. Chagan Rajaram*.
- (99) 1 Bom L R 784 (785), *Queen-Empress v. Babya Bhimappa*.
- (33) AIR 1933 All 128 (130): 34 Cr. L. J. 441: 55 All 68, *Dakhani v. Emperor*. [See (26) AIR 1926 Cal 728 (730): 27 Cr.L.J.398, *Hari Charan Das v. Emperor*.]
11. (34) AIR 1934 Cal 105 (109): 35 Cr. L. J. 554: 61 Cal 6, *Khoda Bux v. Emperor*. [See (40) AIR 1940 Pat 417 (419): 41 Cri L Jour 738, *Judagi Gope v. Emperor*.]
- (38) AIR 1938 Pat 579 (583): 40 Cr. L. J. 147, *Yusuf Mian v. Emperor*.
- (36) 1936 O W N 201 (203), *Wajid Husain v. Emperor*.
- (38) 42 Cal W N 870 (872), *Rezaks Fakir v. Emperor*. (Charges of dacoity and of conspiracy to commit dacoity against several accused—Omission by Judge to deal with evidence against each accused on charge of dacoity.)
- 11a. (36) AIR 1936 Cal 73 (79): 63 Cal 929: 37 Cri L Jour 394, *Benoyendra Chandra v. Emperor*.
12. (36) 37 Cri L Jour 17 (18): 158 I. C. 172 (Lah). *Harold H. Waston v. Emperor*. (Judge dealing with the question of reasonable doubt when dealing with the law in the case—No misdirection.)
- (36) 1936 O W N 201 (203), *Wajid Husain v. Emperor*.
- (33) AIR 1933 P C 218 (221): 34 Cri L Jour 886: 2 All W R 610 (614,615): 1933 A C 699: 102 L J P C 148: 149 L T 574 (P C), *B. R. Lawrence v. Emperor*.
- (06) 4 Cri L Jour 502 (502, 503): 1 M L T 350, *ParaThandan v. Emperor*. (Evidence against accused weak, vague and inconclusive.)
- (98) 2 Weir 500 (500, 501), *In re Sugalgadu*. (The jury did entertain doubt in this case.)
- (00) 5 Cal 768 (769): 6 Cal L R 219, *Roshan Doosadh v. Empress*.
- (81) 1881 Rat 172 (172), *Queen-Empress v. Balu*. [See also (40) 44 Cal W N 840 (843, 844), *Mujjaffar Sheikh v. Emperor*.]

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undermentioned cases.¹³

- (5) Omission to state that even if the plea of *alibi* set up by the accused is not established, there is no presumption that the accused is guilty.¹⁴
- (6) The failure to inform the jury that the mere fact that the accused had absconded for some time will not give rise to a presumption of his being guilty.¹⁵
- (7) Omission to direct that the jury should reject irrelevant evidence,¹⁶ that they should not allow the result of prior proceedings to affect their minds¹⁷ or that they should not consider the conduct of one accused in judging the case of the other.¹⁸
- (8) Omission to point out the absence of evidence material to the case for the prosecution.¹⁹
- (9) Omission to point out the discrepancies between the evidence and the first information report²⁰ or the discrepancies and contradictions in the evidence.²¹
- (10) Failure to state that the evidence of a hostile witness should be viewed with caution or should be rejected.²²

13. ('25) AIR 1925 Nag 154 (155) : 27 Cri L Jour 217, *Rahim Beg v. Emperor*.

('27) AIR 1927 Nag 117 (119) : 28 Cri L Jour 177, *Sonia Koshti v. Emperor*.

('30) AIR 1930 All 28 (29) : 52 All 207 : 30 Cr.L.J. 1146, *Jagmohan v. Emperor*. (Prosecution evidence overwhelming and the jury not likely to have doubt.)

14. ('21) AIR 1921 Cal 252 (254) : 23 Cr. L. J. 244, *Emperor v. Taribullah Sheikh*.

15. ('10) 11 Cr. L. J. 557 (558) : 8 Ind Cas 52 (Cal), *Asfar Sheikh v. Emperor*. [See ('38) AIR 1938 Mad 464 (464) : 39 Cr.L.J. 580, *In re Kalli Koravan*. (Judge pointing out to jury that the absconding of the accused was a point against him when it is doubtful whether he was not absconding even before the offence was committed — This amounts to misdirection.)]

16. ('36) AIR 1936 Cal 73 (79) : 37 Cri L Jour 394 : 63 Cal 929, *Benoyendra Chandra v. Emperor*.

('29) AIR 1929 Cal 617 (625, 626) : 30 Cr. L. J. 993 (SB), *Padam Prashad v. Emperor*.

17. ('20) AIR 1920 Cal 617 (619) : 21 Cr. L. J. 554, *Mir Mouze Ali v. Emperor*.

18. ('03) 27 Bom 626 (634) : 5 Bom L R 599, *Emperor v. Vaman Shivram*.

19. ('75) 23 Suth W R Cr 21 (21), *Queen v. Gunga Govind*.

[See ('36) AIR 1936 Cal 73 (79) : 37 Cri L Jour 394 : 63 Cal 929, *Benoyendra Chandra v. Emperor*. (Judge repeatedly stating the case for the prosecution without clearly pointing out to the jury those parts of it which were not supported by evidence.)]

20. ('26) AIR 1926 All 429 (430, 431) : 27 Cri L Jour 785, *Dhiraji v. Akasi*.

('07) 5 Cri L Jour 424 (426) : 34 Cal 325, *Dasarath Mandal v. Emperor*. (Judge should have called attention of the jury to the fact that witnesses examined by the prosecution were not mentioned in the first information report.)

('85) 11 Cal 10 (12, 13), *Leiu Tu v. Queen-Empress*.

('25) AIR 1925 Cal 729 (733) : 26 Cri L Jour 1009, *Jessarai v. Emperor*.

21. ('21) AIR 1921 Cal 257 (258) : 22 Cr. L. J. 475, *Tenaram Mondal v. Emperor*.

('40) 44 Cal W N 840 (845), *Mujjaffar Sheikh v. Emperor*.

('26) AIR 1926 Cal 139 (144) : 53 Cal 372 : 27 Cr.L.J. 266, *Khijiruddin v. Emperor*.

('29) AIR 1929 Cal 170 (171) : 30 Cri L Jour 912, *Dwarka Das v. Emperor*.

('99) 2 Weir 501 (502, 503), *In re Vasanthugadu Adikari*.

[See however ('36) AIR 1936 Nag 103 (105) : 31 N L R (Sup) 215 : 37 Cr.L.J. 607, *James Dowdall v. Emperor*. (It is impracticable to set forth evidence to the minutest detail.)]

22. ('32) AIR 1932 Cal 293 (294) : 59 Cal 136 : 33 Cri L Jour 441, *Trailokyanath v. Emperor*. (In this case as the jury were warned it was held that there was no misdirection.)

('30) AIR 1930 Cal 276 (278) : 57 Cal 1266 : 31 Cri L Jour 1207, *Panchanan Gogai v. Emperor*.

- (11) Omission to state that the evidence of a witness who deposes without taking the oath should be relied upon with caution.²³
 - (12) Omission to tell the jury that certain evidence is admissible only in corroboration, and leaving them to imagine that it is substantive evidence.²⁴
 - (13) Omission to place before the jury the inordinate delay in preferring the complaint.²⁵
- See also the undermentioned cases.²⁶

13. Effect of misdirection. — Under S.423, sub-s.(2), a verdict of the jury can be altered or reversed only on proof of misdirection by the Judge or misunderstanding of the law by the jury. But it is

(‘31) AIR 1931 Cal 401 (407, 408): 58 Cal 1404: 32 Cri L Jour 768 (FB), *Profulla Kumar Sarkar v. Emperor*. (It is for the jury to rely or not on the evidence of hostile witness.)

[See also (‘38) AIR 1938 Cal 364 (365): 39 Cri L Jour 625, *Ram Gobind Ghose v. Emperor*. (Omission to lay stress on the fact that some of the most material witnesses were declared by the prosecution to be hostile.)]

[But see (‘32) AIR 1932 Cal 523 (523): 33 Cri L Jour 604, *Wahid Ali v. Emperor*. (Asking jury to reject the evidence of hostile witness—Misdirection.)]

23. (‘14) AIR 1914 Cal 276 (279): 41 Cal 406: 14 Cri L Jour 465, *Nafar Sheikh v. Emperor*.

24. (‘36) AIR 1936 Cal 186 (188): 37 Cri L Jour 678, *Nabi Khan v. Emperor*.

25. (‘31) AIR 1931 Cal 10 (11): 32 Cr. L. J. 186, *Ram Charitar Dubey v. Emperor*. (Charge under S. 467, Penal Code—Delay of 3 years.)

26. (‘40) AIR 1940 Nag 221 (224), *Bapurao v. Emperor*. (Failure to refer to every one of the suggestions made by defence is not non-direction.)

(‘40) AIR 1940 Pat 417 (418): 41 Cri L Jour 738, *Judagi Gope v. Emperor*. (Deceased’s death caused by effect of all injuries inflicted by several accused combined — Common object specified in charges under Ss. 147 and 148, Penal Code, was not to kill deceased but to assault him — Charge under S. 302 framed and explained to jury—No alternative charges framed under Ss. 304, 326 or 325, nor principles of S. 34 or S. 149 explained — All accused convicted under S. 302 — Conviction is illegal—Whole procedure amounts to misdirection and non-direction.)

(‘40) 1940 Mad W N 97 (100-102), *Patteyya v. Emperor*. (Failure to lay sufficient stress on fact that all prosecution witnesses were interested — Failure to warn jury against acting on uncorroborated testimony of interested witnesses—Failure to tell jury of non-mention of certain facts in the first report of the occurrence and in charge-sheet—These are all defects in charge which vitiate conviction.)

(‘39) AIR 1939 Cal 497 (499): 40 Cri L Jour 877, *Moseladdi v. Emperor*. (Failure of Judge to point out to the jury that the deceased had not been cross-examined cannot have much effect as the jury knew perfectly well that the deceased had not been cross-examined and after they had spent several days in hearing the case they knew what cross-examination is and the purpose it serves.)

(‘39) AIR 1939 Pat 536 (538): 18 Pat 698: 41 Cri L Jour 1, *Sachinder Rai v. Emperor*. (Failure of Judge in cases of sexual offences to warn jury of danger of convicting accused on uncorroborated testimony of girl amounts to non-direction.)

(‘34) AIR 1934 Oudh 354 (359): 35 Cri L Jour 1066: 10 Luck 119, *Lal Behari Singh v. Emperor*. (Omission to explain important point of law, viz., point as to applicability of S. 149, Penal Code, held to amount to misdirection.)

(‘34) AIR 1934 Pat 537 (538): 36 Cri L Jour 28, *Kuldip Singh v. Emperor*. (Defective nature of test identification—Failure to charge jury with reference to defect is misdirection.)

(‘34) AIR 1934 Cal 610 (614): 61 Cal 991: 35 Cri L Jour 1367, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhagirath Mahto*. (Omission to consider if the right of private defence existed at the particular moment of the alleged attack.)

(‘34) AIR 1934 Cal 622 (623): 35 Cri L Jour 1216, *Id. Samiruddin v. Emperor*. (Failure to comment upon important aspect of case.)

(‘30) AIR 1930 Cal 754 (754): 32 Cr. L. J. 324, *Emperor v. Sashi Kanta*. (Dying declaration as foundation for prosecution case—Omission to caution as to weight and efficacy of such dying declaration—Retrial ordered.)

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not every misdirection and non-direction that will be a ground for reversing the verdict of the jury. By section 537, clause (d), when the misdirection does not occasion a failure of justice, the verdict cannot be altered. So, in appeals against the verdict of a jury it must be shown : (a) that there was misdirection and (b) that such misdirection resulted in a miscarriage or a failure of justice.¹ The same principle

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1. ('39) AIR 1939 Bom 457 (459) : I L R (1939) Bom 648 : 41 Cri L Jour 176, *Emperor v. Jhina Soma*.
- ('36) AIR 1936 Pat 46 (47) : 37 Cri L Jour 320, *Hari Mahto v. Emperor*.
- ('27) AIR 1927 Nag 117 (118) : 28 Cr. L. J. 177, *Sonia Koshti v. Emperor*. (There is miscarriage of justice when omission or misstatement is such that the jury may probably be misled by it.)
- ('28) AIR 1928 Pat 326 (333) : 29 Cri L Jour 325, *Mt. Champa Pasin v. Emperor*.
- ('33) AIR 1933 P C 218 (221) : 34 Cri L Jour 886 : 1933 A C 699 : 102 L J P C 148 : 149 L T 574 (PC), *Basil Ranger Lawrence v. Emperor*. (Jury not directed as to onus of proof — Held there was substantial miscarriage of justice.)
- ('29) 1929 Mad W N 946 (952), *Doraiswamy Pillay v. Emperor*.
- ('18) AIR 1918 Cal 140 (141, 142) : 19 Cri L Jour 649, *Emperor v. Asimoddi*.
- ('66) 5 Suth W R Cr 80 (92) : Beng L R Sup Vol 459, *Queen v. Elahi Bax*.
- ('13) 14 Cri L Jour 638 (638) : 21 Ind Cas 686 (All), *Hooper v. Emperor*.
- ('32) AIR 1932 Cal 295 (296) : 33 Cri L Jour 477, *Golam Asphia v. Emperor*.
- ('33) 1933 Mad W N 320 (323), *Arumuga Goundan v. Emperor*.
- ('67) 7 Suth W R Cr 69 (70), *Queen v. Rammoni Sein*.
- ('01) 5 Cr. L. J. 168 (170) : 9 Bom L R 153, *Emperor v. Mahamed Khan*. (Death caused during course of riot—Judge directing the jury that if riot was established rioters were guilty of murder—Retrial ordered.)
- ('68) 5 Bom H C R Cr 85 (91, 92, 94), *Reg v. Fattechand Vastachand*. (Verdict of jury can be set aside if accused is prejudiced by defective summing up.)
- ('08) 8 Cri L Jour 361 (372) : 1 Sind L R 104, *Imperator v. Vilaitali Shah*.
- ('27) AIR 1927 Pat 370 (375) : 7 Pat 15 : 28 Cr. L. J. 692, *Ramchariter Singh v. Emperor*. (No misdirection — Verdict of jury could not therefore be reversed.)
- ('23) AIR 1923 Pat 103 (103, 104) : 23 Cr. L. J. 91, *Sumeshwar Jha v. Emperor*. (There was probability in this case of the jury's mind being influenced by inadmissible evidence—Conviction was set aside.)
- ('10) 8 Ind Cas 719 (719) : 11 Cr. L. J. 701 (Mad), *Sivasami Pillai v. Emperor*. (There was misdirection in this case which did not result in failure of justice — Conviction maintained.)
- ('17) AIR 1917 Mad 770 (771) : 18 Cri L Jour 15 (16), *In re Anipe Palladu*.
- ('16) AIR 1916 Mad 1224 (1225) : 16 Cr. L. J. 618 (618), *In re Ohinnu*. (Charge carelessly worded but jury not misled—Verdict not reversed.)
- ('09) 10 Cr. L. J. 11(12) : 2 Ind Cas 434 (Mad), *Thoolipatti Rama Goundan v. Emperor*.
- ('84) 2 Weir 488 (489), *In re Government Pleader*.
- ('03) 26 Mad 1 (8, 9, 14, 15) : 2 Weir 521, *Emperor v. Edward William Smither*.
- ('70-71) 6 Mad H C R 120 (121) : 1 Weir 452, *In re Shriram Venkatasami*. (Summing up defective — Accused not prejudiced — Conviction was maintained.)
- ('28) AIR 1928 Cal 769 (770, 771) : 30 Cri L Jour 825, *Anbar Ali v. Emperor*. (Judge's charge open to criticism — The verdict of jury ought not to be interfered with except where charge taken as a whole cannot be supported.)
- ('27) AIR 1927 Cal 680 (682) : 54 Cal 539 : 28 Cr. L. J. 689, *Ayub Mandal v. Emperor*.
- ('27) AIR 1927 Cal 398 (401) : 28 Cr. L. J. 485, *Azimuddi v. Emperor*.
- ('22) AIR 1922 Cal 106 (106, 107) : 24 Cr. L. J. 143, *Superintendent and Remembrancer of Legal Affairs v. Shyam Sunder Bhumi*. (Jury's verdict was not due to misdirection—Verdict was maintained.)
- ('09) 10 Cr. L. J. 498 (499) : 4 I. C. 120 (Cal), *Kesahab Pal v. Emperor*. (Misdirection not resulting in failure of justice—Retrial not ordered.)
- ('95) 22 Cal 377 (383), *Krishna Dhan Mandal v. Queen-Empress*.
- ('94) 21 Cal 955 (977, 978, 979), *Wafadar Khan v. Empress*.
- ('75) 24 Suth W R Cr 77 (78, 79), *Queen v. Chunder Koomar Muzoomdar*. (Misdirection prejudicing the accused—Retrial ordered.)
- ('73) 19 Suth W R Cr 71 (72) : 10 Beng L R App 36, *Queen v. Rajcoomar Bose*.
- ('72) 18 Suth W R Cr 66 (66, 67), *Queen v. Muthoora Singh*.
- ('29) AIR 1929 Bom 296 (301, 305) : 53 Bom 479 : 31 Cri L Jour 65, *Emperor v. C. E. Ring*.

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will apply with regard to a non-direction.² What is miscarriage of justice should be judged from the facts and circumstances of each case. In the undermentioned Allahabad cases³ the Court remarked that a "miscarriage of justice through misdirection means that there must be a reasonable ground for apprehending that the misdirection may have affected the jury's verdict." It has not been interpreted to mean that the appellate Court must find before setting aside a verdict that the accused was entitled to an acquittal on the evidence. If this were so, there is no object in ordering a new trial. It means that there must be a reasonable ground for apprehending that, but for the misdirection, the jury may have arrived at a different verdict,⁴ or putting it in another way, "whether in spite of the misdirection the conviction and verdict are not justified in law, as they stand," and if they are justified there is no failure of justice.⁵ Where the appellate Court finds that there is misdirection, it can under S. 423 either acquit the accused setting aside the verdict, or reduce the sentence, or order a new trial with a fresh jury.⁶ In trials by the High Court Sessions, by virtue of

(1900) 2 Bom L R 1129 (1130, 1131) *Queen-Empress v. Shettya*.

(1900) 2 Bom L R 751 (752), *Queen-Empress v. Sangaya*. (All the evidence bearing on the charge of murder not recorded in view of admission made by the pleader appointed by Court to defend the accused—Other sufficient evidence to support verdict of murder—Conviction not set aside.)

[See ('36) AIR 1936 Bom 52 (53, 55) : 60 Bom 599 : 37 Cr. L. J. 366 (FB), *Puttan Hasan v. Emperor*. (Review under Cl. 26, Letters Patent (Bombay).)]

('36) AIR 1936 Cal 227 (229) : 37 Cri L Jour 676 : 63 Cal 1089, *Bhakta Bhusan v. Emperor*. (Judge directing jury to consider whether certain confession is admissible commits error of law—But failure of justice is necessary to vitiate trial.)]

See also S. 423 Note 40.

2. ('39) AIR 1939 Bom 457 (459) : I L R (1939) Bom 648 : 41 Cri L Jour 176, *Emperor v. Jhina Soma*. (*Held*, omission to read and explain the relevant sections was not such as could be said to have occasioned a failure of justice.)

('15) AIR 1915 Bom 249 (251) : 40 Bom 220 : 17 Cr. L. J. 133, *Fakira v. Emperor*.

('30) AIR 1930 All 28 (28, 29) : 52 All 207 : 37 Cr. L. J. 1146, *Jagmohan v. Emperor*. (Evidence equally balanced—Failure to direct the jury to give benefit of reasonable doubt to the accused was held in this case to amount to miscarriage of justice.)

('68) 10 Suth W R Cr 7 (8, 9), *Queen v. Ramgopal Dhur*.

3. ('26) AIR 1926 All 429 (431) : 27 Cri L Jour 785, *Dhiraji v. Akasi*.

('30) AIR 1930 All 28 (29) : 52 All 207 : 30 Cr. L. J. 1146, *Jagmohan v. Emperor*.

4. ('26) AIR 1926 All 429 (431) : 27 Cri L Jour 785, *Dhiraji v. Akasi*.

('34) AIR 1934 Cal 847 (849) : 62 Cal 337 : 36 Cri L Jour 358, *Ilu v. Emperor*.

('33) AIR 1933 P C 218 (221) : 34 Cr. L. J. 886 : 1933 A C 699 : 102 L J P C 158 : 149 L T 574 (PC), *Basil Ranger Lawrence v. Emperor*. (Misdirection as to onus of proof—Unless it can be predicted that properly directed jury must have returned the same verdict, a substantial miscarriage of justice must be deemed to be established.)

[See ('33) AIR 1933 P C 124 (133) : 34 Cr. L. J. 322 (P C), *Dwarkanath v. Emperor*.]

5. ('17) AIR 1917 All 173 (175) : 18 Cr. L. J. 491 : 39 All 348, *Ikramuddin v. Emperor*.

6. ('98) 25 Cal 711 (716) : 2 C W N 369, *Taju v. Empress*. (There is no law that, when the verdict of jury is set aside the Court must necessarily direct a new trial.)

('40) AIR 1940 Lah 87 (90) : 41 Cr. L. J. 482, *A. M. Mathews v. Emperor*. (High Court can set aside verdict on one charge and uphold conviction on rest of charges and need not send case for retrial.)

('39) AIR 1939 Sind 209 (216, 217) : 41 Cri L Jour 28 : I L R (1940) Kar 249, *Shevaram Jethanand v. Emperor*.

('38) AIR 1938 Cal 51 (59) : 39 Cri L Jour 161 : I L R (1938) 1 Cal 290, *Goloke Behari v. Emperor*. (Retrial not ordered but accused acquitted especially in view of the fact that accused had been in detention for nearly two years and through no fault of their own had to undergo two trials.)

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the provisions in Letters Patent of the High Courts, the verdict may be reviewed.⁷ As to the powers of the High Court in reviewing the decision, see the undermentioned case.⁸

An appeal would not lie to the Privy Council merely on the ground of misdirection.⁹ See also the undermentioned cases¹⁰ where the principles on which the Privy Council would exercise their jurisdiction in criminal cases have been laid down.

- (‘30) AIR 1930 Cal 370 (378, 379) : 58 Cal 96 : 32 Cri L Jour 10, *Govt. of Bengal v. Santiram Mondal*. (In this case the High Court reversed the verdict of acquittal and itself convicted the accused.)
- (‘22) AIR 1922 Cal 505(506):24 Cr.L.J.76, *Abdul Gohur Sikdar v. Emperor*. (Conviction was set aside leaving the question of fresh trial to the authorities.)
- (‘33) AIR 1933 Bom 153 (155, 156) : 35 Cri L Jour 747, *Ramachandra v. Emperor*.
- (‘25) AIR 1925 Sind 116 (123, 126) : 25 Cri L Jour 761, *Topandas v. Emperor*. (Sentences reduced.)
- (‘18) AIR 1918 Low Bur 104 (105, 107, 108) : 18 Cri L Jour 929 (930, 933) : 9 Low Bur Rul 60 (FB), *Thein Myin v. Emperor*. (There was good prima facie case to go to the jury — Retrial ordered.)
- (‘09) 9 Cr. L. J. 567 (567) : 32 Mad 179 : 2 I. C. 307, *Public Prosecutor v. Bomigiri Pottigadu*. (Acquittal.)
- (‘29) AIR 1929 Cal 617 (622) : 30 Cr. L. J. 993 (S B), *Padam v. Emperor*. (Where jury could not have convicted but for the misdirection, acquittal was ordered.)
- (1900) 4 Cal W N 576 (581, 582), *Sadhu Sheikh v. Empress*. (Retrial ordered.)
- (‘02) 29 Cal 782 (791) : 6 C W N 553, *Jamiruddi Massali v. Emperor*. (Acquittal.)
- (‘32) AIR 1932 Oudh 23 (25) : 7 Luck 390 : 33 Cri L Jour 167, *Sita Ram v. Emperor*.
- (‘26) AIR 1926 Nag 53 (54, 55) : 26 Cri L Jour 1090, *Ramprasad v. Emperor*. (No evidence on record to warrant a conviction—Order for retrial will not be justified.)
- [See (‘37) AIR 1937 Pat 263 (274) : 38 Cr. L. J. 673 : 15 Pat 817, *Samarendra Kumar v. Emperor*. (A retrial should not be ordered, unless it can be shown that matters which counsel would have placed have not been placed before the jury or that the charge of the Judge is defective and erroneous in material particulars.)]
- See also S. 423 Note 40.
7. (‘36) AIR 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (F B), *Puttan Hasan v. Emperor*. (The failure of the Judge to comply with this section is an error of law which brings the case within Cl. 26, Letters Patent, Bombay.)
- (‘90) 17 Cal 642 (668, 669), *Queen-Empress v. O’Hara*.
8. (‘36) AIR 1936 Bom 52 (53, 54) : 60 Bom 599 : 37 Cr. L. J. 366 (F B), *Puttan Hassan v. Emperor*.
9. (‘36) AIR 1936 P C 160 (168) : 37 Cr. L. J. 679 : 1936 A C 445 : 105 L J P C 84 : 155 L T 1 (PC), *D. R. Renouf v. Attorney-General for Jersey*. (1914 A C 599, Followed.)
- (‘36) AIR 1936 P C 169 (170) : 37 Cri L Jour 628 : 1936 A C 338 : 105 L J P C 79 : 154 L T 620 (PC), *Attygalle v. King*. (Misdirection as such will not suffice for granting of special leave to appeal. 1914 A C 599, Followed.)
- (‘93) 15 All 310 (315) : 20 I A 90 : 6 Sar 344 (PC), *In the matter of Maccreea*.
- (‘14) AIR 1914 P C 116 (126, 127) : 41 Cal 1023 : 41 I A 149 : 8 L B R 16 : 15 Cri L Jour 309 (P C), *Channing Arnold v. Emperor*.
- [See also (‘39) AIR 1939 Cal 682 (684, 688) : 41 Cri L Jour 59 : I L R (1939) 1 Cal 187, *C. B. Plucknett v. Emperor*. (Unless the High Court is satisfied that the misdirections complained of are material or that they have led to any miscarriage of justice, leave to appeal to the Privy Council will not be granted.)]
10. (‘39) AIR 1939 Cal 682 (684) : 41 Cr. L. J. 59 : I L R (1939) 1 Cal 187, *C. B. Plucknett v. Emperor*.
- (‘37) AIR 1937 P C 179 (180) : 38 Cr. L. J. 573 : 64 I A 134 : I L R (1937) Lah 371 : 31 S L R 300 (PC), *Mangal v. Emperor*. (It is no part of the duty of the Board of their Lordships of the Privy Council to sit in criminal cases as a Court of criminal appeal but only to correct what they regard as a miscarriage of justice.)
- (‘36) AIR 1936 P C 160 (168) : 37 Cri L Jour 679 : 1936 A C 445 : 105 L J P C 84 : 155 L T 1 (PC), *Dennis Romain Renouf v. Attorney General of Jersey*.
- (‘36) AIR 1936 P C 169 (170) : 37 Cr. L. J. 628 : 1936 A C 338 : 105 L J P C 79 : 154 L T 620 (PC), *Attygalle v. King*. (There must be something which in the particular case deprives the accused of the substance of fair trial and protection of law, or which in general tends to divest the due and orderly administration of law into a new course which may be drawn into an evil precedent in future.)

14. Duty of appellate Court in reviewing a charge. — The appellate Court in reviewing the charge to a jury should judge it *as a whole*. It is sufficient to see whether the tendency of a charge taken as a whole has given a correct or incorrect direction to the mind of the jury.¹ In a Full Bench case² of the Bombay High Court, Beaumont, C. J., observed as follows :

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"It is, in my judgment, clearly open to the Court to consider, not so much what effect the misdirection has upon the minds of this Court sitting in place of a jury, but what the effect of the misdirection was or may have been upon the minds of the jury which tried the case; and in so doing we must, I think, assume that the jury was a reasonably competent jury, though we must remember that a jury consists of laymen, and that a misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge."

15. Record of charge to jury. — See Note 15 to S. 367.

16. Effect of a juror not understanding the charge. — Where one of the jurors is unacquainted with the language in which the charge is made and so is unable to follow it, it has been held by the Privy Council that the whole trial is vitiated.¹ See also S. 278 Note 3.

17. Effect of a bad charge. — Where a charge is inadequate and insufficient and it does not assist the jury to exercise their function as jurors or place before them clearly the issues to be decided, the whole trial will be bad.¹ But the question in each case would be

(125) AIR 1925 P C 305 (306) (P C), *Shafi v. Emperor*. (Privy Council will not interfere unless there is violation of principles of natural justice or legal forms.)
(13) 15 Cr. L. J. 144 (144): 41 Cal 568: 40 IA 241: 22 I C 496 (P C), *Clifford v. Emperor*.
See also S. 404 Note 2 and Letters Patent (Cal) Cl. 41 Note 3.

Note 14

1. (169) 12 Suth W R Cr 80 (80) : 4 Beng L R App 50, *Queen v. Gogalao*.
(140) AIR 1940 Oudh 337 (340) : 41 Cri L Jour 545, *Jagadish Dutt v. Emperor*.
(139) AIR 1939 Cal 682 (686) : 41 Cri L Jour 59 : I L R (1939) 1 Cal 187, *C. B. Plucknett v. Emperor*.
(121) AIR 1921 Cal 73 (74) : 23 Cri L Jour 342, *Hari Charan Das v. Emperor*.
(173) 20 Suth W R Cr 41 (42), *Queen v. Nimchand Mookerjee*.
(98) 2 Cal W N 702 (706), *Queen-Empress v. Bhairab Chunder*.
(118) AIR 1918 Cal 72 (72) : 19 Cri L Jour 959, *Emperor v. Kabili Katoni*.
(14) AIR 1914 Low Bur 65 (119) : 7 Low Bur Rul 143 : 15 Cri L Jour 80 (FB), *G. S. Clifford v. Emperor*.
[See also (138) AIR 1938 Pat 579 (583) : 40 Cr. L. J. 147, *Yusuf Mia v. Emperor*.
(The essential point for determination is whether case against accused has been fairly brought to notice of jury which may guide them in deciding whether accused is guilty or not.)]
(137) AIR 1937 Pat 191 (193) : 38 Cri L Jour 129, *Rajendra Nath v. Emperor*.
(High Court should not be too critical.)]
2. (136) AIR 1936 Bom 52 (54) : 37 Cri L Jour 366 : 60 Bom 599 (FB), *Puttan Hasan v. Emperor*.

Note 16

1. (133) AIR 1933 P C 208 (209) : 60 I A 354 : 34 Cr. L. J. 843 : 12 Pat 811 (P C), *Ras Behari Lal v. Emperor*.
[See also (104) 1 Cri L Jour 598 (598) : 6 Bom LR 535, *Emperor v. Bhavanrao*.]

Note 17

1. (126) AIR 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ramprasad v. Emperor*.
(Neither evidence for prosecution was summed up nor was law laid down for guidance of the jury.)
(166) 5 Suth W R Cr 68 (69), *Queen v. Jehen Baksh*. (Evidence not analysed and arranged.)
(103) 30 Cal 822 (830) : 7 Cal W N 639, *Birendra Lal Bhaduri v. Emperor*.
(Charge did not show what the facts were, what the evidence was, or what the case of the defence was.)

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whether there was a failure of justice consequent on such bad charge.²
See also Note 13.

18. When Judge can re-charge the jury. — In cases where the jury returns an unintelligible verdict, the Judge instead of asking questions under S. 303 may *again sum up the case to them* and direct them to give a fresh verdict.¹

But the Judge cannot re-charge the jury and ask them to return a fresh verdict merely because he disagrees with their first verdict.²

Section 298

Duty of Judge.

298.* (1) In such cases it is the duty of the Judge —

- (a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;
- (b) to decide upon the meaning and construction of all documents given in evidence at the trial;
- (c) to decide upon all matters of fact which it may be necessary to prove in order to

* 1882 : S. 298; 1872 : S. 256; 1861 — Nil.

(1868) 9 Suth W R Cr 52 (54), *Queen v. Denonath Bujjur*. (Charge of giving false evidence — Jury's attention was not called to intention of the accused.)

(1921) AIR 1921 Cal 269 (270) : 23 Cri L Jour 41, *Gangadhar Goala v. Reginald William Lemon Reed*.

[See (1929) AIR 1929 Cal 182 (185) : 56 Cal 840 : 30 Cri L Jour 580, *Babarali Sardar v. Emperor*. (Charge cannot be said to be bad unless it is insufficient.)]

2. (1924) 25 Cri L Jour 294 (296) : 76 Ind Cas 966 (Cal) (FB), *Emperor v. Charu Chunder Mukerjee*.

(1966) 5 Suth W R Cr 80 (88), *In re Elahee Bakshi*.

(1864) 1864 Suth W R Gap Cr 15 (15), *Queen v. Mahadeo*. (Different trial against a different prisoner for the same crime — No new charge delivered but the charge to the former jury read out — The former charge being applicable to the present trial, High Court did not interfere.)

[See (1970) 14 Suth W R Cr 66 (66), *Queen v. Sitwa*. (Evidence on both sides not summed up — High Court refused to interfere on this ground alone.)]

Note 18

1. (1930) AIR 1930 Cal 320 (320) : 57 Cal 61 : 31 Cr.L.J. 761, *Hamid Ali v. Emperor*. See also S. 302 Note 1 and S. 304 Note 1.

2. (1935) AIR 1935 All 1020 (1022) : 36 Cri L Jour 1377, *Dori v. Emperor*.

enable evidence of particular matters to be given ;

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Note 1

(d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations

(a) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Synopsis

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| 1. Scope and object of the section. | 6. "In his discretion." |
| 2. "Judge to decide all questions of law arising in the course of the trial." | 7. Construction of documents — Clause (b). |
| 3. Relevancy and admissibility to be decided by the Judge. | 8. "To decide upon all matters to enable evidence of particular matters to be given" — Clause (c). |
| 4. "Propriety of questions asked by or on behalf of the parties." | 9. When and how far a Judge may give his opinion on question of fact — Sub-section (2). |
| 5. "To prevent the production of inadmissible evidence whether it is or is not objected to by the parties." | |

Other Topics (miscellaneous)

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| Competency of witnesses. See Note 2. | Misdirection. See Note 9. |
| Evidence to be heard and not prior depositions. See Note 3. | Objections to evidence to be heard in absence of jury. See Note 3. |
| Functions of Judge and jury distinct. See Note 1. | Sufficiency of evidence for jury. See Note 1. |
| Inadmissible evidence. See Notes 3, 5 and 6. | Value of confessions. See Note 3. |
| Judge's opinion and jury's liberty to form their own. See Note 9. | Voluntary nature of confessions for Judge. See Note 3. |

1. Scope and object of the section. — This section and the next specify the duties of the Judge and the jury respectively¹ and embody

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- (195) 19 Bom 741 (742, 743), *Queen-Empress v. Rego Montopoulo*. [See (1940) AIR.1940 Oudh 337 (340): 41 Cr. L. J. 545, *Jagdish Dutt v. Emperor*. (In this case it was observed that the section does not lay down any principles on the question of misdirection but that it does lay down what are the duties of a Judge trying a criminal case with the aid of a jury both in the course of the trial and in the course of the summing up — It is not clear what exactly is meant by this, seeing that a transgression of the duties laid down in the section in summing up would clearly be a misdirection and that sub-s. (2) clearly deals with what a Judge may say in his charge.)]

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the general principle that the question what the jury are to *receive* is for the Judge and what they are to *believe* is for the jury; in other words, the question whether there is *any* evidence is for the Judge; whether there is *sufficient* evidence is for the jury.²

The provisions of this section show that the Judge should evince an interest in the case even from its beginning.³

2. "Judge to decide all questions of law arising in the course of the trial." — The decision on all questions of law arising in the course of the trial is solely for the Judge¹ whose direction thereon is absolute and binding on the jury.² In other words, the jury is to take the law from the Judge.³

The following questions are for the Judge :

- (1) Whether, when an adult woman had consented to sexual intercourse it would be an offence of rape within the meaning of the Penal Code.⁴
- (2) In a case of defamation whether the imputation found to have been made and the harm found to have been the probable or expected result were such as to satisfy the definition of the offence of defamation.⁵
- (3) Whether a particular communication is a privileged one or not.⁶
- (4) Whether any evidence had been given on which the jury could properly find the question for the party on whom the *onus* of proof lies.⁷
- (5) Whether a person is an accomplice.⁸ The High Court of Calcutta has, however, taken the view that it is the duty of the Judge only to put all the facts before the jury and it is for them to decide whether he is an accomplice whose testimony has to be received with caution.⁹
- (6) Whether there is corroboration.¹⁰

2. ('89) 1889 Rat 452 (453), *Queen-Empress v. Lal Singh*.

3. ('30) AIR 1930 All 534 (536) : 32 Cr. L. J. 158, *Suraj Prasad v. Emperor*.

Note 2

1. ('39) AIR 1939 Mad 190 (192) : 40 Cri L Jour 437, *Emperor v. Labbai Kutti*.
(16) AIR 1916 Pat 236 (238) : 1 Pat L Jour 317 : 17 Cri L Jour 353 (355), *Ek Nath Sahay v. Emperor*.

(27) AIR 1927 Cal 200 (202) : 28 Cri L Jour 201, *Isu Sheikh v. Emperor*.

[See ('67) 8 Suth W R Cr 87 (88), *Queen v. Nobo Kisto Ghose*.]

2. ('73) 20 Suth W R Cr 41 (42), *Queen v. Nim Chand*.

(29) AIR 1929 Cal 57 (60) : 56 Cal 150 : 30 Cr. L. J. 435, *Rebati Mohan v. Emperor*.
(The question as to what amounts or does not amount in law to evidence.)

3. ('95) 1895 Rat 736 (737), *Queen-Empress v. Bharmia*.

4. ('95) 19 Bom 735 (736), *Queen-Empress v. Madhav Rao*.

5. ('79) 1879 Rat 140 (140), *In re Pitamber*.

6. ('68) 10 Suth W R Cr 14 (14) : 1 Beng L R App Cr 8, *Queen v. Chandra Kant*.
[See ('98) 25 Cal 736 (741) : 2 C W N 484, *Abbaspeada v. Queen-Empress*.]

7. ('39) AIR 1939 Mad 190 (192) : 40 Cri L Jour 437, *Emperor v. Labbai Kutti*.

(15) AIR 1915 Cal 773 (777) : 16 Cr. L. J. 561 (565) (FB), *Emperor v. Upendra Nath*.

8. ('03) 26 Mad 1 (6, 7) : 2 Weir 521, *Emperor v. Smither*.

9. ('27) AIR 1927 Cal 460 (461) : 28 Cri L Jour 278, *E. St. C. Moss v. Emperor*.

10. ('32) AIR 1932 Cal 295 (296, 297) : 33 Cr. L. J. 477, *Golan Asphia v. Emperor*.
[See also ('29) AIR 1929 Cal 57 (59) : 56 Cal 150 : 30 Cri L Jour 435, *Rebati Mohan v. Emperor*. (Cuming, J. doubted but followed on authority; Lort-Williams, J. *contra*.)]

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Notes 2-3

- (7) Whether a witness is capable of testifying as a witness, though, after the Judge has decided in favour of his competency, it is for the jury to decide on the amount of credit to be given to such a witness.¹¹ So the question whether a child¹² or a deaf and dumb person¹³ or one who is unable to take the oath¹⁴ can be examined as a witness should be decided by the Judge as provided by S. 118 of the Evidence Act.
- (8) Whether a charge under S. 498 of the Penal Code is proper in the absence of a complaint under S. 199, Criminal Procedure Code.¹⁵
- See also the undermentioned case.¹⁶

3. Relevancy and admissibility to be decided by the Judge.

— It is the duty of the Judge to decide whether a certain piece of evidence is admissible or relevant.¹ In introducing evidence in a trial with the aid of a jury, the Judge should be very careful to see that there is no miscarriage of justice.² He should decide about the admissibility as and when the question arises and should, if the evidence is inadmissible, shut it out from the jury.³ The moment to decide the question of admissibility is when the evidence is sought to be admitted.⁴ If inadmissible evidence is once let in, any later exhortation to the jury to ignore that will be insufficient (see Note 11 to S. 297). It is always desirable that the jury should be asked to retire from the Court when the question as to the admissibility of a particular piece of evidence is being discussed.⁵ The Judge should decide that a confession is voluntary before admitting it and placing it before the jury,⁶ although such a

11. ('14) AIR 1914 Cal 276 (279) : 14 Cr.L.J. 485: 41 Cal 406, *Nafar v. Emperor*.

12. ('67) 8 Suth W R Cr 60 (60), *Queen v. Hosseinee*.

(06) 4 Cri L Jour 412 (413, 414) : 11 C W N 51, *Sheikh Fakir v. Emperor*.

(23) AIR 1923 Lah 332 (333) : 25 Cri L Jour 317, *Hussain Khan v. Emperor*.

13. ('12) 13 Cri L Jour 271 (271) : 14 Ind Cas 655 (Mad), *Venkattan v. Emperor*.

14. ('18) AIR 1918 Bom 212 (213) : 19 Cri L Jour 593, *Emperor v. Hari Ramji*.

15. ('35) AIR 1935 Pat 357 (357):36 Cr.L.J.856:14 Pat 717, *Ramjanam v. Emperor*.

16. ('37) AIR 1937 Lah 127 (130) : 17 Lah 547 : 38 Cr. L. J. 472, *Mangal Singh v. Emperor*. (Murder trial—Accused not able to explain suspicious circumstances against him appearing in circumstantial evidence—Question of inference of guilt in such cases is one of fact and not of law.)

Note 3

1. ('38) AIR 1938 Cal 460 (462) : 39 Cri L Jour 674, *Ebadi Khan v. Emperor*. (Admissibility of first information report.)

(89) 1889 Rat 452 (453, 456), *Queen-Empress v. Lal Singh*.

(89) 1889 Rat 491 (492), *Queen-Empress v. Tulsaji*.

(35) AIR 1935 Sind 115 (126) : 29 Sind L R 121 : 36 Cr. L. J. 1310, *Bhurasingh v. Emperor*. (Evidence of previous conviction.)

2. ('26) AIR 1926 Cal 147 (149) : 27 Cr. L. J. 277, *Keramat Mandal v. Emperor*.

3. ('06) 4 Cr. L. J. 332 (333) : 8 Bom L R 697, *Emperor v. Bhagivedu*. (Judge to be satisfied that a confession was voluntarily made.)

(19) AIR 1919 Lah 184 (186) : 20 Cri L Jour 305, *Kapur Singh v. Emperor*.

(29) AIR 1929 Cal 617 (620) : 30 Cr. L. J. 993 (SB), *Padam Prashad v. Emperor*. (Admissibility of documents.)

(94) 1894 Rat 730 (731), *Queen-Empress v. Balappa*. (Retracted confession.)

4. ('32) AIR 1932 Sind 201 (205) : 26 S. L. R. 302 : 34 Cr.L.J.147, *Pharho v. Emperor*.

5. ('33) AIR 1933 Cal 835 (837) : 34 Cr. L. J. 1087 (SB), *Kali Charan v. Emperor*. (The question of retracted confession.)

6. ('36) 37 Cr. L. J. 1084 (1085) : 165 Ind Cas 127 : 63 Cal 833 (FB), *Badan Ali v. Emperor*. (In this case it is held that the question whether the confession is voluntarily made or not, is a question of law to be determined by the Judge from the facts as a condition precedent to its admission : *Burton v. State*, 107 Ala. 108 (American case) followed — In view of cl. (c) of this section, the question is only of academic interest.)

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Note 3

question is one of fact. The reason is that all facts *preliminary to the admissibility* of evidence are for the Court.⁷ The Judge is not concerned with the truth of the confession, even if he is satisfied that it is true, but if its voluntary nature is doubted then the Judge should exclude it under the law.⁸ When the Judge has decided on its admissibility, it is for the jury to see whether it is true and can be relied upon, and one test which they will apply is whether it appears to them to have been freely and voluntarily made.⁹ See also the undermentioned cases.¹⁰ Similarly, the Judge has to see if the confession is vitiated by any other circumstance mentioned in Ss. 24, 25, etc., of the Evidence Act.¹¹ He should never leave it to the jury to decide about the admissibility of the confession.¹² Where a Judge admits a first information report into evidence, he should leave the matter entirely free to the jury as to what weight they should attach to it. It is not proper for him to give his reasons for admitting the document. He should merely state that he

(136) AIR 1936 Cal 227 (229) : 37 Cr. L. J. 676 : 63 Cal 1089, *Bhakta Bhusan v. Emperor*. (In this case it was remarked by Cunliffe, J. that the voluntary or involuntary nature of a confession involves a mixed question of both fact and law — But the question is only of academic interest in view of cl. (c) of this section.)

(1901) 25 Bom 168 (171, 172) : 2 Bom L R 761, *Queen-Empress v. Basvanta*.

7. ('07) 6 Cr. L. J. 164 (174) : 32 Bom 111 : 9 Bom L R 789 (FB), *Emperor v. Narayan Raghunath Patki*.

8. ('25) AIR 1925 Cal 587 (588) : 52 Cal 67 : 26 Cri L Jour 782, *Emperor v. Panchkari Dutt*.

9. ('36) 37 Cr. L. J. 1084 (1085) : 165 I. C. 127 : 63 Cal 833 (FB), *Badan Ali v. Emperor*. (The jury may, therefore, in the exercise of their authority, and within their province, determine that the confessions are untrue or not entitled to any weight, upon the grounds that they were not voluntarily made. *Burton v. State* 107 Ala. 108 (American case) followed.)

(136) AIR 1936 Cal 227 (228) : 37 Cr. L. J. 676 : 63 Cal 1089, *Bhakta v. Emperor*.

(135) AIR 1935 Cal 308 (309) : 36 Cri L Jour 921, *Kishori Kishore v. Emperor*.

(118) AIR 1918 Cal 72 (72) : 19 Cri L Jour 959, *Emperor v. Kabil Katoni*.

(198) 1898 Rat 952 (952), *Queen-Empress v. Balya Dagdu*.

(134) AIR 1934 Cal 853 (855, 856) : 62 Cal 312 : 36 Cri L Jour 485, *Kasimuddin v. Emperor*. (Judge saying that voluntary nature of confession should be treated by them as concluded by his decision to admit it in evidence commits a misdirection in his charge.)

(134) AIR 1934 Cal 636 (640) : 61 Cal 399 : 35 Cri L Jour 1479, *Nayeb Shahana v. Emperor*.

10. ('29) AIR 1929 Cal 726 (727, 728) : 57 Cal 649 : 31 Cr. L. J. 909, *Khiro Mondal v. Emperor*.

(125) AIR 1925 Cal 887 (888) : 26 Cri L Jour 606, *Sheikh Abdul v. Emperor*.

(109) 10 Cri L Jour 65 (66, 68) : 2 Ind Cas 517 (Bom), *Emperor v. Kcsari Dayal*.

11. (1900) 27 Cal 295 (302) : 4 C W N 129, *Queen-Empress v. Jadub Das*. (Confession to police-officer.)

(117) AIR 1917 Low Bur 93 (93) : 18 Cri L Jour 383 (384), *Nga Ba v. Emperor*. (Confession caused by inducement.)

(121) AIR 1921 Bom 70 (71) : 45 Bom 1086 : 22 Cr. L. J. 318, *Dinanath v. Emperor*. (Do.) (1865) 4 Suth W R Cr 1 (2), *Queen v. Gunesk Koormee*. (Confession caused by force.)

(119) AIR 1919 Cal 11 (13) : 20 Cr. L. J. 833, *Mobarak Ali v. Emperor*. (Confession under the influence of police.)

(115) AIR 1915 Bom 249 (252) : 40 Bom 220 : 17 Cr. L. J. 133, *Fakira Appaya v. Emperor*. (Do.)

(116) AIR 1916 Cal 352 (352, 353) : 17 Cr. L. J. 188 (189), *Emperor v. Aushi Bibi*. (Confession under inducement from the president of panchayat.)

12. ('95) 1895 Rat 748 (749), *Queen-Empress v. Menga Budhia*.

(133) AIR 1933 Cal 187 (188) : 34 Cri L Jour 369, *Baldeo v. Emperor*.

(118) AIR 1918 Cal 88 (91) : 19 Cr. L. J. 305 : 45 Cal 557, *Amiruddin v. Emperor*.

(196) 1896 Rat 842 (842), *Queen-Empress v. Ganu*.

(114) AIR 1914 Bom 305 (306) : 38 Bom 156 : 14 Cr. L. J. 625, *Gangapa v. Emperor*.

admits the document in evidence and should lay it before the jury.¹³

The Judge should see that witnesses depose before the jury the facts known to them; it is irregular to read their deposition in the prior trial and ask them if it is true. See also the undermentioned case,¹⁴ where the advantage of the jury hearing the evidence as it is deposed to by the witnesses before them is pointed out.

See also the undermentioned decision¹⁵ as to whether a Judge's admission of evidence amounts to a "decision" within the meaning of Letters Patent, Clause 26. Where certain evidence is wrongly admitted but the course of the trial is not in any way deflected thereby it, would form no ground on which an application under clause 39 of the Letters Patent (Rangoon) can be based.¹⁶

4. "Propriety of questions asked by or on behalf of the parties." — See ss. 148 to 152 of the Evidence Act. The Judge should control the examination-in-chief by the prosecution and allow only legal questions to be put in a legal way.¹ Similarly, it is his duty to control the cross-examination in such a way as to disallow any question which is improper or misleading.²

5. "To prevent the production of inadmissible evidence, whether it is or is not objected to by the parties." — An erroneous omission on the part of the parties to object to the admissibility of a piece of evidence will not render it admissible if otherwise it is not.¹ This section, therefore, provides that the Judge may prevent the production of inadmissible evidence, *whether it is or is not objected to by the parties*.^{1a}

13. ('38) AIR 1938 Cal 460 (462) : 39 Cri L Jour 674, *Ebadi Khan v. Emperor*.

14. ('24) AIR 1924 Lah 17(19) : 4 Lah 382 : 25 Cr. L. J. 377, *John Thomas v. Emperor*.

15. ('35) AIR 1935 Mad 486 (495) : 58 Mad 523 : 36 Cri L Jour 1398 (1418, 1425) (FB), *Emperor v. Ramanuja Ayyangar*. (It does not so amount.)

16. ('35) AIR 1935 Rang 214 (218) : 13 Rang 141 : 36 Cr. L. J. 1232, *Scott v. Emperor*.

Note 4

1. ('18) AIR 1918 Pat 146 (152) : 19 Cr. L. J. 789, *Ritbaran Singh v. Emperor*.

2. ('33) AIR 1933 Lah 667 (668) : 34 Cri L Jour 606, *Abbas Ali v. Emperor*.

Note 5

1. ('97) 19 All 76 (92) : 23 I A 106 : 7 Sar 73 (PC), *A.B. Miller v. Madho Das*.

('20) AIR 1920 Bom 244 (245) : 44 Bom 192, *Narhari Hari v. Ambabai Balkrishna*.

('03) 26 Mad 38 (40) : 2 Weir 733, *Thandraya Mudali v. Emperor*.

1a. ('74) 11 Bom H C R Cr 44 (45), *Reg. v. Daya Anand*.

('09) 10 Cr. L. J. 65 (67) : 2 Ind Cas 517 (Bom), *Emperor v. Kesari Dayal Kanji*.

('25) AIR 1925 Cal 587 (588) : 52 Cal 67 : 26 Cr. L. J. 782, *Emperor v. Panch Kari Dutt*.

('25) AIR 1925 Cal 887 (888) : 26 Cri L Jour 606, *Sheikh Abdul v. Emperor*.

('32) AIR 1932 Sind 201 (204, 205) : 26 Sind L R 302 : 34 Cr. L. J. 147, *Pharho Shahwali v. Emperor*.

('67) 7 Suth W R Cr 72 (72), *Queen v. Bhukoo Singh*.

[See ('31) AIR 1931 Pat 345 (345) : 32 Cr. L. J. 1025, *Phekan Singh v. Emperor*.

('67) 7 Suth W R Cr 2 (2), *Queen v. Kali Charn Gangooly*. (Hearsay evidence.)

('64-66) 2 Bom H C R 125 (126), *Reg. v. Timmi*. (Evidence of character and previous conduct of a prisoner ought not to be allowed to go to the jury.)

('67) 8 Suth W R Cr 11 (12), *Queen v. Phool Chand*. (Evidence as to previous conviction and bad character.)

('68) 10 Suth W R Cr 57 (58), *Queen v. Ram Gopal Dhur*.

('71) 15 Suth W R Cr 37 (39) : 6 Beng L R App 108, *Queen v. Mahima Chandra Dass*. (Hearsay evidence.)

('68) 10 Suth W R Cr 39 (39), *Queen v. Kulum Sheikh*. (Evidence as to previous bad character.)

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Notes 5-8

In *Abbas Peada v. Queen-Empress*,² their Lordships of the Calcutta High Court observed :

"This is a wise provision of the law, because in many of these cases tried in the Sessions Court by a jury, sometimes the prisoners are not defended at all, and sometimes defended by persons not fully qualified for their work. It is, therefore, the duty of the Judge to see that evidence, which is not admissible in itself, should not be allowed to go in to the prejudice of the accused."

The fact that the accused puts forward some *particular ground* for holding that certain evidence is not admissible does not relieve the Judge of his duty to look into *all* the circumstances in order to judge whether the evidence is admissible or not.³ If by accident such inadmissible evidence is let in, the Judge must distinctly tell the jury to guard themselves from being influenced by it.⁴ It is impossible, however, to say, even in such cases, that the minds of the jury were not affected in any way by the admission of inadmissible evidence.⁵ Where such admission has been prejudicial to the accused, the trial will be vitiated.⁶

6. "In his discretion." — It is difficult to understand the object of these words in this section. Granted that a piece of the evidence which is about to be let in, is inadmissible under law, it is impossible to say that the Judge can have a *discretion* to allow its admission or not. The judicial decisions under this section have in fact held that it is the *duty* of the Judge to prevent inadmissible evidence going in.

7. Construction of documents — Clause (b). — It is the duty of the Judge to decide upon the meaning and construction of all the documents given in evidence.¹ He will be in error if he leaves the legal construction of a letter or other document to the jury.² See also the undermentioned case.³

8. "To decide upon all matters . . . to enable evidence of particular matters to be given" — Clause (c). — This clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible.¹ Thus, the question whether

(²⁶) AIR 1926 Cal 793 (794) : 27 Cr. L. J. 641, *Gahur Howldar v. Emperor*.

(⁹⁷) 1897 Rat 924 (925), *Queen-Empress v. Soma Dalji*. (Judge should not refer to evidence before the committing Magistrate without making the depositions exhibits in his own proceedings.)

(⁸⁰) 5 Cal 768 (769) : 6 C L R 219, *Roshun Doosadh v. Empress*.]

2. (⁹⁸) 25 Cal 736 (740) : 2 C W N 484.

3. (²⁵) AIR 1925 Cal 587 (588) : 52 Cal 67 : 26 Cr. L. J. 782, *Emperor v. Punch Kari Dutt*.

4. (⁶⁸) 10 Suth W R Cr 17 (19), *Queen v. Bykant Nath Banerjee*.

5. (²³) AIR 1923 Pat 142 (142) : 23 Cri L Jour 141, *Madodar Ram v. Emperor*.

(⁰³) 27 Bom 626 (632, 633) : 5 Bom L R 599, *Emperor v. Vaman Shivram*.

6. (⁹⁴) 21 Cal 955 (979), *Wafadar Khan v. Queen-Empress*.

(⁸⁴) 10 Cal 775 (777), *Queen-Empress v. Uzeer*.

[See (⁰⁷) 5 Cr. L. J. 427 (429) : 34 Cal 698 : 11 C W N 666, *Jatindra Nath v. Emperor*.]

Note 7

1. (³³) AIR 1933 PC 7 (10) : 34 Cr. L. J. 550 (PC), *Albert Godamune v. The King*.

2. (1865) 3 Suth W R Cr 69 (69), *Queen-Empress v. Setul Chunder*.

3. (⁰⁴) 28 Bom 533 (545) : 1 Cr. L. J. 390 : 6 Bom L R 379, *Emperor v. Bankatram Lachiman*.

Note 8

1. (¹⁵) AIR 1915 Cal 667 (674) : 16 Cr. L. J. 65 : 42 Cal 856, *Sashi Rajbanshi v. Emperor*.

an accused person was in police custody while making a confession is to be decided by the Judge.² Similarly, the Court has to find the preliminary facts before admitting secondary evidence or statements under S. 32, sub-s.(1) or S. 33 of the Evidence Act.³ But where an approver whose pardon has been revoked is tried for the offence as provided for under S. 339, and where under that section he pleads that he has complied with the conditions of the pardon, the question whether he has forfeited the pardon is one for the jury and not for the Judge.⁴

The Judge should always first decide the preliminary point on which the admissibility of other evidence depends. It is always dangerous to give in advance evidence the admissibility of which depends on what other witnesses may say.⁵

The Judge has ample powers under S. 165 of the Evidence Act to put any question to the witness or to examine any witness.⁶

As to the duty of the Judge to decide about the voluntary character of a confession, see Note 3.

9. When and how far a Judge may give his opinion on question of fact — Sub-section (2). — It is within the competence of a Judge in charging the jury to express his own opinion on facts and make his own suggestions on any points raised. It is for the jury to accept or reject the view of the Judge.¹ In many cases it is not merely permissible but also desirable that the Judge should tell the jury what view he has taken of the facts in order to enable them to consider the facts properly and arrive at their own decision on them.² The jurors have no experience in the matter of sifting evidence and

2. ('08) 7 Cr. L. J. 325 (327) : 31 Mad 127 : 18 M L J 66, *In re Sankappa Rai*.

3. ('71) 15 Suth W R Cr 11 (13, 14), *In the case of Sheikh Tenoo*.

4. ('10) 11 Cr. L. J. 254 (255) : 33 Mad 514 : 5 I. C. 831, *In re Aligiriswami Naicken*. ('15) AIR 1915 Cal 667 (674) : 16 Cr. L. J. 65 (67) : 42 Cal 856, *Sashi Rajbanshi v. Emperor*. See also S. 339A Note 3.

5. ('19) AIR 1919 Cal 514 (517) : 46 Cal 895 : 20 Cr. L. J. 324, *Romesh v. Emperor*.

6. ('86) 1886 Rat 245 (248), *Queen-Empress v. Ruyya*.

Note 9

1. ('40) AIR 1940 Nag 221 (224), *Bapurao v. Emperor*.

('03) 5 Bom L R 207 (209), *Emperor v. Appunna Devappa*.

('96) 1896 Rat 842 (843), *Queen-Empress v. Ganu*.

('28) AIR 1928 All 622 (623) : 50 All 540 : 29 Cr. L. J. 342, *Emperor v. Sheo Din*. (Opinion on the value of evidence.)

('70) 13 Suth W R Cr 34 (34), *In re Dwarakanath Sen*.

('68-69) 5 Bom H C R Cr 85 (97), *Reg. v. Pattechand*. (Impressions on evidence.)

(1864) 1 Suth W R Cr 17 (17), *Queen v. Bustee Khan*. (Judge warning the jury not to disbelieve a mass of otherwise consistent evidence.)

('12) 13 Cr. L. J. 821 (822) : 40 Cal 367 : 17 I. C. 565, *Samaruddin v. Emperor*.

(Suggestion by Judge that real case might be between cases alleged by both sides.)

('31) AIR 1931 Cal 601 (603) : 33 Cri L Jour 11, *Bhondar v. Emperor*.

('20) AIR 1920 Pat 575 (575) : 22 Cr. L. J. 1250, *Baijnath Mahton v. Emperor*.

(Judge pointing out to jury the way in which discrepancies should be looked into.)

2. ('38) AIR 1938 Cal 658 (661) : 1 L R (1938) 1 Cal 636 : 40 Cr. L. J. 101, *Abdul Gafur v. Emperor*.

('37) 1937 Mad W N 552 (553), *Subba Valayan v. Emperor*.

('36) AIR 1936 Oudh 164 (164) : 37 Cr. L. J. 182 : 11 Luck 687, *Satdeo v. Emperor*.

('36) AIR 1936 Mad 516 (519) : 37 Cr. L. J. 909 : 59 Mad 904, *Rathanasabapathy v. Public Prosecutor*.

('28) AIR 1928 Cal 269 (270), *Abdul Razak v. Emperor*.

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weighing probabilities and consequently stand in need of intelligent guidance from the Judge.³ It is, therefore, necessary that all help should be given to them.⁴ It has been held that a charge which succeeds in avoiding any expression of opinion by Judge is the most colourless and unhelpful one,⁵ and in a recent case it was observed that if a Judge with all his advantages forms a definite and strong opinion that the evidence is not sufficient for a conviction, it is dangerous to leave the matter to the jury without a strong indication of such opinion.⁶

In so expressing his opinion the Judge should remember that the jury are the final judges of fact. The Judge should, in cases where he expresses his opinion, tell the jury in the clearest terms that the responsibility for the decision is theirs and that they have to make up their minds themselves and that they need not rely on any opinion of his on the facts. He must warn them that his opinion is not binding on them.⁷ This warning should not be given in a formal way either at the beginning or at the end of the charge, but should be given at the

- { '35 } AIR 1935 Rang 214 (216) : 13 Rang 141 : 36 Cr. L. J. 1232, *Scott v. Emperor*.
[See { '34 } AIR 1934 Cal 622 (623) : 35 Cr. L. J. 1216, *Mahomed Samiruddin v. Emperor*. (Definite case by prosecution — Failure to prove same — Failure of Judge to point out this to jury—Charge is defective.)]
{ '35 } AIR 1935 Cal 31 (32) : 36 Cr. L. J. 480, *Kasimuddin v. Emperor*. (Judge thinking that evidence is so weak that there are grave doubts as to guilt of accused—Omission to direct jury to give accused benefit of doubt may amount to misdirection.)]
3. { '66 } 5 Suth W R Cr 80 (94) : Beng L R Sup Vol 459, *Queen v. Elahi Bux*.
{ 1864 } 1864 Suth W R Sup 5 (5), *Queen v. Abdul Juleel*.
4. { '26 } AIR 1926 Cal 235 (239) : 53 Cal 181 : 26 Cr. L. J. 1577, *Abdul Gani v. Emperor*.
5. { '40 } AIR 1940 Nag 221 (224), *Bapurao v. Emperor*.
- { '37 } 1937 Mad W N 552 (553), *Subba Valayyan v. Emperor*. (Charge to jury held was very colourless and gave no hint as to what the Judge himself thought of the evidence.)
- { '29 } AIR 1929 Cal 742 (746) : 31 Cr. L. J. 673 : 57 Cal 740, *Nagendra Nath v. Emperor*.
6. { '31 } AIR 1931 Cal 752 (755) : 33 Cri L Jour 85, *Sali Sheikh v. Emperor*.
7. { '37 } 1937 Mad W N 552 (553), *Subba Valayan v. Emperor*.
- { '36 } AIR 1936 Mad 516 (519) : 37 Cr. L. J. 909 : 59 Mad 901, *Rathanasabapathy v. Public Prosecutor*.
- { '36 } 1936 O W N 201 (203), *Wajid Husain v. Emperor*. (But where the Judge expressed his opinion by dubbing the accused 'burglars' and remarked "probably an account of the prompt action of the police all the three accused delivered the property which they had stolen in the aforesaid theft" — Held, that the manner in which the Judge delivered himself of his opinion as to the guilt of the accused was highly improper and must have prejudiced the accused.)
- { '36 } AIR 1936 Oudh 164 (164) : 37 Cr. L. J. 182 : 11 Luck 687, *Satdeo v. Emperor*.
(There is no misdirection if the Judge while expressing his opinion on evidence gives a proper warning to the jury.)
- { '33 } AIR 1933 Cal 190 (192) : 34 Cri L Jour 430, *Eusuff Ali v. Emperor*.
- { '14 } AIR 1914 Low Bur 34 (35) : 15 Cri L Jour 257, *G. H. Browne v. Emperor*.
- { '29 } AIR 1929 Bom 296 (300) : 53 Bom 479 : 31 Cr. L. J. 65, *Emperor v. C. E. Ring*.
- { '07 } 5 Cr. L. J. 427 (429) : 34 Cal 698 : 11 C W N 666, *Jatindra Nath v. Emperor*.
- { '26 } AIR 1926 Cal 105 (105) : 26 Cri L Jour 1553, *Fazaruddin v. Emperor*.
- { '31 } AIR 1931 Cal 752 (755) : 33 Cri L Jour 85, *Sali Sheikh v. Emperor*.
- { '33 } 1933 Mad W N 320 (323), *Arumuga Goundan v. Emperor*.
- { '33 } AIR 1933 Pat 96 (100) : 34 Cri L Jour 421, *Raghunath v. Emperor*.
- { '29 } AIR 1929 Pat 313 (316) : 8 Pat 344 : 30 Cr. L. J. 721, *Ramdas Rai v. Emperor*.
- { '23 } AIR 1923 Pat 238 (239) : 24 Cri L Jour 495, *Gajo Singh v. Emperor*.
- { '34 } AIR 1934 Oudh 122 (123) : 35 Cri L Jour 502, *Hadi Hussain v. Emperor*.

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moment when the Judge has forcibly or otherwise expressed his opinion to the jury,⁸ though it must be remembered that in the course of a lengthy charge the Judge cannot be expected to pause always to assure the jury that the matters of fact are matters for them.⁹ In a decision of the Chief Court of Oudh,¹⁰ Stuart, C. J., observed :

"If the Judge attempts to take the case out of the jury's province by something in the nature of imposing his own view upon the jury, it is a case of misdirection, but if a Judge simply states the opinion, which the law allows him to state, in such a manner that intelligent jurymen should see for themselves that it is only his opinion and nothing else, it is not necessary for him to add as a safeguard a remark that it is only his opinion and that the jury are perfectly at liberty to form their own."

The Judge should not usurp the functions of the jury but should allow them to give a finding and for that purpose should present the case to the jury in a dispassionate and impartial manner.¹¹ He should not sum up in too strong and unqualified terms or give a decided opinion on the case,¹² he should not thrust his own opinion on them so as to dictate to them their verdicts¹³ nor should he be dogmatic in his expression of the opinion¹⁴ or persuade the jury to accept his

(29) AIR 1929 Cal 742 (746): 31 Cr.L.J. 673: 57 Cal 740, *Nagendra Nath v. Emperor*.

(28) AIR 1928 Cal 269 (270), *Abdul Razak v. Emperor*.

(08) 8 Cr.L.J. 6 (8): 35 Cal 531: 12 C W N 774: 7 C. L. J. 599, *Natabar Ghose v. Emperor*.

(06) 3 Cri L Jour 144 (148): 10 C W N 153, *Sourendra Nath Mitra v. Emperor*.

(98) 25 Cal 230 (231, 232), *Ali Fakir v. Queen-Empress*.

(84) 10 Cal 970 (972), *Queen-Empress v. Bepin Biswas*.

(25) AIR 1925 Cal 872 (874): 52 Cal 595: 26 Cr.L.J. 1037, *Ledu Molla v. Emperor*.

(1864) 1864 Suth W R Sup 5 (5), *Queen v. Abdool Juleel*.

(99) 23 Bom 316 (317), *Queen-Empress v. Gangia*.

(34) AIR 1934 Pat 309 (311): 13 Pat 529: 35 Cr.L.J. 1104, *Nanhak Ahir v. Emperor*.

(35) AIR 1935 Rang 214 (216): 13 Rang 141: 36 Cr.L.J. 1232, *Scott v. Emperor*.

[See (36) 37 Cri L Jour 17 (18): 158 I. C. 172, *Watson v. Emperor*. (Question of reasonable doubt — Judge discussing the question and at the close of the charge warning the jury that they are themselves to weigh the evidence and come to a finding on facts on their judgment — *Held*, there was no misdirection.)]

8. (34) AIR 1934 Cal 77 (79): 35 Cr. L. J. 483, *Kamiraddi Sheikh v. Emperor*.

9. (31) AIR 1931 Cal 178 (182): 32 Cr.L.J. 190 (FB), *Emperor v. Panchu Sheikh*.

[See (35) AIR 1935 All 928 (929), *Srikishen v. Emperor*. (It is not necessary for Judge on every occasion on which he expresses his opinion on a question of fact to tell the jury that they are sole judges of questions of fact — It is sufficient if he makes that statement quite clearly to the jury at the end of his charge.)]

[See also (1900) 4 Cal W N 196 (200), *Rahamat Ali v. Empress*.]

10. (28) AIR 1928 Oudh 326 (327, 328): 29 Cri L Jour 721, *Des Raj v. Emperor*.

11. (21) AIR 1921 Cal 252 (255): 23 Cri L Jour 244, *Emperor v. Taribulla*.

12. (27) AIR 1927 Oudh 259 (259): 2 Luck 597: 28 Cri L Jour 683, *Nahru Mal v. Emperor*.

(14) AIR 1914 Cal 549 (550): 15 Cri L Jour 147, *Ofel Molla v. Emperor*.

(31) AIR 1931 Cal 11 (11, 13): 32 Cri L Jour 418, *Jahura Bibi v. Emperor*.

(1864) 1 Suth W R Cr 25 (26), *Queen v. Gunga Bishen*.

(98) 2 Weir 385 (386), *In re Lazumana*.

13. (1865) 3 Suth W R Cr Letters 4 (4).

(06) 10 Cal W N lix (lx), *Dera Shuttollah v. Emperor*.

(08) 7 Cri L Jour 315 (317): 7 Cal L Jour 246, *Kali Singh v. Emperor*.

(30) AIR 1930 Cal 430 (432): 31 Cri L Jour 1115, *Monohar Mandal v. Emperor*.

(31) AIR 1931 Cal 533 (535): 32 Cri L Jour 1101 (SB), *Superintendent and Remembrancer of Legal Affairs v. Purna Chandra Das*.

(26) AIR 1926 Cal 439 (442): 26 Cri L Jour 567, *Chhekhar Shaik v. Emperor*.

(24) AIR 1924 Cal 960 (960, 961): 25 Cr.L.J. 1217, *Emperor v. Sagarmal Agarwalla*.

(10) 11 Cri L Jour 683 (684): 8 I. C. 573 (Mad), *Public Prosecutor v. Papakka*.

14. (29) AIR 1929 Cal 170 (171, 172): 30 Cr. L. J. 912, *Dwarka Das v. Emperor*.

(25) AIR 1925 Sind 116 (123): 25 Cri L Jour 761, *Topandas v. Emperor*.

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opinion.¹⁵ He should charge in such a way as not to create any impression in the mind of the jury that it was a direction from the Judge which they should follow¹⁶ or that the opinion was the only opinion that could be arrived at from the evidence in the case.¹⁷

If the Judge by his strong expression of opinion takes away the case from the province of the jury, then it will amount to a misdirection.¹⁸ But if on a whole review of the charge it appears that the case is left to the jury to decide, it will not amount to a misdirection.¹⁹ See also Note 11 to S. 297.

Section 299

Duty of jury. **299.**^{*} It is the duty of the jury —

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;

* 1882 : S. 299; 1872 : S. 257; 1861 — Nil.

[See however ('40) AIR 1940 Nag 221 (224), *Bapurao v. Emperor*. (Opinion even when it is couched in somewhat dogmatic and assertive language will not vitiate the charge if the Judge cautions the jury, as regards their duty as to the question of fact and their right to disregard his remarks.)

('31) AIR 1931 Cal 178 (181): 32 Cr. L. J. 190 (FB), *Emperor v. Panchu Sheikh*. (Do.)]

15. ('73) 19 Suth W R Cr 71 (73) : 10 Beng LR App 36, *Queen v. Rajcoomar Bose*.

('22) AIR 1922 Cal 107 (114) : 49 Cal 573 : 23 Cr. L. J. 657, *Abdul Salim v. Emperor*.

('90) 17 Cal 642 (666) (FB), *Queen-Empress v. O'Hara*.

16. ('26) AIR 1926 Cal 996 (997) : 27 Cr. L. J. 1038, *Naibulla Shaikh v. Emperor*.

17. ('92) 14 All 25 (27) : 1891 All W N 170, *Queen-Empress v. Hughes*.

('95) 1895 Rat 748 (748), *Queen-Empress v. Menga Budhia*.

('68) 9 Suth W R Cr 51 (51), *Queen v. Shumshere Beg*.

18. ('37) AIR 1937 Nag 110 (112) : 1 L R (1937) Nag 123 : 38 Cr. L. J. 589, *Fatch Md. v. Emperor*.

('68) 10 Suth W R Cr 7 (8), *Queen v. Ramgopal Dhur*.

('28) AIR 1928 Oudh 326 (327) : 29 Cr. L. J. 721, *Des Raj Singh v. Emperor*.

('31) AIR 1931 Oudh 171 (172) : 32 Cr. L. J. 858 : 6 Luck 705, *Mangal v. Emperor*.

('27) AIR 1927 Cal 631 (632) : 28 Cr. L. J. 742, *Emperor v. Rajab Ali Fakir*.

('10) 11 Cr. L. J. 334 (334) : 5 I. C. 935 (Mad), *In re Shirappa Higade*.

('25) AIR 1925 Oudh 311 (313) : 28 Oudh Cas 69 : 26 Cr. L. J. 310, *Emperor v. Ali Raza*.

(1864) 1 Suth W R Cr 2 (3), *In re Bharut Chunder*.

[See ('71) 16 Suth W R Cr 20 (21), *In re Huroo Saha*.]

19. ('40) AIR 1940 Oudh 337 (340) : 41 Cr. L. J. 545, *Jagdish Dutt v. Emperor*.

('38) AIR 1938 Cal 658 (661) : 1 L R (1938) 1 Cal 636 : 40 Cr. L. J. 101, *Abdul Gafur v. Emperor*.

('24) AIR 1924 Cal 257 (282) : 25 Cr. L. J. 817 (FB), *Emperor v. Barendra Kumar*.

('14) AIR 1914 P C 116 (124) : 15 Cr. L. J. 309 : 41 Cal 1023 : 8 Low Bur Rul 16 : 41 Ind App 149 : 1914 A C 644 : 83 L J P C 299 : 111 LT 324 (PC), *Channing Arnold v. Emperor*.

('33) AIR 1933 All 941 (943, 944) : 35 Cr. L. J. 668 : 56 All 210, *Lala v. Emperor*.

(1865) 2 Suth W R Cr 60 (60), *Queen v. Seethanath Ghosal*.

('28) AIR 1928 Oudh 326 (327) : 29 Cr. L. J. 721, *Des Raj Singh v. Emperor*.

- (c) to decide all questions which according to law are to be deemed questions of fact;
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

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Illustrations

(a) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what view of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

Synopsis

- | | |
|---|---|
| 1. Legislative changes. | 4. Voluntariness of confession. See S. 298 Note 3. |
| 2. Duties of the Judge and jury respectively. | 5. Charge for graver offence — Verdict for smaller offence. |
| 3. Meaning of words. | 6. Illustration (a) to the section. |

Other Topics (miscellaneous)

Benefit of doubt. See Note 2.
Forfeiture of pardon. See S. 298 Note 8.
Provocation. See Note 2.
Questions of fact. See Note 2.

Questions of law. See Note 2.
Several accused. See S. 297 Note 7.
Sufficiency of evidence. See Note 2.

1. Legislative changes.

Changes introduced in 1882 —

- (1) The words “(other than terms of law)” were newly added.
- (2) The words “declared by the Indian Penal Code or by any other law to be questions of fact” were replaced by the words “which according to law are to be deemed questions of fact.”

2. Duties of the Judge and jury respectively. — The different duties of the Judge and the jury are made clear in ss. 297, 298 and in this section. Shortly stated, it is the duty of the Judge to lay down the law, and it is the duty of the jury to decide which view of the facts is true, in accordance with the directions of the Judge on the questions of law.¹ It is not the province of the Judge to decide upon the facts

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1. ('36) AIR 1936 Rang 421 (422) : 37 Cr. L. J. 1050 : 14 Rang 716 (FB), *Emperor v. Nga E Pe*.
(195) 1895 Rat 748 (749), *Queen-Empress v. Menga Budhia*.
(1864) 1 Suth W R Cr 50 (50, 51), *Queen v. Uckoor Ghose*.
(173) 20 Suth W R Cr 41 (42), *Queen v. Nimchand Mookerjee*. (What a Judge says to a jury upon the law is an absolute and binding direction upon them.)

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except in cases coming under clause (c), s. 298(1). Nor is it the province of the jury to decide questions of law.² It is for the Judge to give direction to the jury on the following questions —

- (1) the admissibility of evidence,³ or the capacity of a witness to depose,⁴ or the legal sufficiency of the evidence, *e. g.*, whether eye-witnesses are necessary in any particular case;⁵
- (2) whether a person was in police custody while making a confession;⁶
- (3) whether a confession under s. 25 of the Evidence Act should or should not be used in favour of a co-accused.⁷

See also Notes to sections 297 and 298.

The Judge should not, however, allow the jury to resort to legal treatises during their consultation about the verdict,⁸ or cite cases or rulings to them⁹ or ask them to differentiate or form an opinion on those authorities.¹⁰

The following are all questions of fact which it is for the jury alone to determine —

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- (174) 21 Suth W R Cr 69 (70, 71), *Queen v. Sadhu Mundul*.
 2. ('24) AIR 1924 Cal 701 (702, 703) : 51 Cal 160 : 25 Cri L Jour 1000, *Emperor v. Jamaldi Fakir*.
 ('29) AIR 1929 Cal 57 (60) : 56 Cal 150 : 30 Cr. L. J. 435, *Rebati v. Emperor*. (What amounts or does not amount in law to evidence is a question of law.)
 ('33) AIR 1933 Pat 273 (273) : 34 Cri L Jour 731, *Emperor v. Sitalu*. (Whether witnesses are to be believed or not is a question for jury.)
 ('95) 1895 Rat 736 (737), *Queen-Empress v. Bharmia*. (The jury are not entitled to refer to commentary on law during their consultation about the verdict.)
 (1865) 3 Suth W R Cr 4 (4), *Queen v. Madaree Chowkeedar*.
 ('67) 7 Suth W R Cr 2 (2), *Queen v. Kali Charan*. (Cause of death is to be left to jury.)
 ('68) 9 Suth W R Cr 51 (52), *Queen v. Shumshere Beg*.
 ('73) 19 Suth W R Cr 15 (15) : 10 Beng L R App 10, *Queen v. Bheekoo Kalwar*. (Question of accused's unsoundness of mind should be tried by jury and not by Judge himself personally.)
 ('73) 19 Suth W R Cr 26 (26), *Queen v. Doorjodhum Shamonto*.
 ('68) 10 Suth W R Cr 14 (14) : 1 Beng L R A C 8, *Queen v. Chandrakant*. (Whether a communication is privileged or not is a point of law.)
 ('70) 13 Suth W R Cr 26 (26), *Queen v. Shurffuddin*.
 [See ('24) AIR 1924 Cal 321 (322) : 51 Cal 347 : 25 Cr. L. J. 758, *Emperor v. Dhananjay Roy*.]
 3. ('32) AIR 1932 Bom 406 (409) : 56 Bom 304 : 33 Cri L Jour 666, *Emperor v. Ramrao Mangesh*.
 ('33) AIR 1933 Cal 187 (188) : 34 Cri L Jour 369, *Baldeo v. Emperor*.
 4. ('14) AIR 1914 Cal 276 (279) : 41 Cal 406 : 14 Cr. L. J. 485, *Nafar Sheikh v. Emperor*.
 ('67) 8 Suth W R Cr 60 (60), *Queen v. Hosseinee*.
 5. ('76) 25 Suth W R Cr 36 (36), *Queen v. Gokool Kahar*.
 6. ('08) 7 Cr. L. J. 325 (327) : 18 M L J 66 : 3 M L T 270 : 31 Mad 127, *In re Sankappa Rai*.
 7. ('77) 2 Bom 61 (64), *Imperatrix v. Pitamber Jina*.
 8. ('95) 1895 Rat 736 (737), *Queen-Empress v. Bharmia*. (Such as a reference to Mayne's Penal Code.)
 ('97) 14 Cal 164 (166), *Jaspath Singh v. Queen-Empress*.
 ('26) AIR 1926 Cal 895 (897) : 27 Cri L Jour 926, *Emperor v. G. C. Wilson*.
 See S. 297 Note 9 and S. 300 Note 1.
 9. ('05) 2 Cr. L. J. 157 (158) : 1 Cal L J 159, *Shyama Charan v. Emperor*.
 10. ('12) 13 Cri L Jour 26 (27) : 13 Ind Cas 215 (Cal), *Mehr Sardar v. Emperor*.
 [But see ('27) AIR 1927 Rang 68 (70) : 4 Rang 488 : 28 Cr. L. J. 213 (FB), *Emperor v. Nga Tin Gyi*. (It was held that the Judge may read out some passages from the judgments for the guidance of jury.)]

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- (1) the weight to be attached to the evidence,¹¹ or to a confession,¹² or the evidence of an accomplice;¹³
- (2) the question whether fraud or negligence is established by the evidence in the case,¹⁴ or whether a thing was done with a particular intention¹⁵ or knowledge,¹⁶ in forming an opinion as to this, the jury may draw such presumption about facts as section 114 of the Evidence Act allows a Court to do;¹⁷

11. ('91) 15 Bom 452 (461), *Queen-Empress v. Dada Ana*.
- ('17) AIR 1917 All 173 (175): 18 Cr.L.J. 491:39 All 348, *Ikramuddin v. Emperor*.
- ('95) 1895 Rat 748 (749), *Queen-Empress v. Menga Budhia*.
- (1865) 3 Suth W R Cr 58 (58), *Queen v. Rookni Kant*.
- ('71) 16 Suth W R Cr 20 (21), *In re Huroo Shaha*.
- ('76) 25 Suth W R Cr 25 (26), *Queen v. Wazir Mundul*. (Jury to decide the credibility of witnesses.)
- ('97) 1 Cal W N 465 (479), *Empress v. Kali Prasanna*. (Weight to be attached to expert opinion.)
- ('05) 10 Cal W N lix (lx), *Derashutollah v. Emperor*. (Whether the whole prosecution story is discreditable for part being false.)
- ('86) 10 Bom 497 (502), *Empress v. Mania Dayal*.
- ('05) 2 Cr. L. J. 259 (268): 9 C W N 520: 32 Cal 759, *Emperor v. Abdul Hamid*. (Weight to be attached to expert evidence.)
- ('25) AIR 1925 Cal 394 (395): 26 Cri L Jour 677, *Emperor v. Faratulla*. (Effect should be given to jury's verdict when the case rests entirely on oral evidence.)
- ('25) AIR 1925 Cal 876 (882): 52 Cal 987: 26 Cr. L. J. 1256, *Emperor v. Premananda Dutt*. (Weight and value of dying declarations.)
- ('30) AIR 1930 Cal 228 (230): 31 Cri L Jour 916, *Tafiz Pramanik v. Emperor*.
- ('31) AIR 1931 Cal 401 (407): 58 Cal 1404: 32 Cr.L.J. 768(FB), *Profulla Kumar v. Emperor*. (Appreciation of evidence — Believing testimony of witness in part is not improper.)
- ('29) AIR 1929 Pat 34 (35): 7 Pat 153: 30 Cr. L. J. 273, *Wazid Ali v. Emperor*. (Whether first information report is true or false.)
- ('32) AIR 1932 Bom 406 (409): 56 Bom 304: 33 Cr.L.J. 666, *Emperor v. Ramrao*.
- ('67) 8 Suth W R Cr 60 (60), *Queen v. Hossinees*.
- ('14) AIR 1914 Cal 276 (279): 41 Cal 406: 14 Cr.L.J. 485, *Nafar Sheikh v. Emperor*.
- ('33) AIR 1933 Cal 187 (188): 34 Cri L Jour 369, *Baldeo v. Emperor*.
- ('35) AIR 1935 Pat 433 (434, 435), *Emperor v. Bhagwat Sahu*. (Verdict depending upon credibility of witnesses — Considerable weight to be given to verdict.)
- ('33) AIR 1933 Pat 273 (273): 34 Cr. L. J. 731, *Emperor v. Sitalu Ahir*. (Do.)
- [See also ('04) 1 Cri L Jour 772 (773): 6 Bom L R 671, *Emperor v. Mahomad Ismail*. (Verdict of the jury should be taken upon the evidence actually adduced at the trial, and not upon the Judge's view of the strength of the evidence.)]
12. ('86) 1886 Rat 311 (312), *Queen-Empress v. Bayaji*.
- ('77) 1 Cal L R 275 (277), *Empress v. Mukhun Kumar*. (The voluntariness of a confession is for the jury.)
- ('18) AIR 1918 Cal 72 (72): 19 Cri L Jour 959, *Emperor v. Kabili Katoni*.
- ('18) AIR 1918 Cal 88(91): 45 Cal 557:19 Cr.L.J. 305, *Amiruddin Ahmed v. Emperor*.
- ('25) AIR 1925 Cal 587 (589): 52 Cal 67: 26 Cr.L.J. 782, *Emperor v. Panchkari Dutt*. (Truth or falsity of confession is for the jury.)
- ('27) AIR 1927 Cal 398 (400): 28 Cri L Jour 485, *Azimuddiy v. Emperor*.
- ('96) 20 Bom 215 (221), *Queen-Empress v. Devji Govindji*.
13. ('78) 1 Mad 394 (395): 2 Weir 799, *Reg. v. Ramasami Padayachi*.
- ('33) AIR 1933 Cal 509 (511): 34 Cr. L. J. 841, *Chittya Ranjan Das v. Emperor*.
- ('30) AIR 1930 Pat 513 (515): 9 Pat 606: 32 Cr. L. J. 72, *Ramsarup v. Emperor*.
14. ('95) 19 Bom 749 (756), *Queen-Empress v. Ramachandra Govind*.
15. ('98) 22 Bom 112 (132), *Queen-Empress v. Bal Gangadhar Tilak*.
- (1900) 2 Bom L R 286 (296), *Queen-Empress v. Luxman Narayan*.
- (1865) 3 Suth W R Cr 58 (58), *Queen v. Chukkun*.
- ('18) AIR 1918 Cal 140 (141): 19 Cri L Jour 649, *Emperor v. Asimoddi*.
16. ('31) AIR 1931 Cal 261 (262): 32 Cr. L. J. 187 (SB), *Emperor v. Damullya Molla*.
- ('25) AIR 1925 Oudh 311(313): 28 Oudh Cas 69: 26 Cr.L.J. 310, *Emperor v. Ali Raza*.
17. ('95) 19 Bom 749 (756), *Queen-Empress v. Ramachandra Govind*.
- ('78) 1 Mad 394 (395): 2 Weir 799, *Reg. v. Ramasami Padayachi*.

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Notes 2-3

- (3) the question whether the accused has sufficient maturity of understanding to judge the nature and consequences of his conduct;¹⁸
- (4) the question whether a provocation was so grave and sudden as to be sufficient to bring the case within the exceptions recognised by law;¹⁹
- (5) the question as to whether the accused intended to convey any imputation by his words and whether he believed or had reason to believe that the imputation would produce a particular effect;²⁰
- (6) whether particular fact or facts have been proved.²¹

In murder cases, the question of inference of guilt of the accused to be drawn from the circumstantial evidence appearing against him is a question of fact and not of law and should be left to the jury to decide.²² In such cases, the jury must first decide whether the facts proved exclude the possibility that the deed was done by some other person and if they have doubts they must let the prisoner have the benefit of it.²³

See also the undermentioned cases.²⁴

3. Meaning of words. — It is for the jury to decide the meaning and effect of words except the meaning of terms of law. Thus, to ascertain the effect of certain articles in a newspaper alleged to be seditious is for the jury. But the meaning of the word "disaffection" as

18. ('69) 1869 Rat 27 (27), *Reg. v. Inam*.

19. ('96) 20 Bom 215 (225, 226), *Queen-Empress v. Devji Govindji*.

('95) 1895 Rat 766 (768), *Queen-Empress v. Dadabhai*.

('68) 9 Suth W R Cr 72 (72), *Queen v. Gunesli Luskur*.

('70) 13 Suth W R Cr 33 (33), *Queen v. Sohraie*.

('85) 11 Cal 410 (412), *Netai Luskur v. Queen-Empress*.

[See also ('99) 1 Bom L R 784 (785), *Queen-Empress v. Babya*.]

20. ('79) 1879 Rat 140 (140), *In re Pitambar*.

21. (1900) 4 Cal W N 576 (581), *Sadhu Sheikh v. Empress*.

22. ('37) AIR 1937 Lah 127 (130) : 17 Lah 547 : 38 Cr. L. J. 472, *Mangal v. Emperor*.

23. ('17) AIR 1917 Lah 3 (4, 8) : 18 Cr. L. J. 482 (483, 484) : 1917 Pun Re No. 7 Cr, *Emperor v. Browning*.

24. ('37) 38 Cri L Jour 442 (443) : 167 I. C. 748 (Nag), *Gangabisan v. Emperor*. (The jury alone have the power to determine the question of fact whether the accused committed the offence under S. 307 or S. 325 or S. 323, Penal Code.)

('29) AIR 1929 Cal 57 (61) : 56 Cal 150 : 30 Cr. L. J. 435, *Rebati Mohan v. Emperor*. (Whether one witness corroborates another.)

('10) 11 Cr. L. J. 254 (255) : 5 I. C. 831 : 33 Mad 514, *In re Aligiriswami Naicken*. (It is the duty of the jury and not of the Judge to decide whether the approver has forfeited his pardon or not.)

('08) 6 Cri L Jour 359 (360) : 6 Cal L Jour 253, *Emperor v. Kamar Ali*. (The verdict of the jury after seeing the physical condition of the accused is to be preferred to the testimony of witnesses. The jury were competent to decide whether a person in physical condition was capable of taking part in a riot and could have had the courage to be at a place where a riot took place.)

('29) AIR 1929 Cal 1 (7) : 30 Cri L Jour 494, *Bazlur Rahman v. Emperor*. (It is for the jury to decide whether prisoner when he committed offence was incapable of distinguishing right from wrong.)

('05) 2 Cri L Jour 311 (313) : 1 C L J 385, *Panchu Mondal v. Emperor*. (Questions as to the identity of thumb impressions on two or more documents being of the same person.)

('15) AIR 1915 Cal 667 (674) : 16 Cri L Jour 65 (67) : 42 Cal 856, *Sashi Rajbanshi v. Emperor*. (Whether the pardon was forfeited.)

('03) 26 Mad 467 (468) : 2 Weir 517, *Guzzala Hanuman v. Emperor*. (Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury.)

used in S. 124A, Penal Code, which is a term of law¹ as well as the legal effect and bearing of a document,² are for the Judge to decide.

Section 299
Notes 3-6

4. **Voluntariness of confession.** — See Section 298 Note 3.

5. **Charge for graver offence — Verdict for smaller offence.** — A jury may find the accused guilty of a smaller offence than that with which he is charged.¹

6. **Illustration (a) to the section.** — It is not in every case of murder that the Judge should point out to the jury the difference between murder and culpable homicide; where in a trial for murder a verdict of culpable homicide not amounting to murder cannot properly be come to, under any aspect of the case before the Court, the Judge is not called upon to explain the distinction between murder and culpable homicide not amounting to murder.¹

300.* In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Section 300

Except with the leave of the Court, no person other than a juror shall speak to or hold any communication with, any member of such jury.

Synopsis

1. Retirement to consider verdict.
2. Prohibition of communication with non-jurors.

Other Topics (miscellaneous)

Charge before verdict — Essential. See S. 297 Note 2.	Opinion expressed beforehand — Fresh trial and fresh jury. See Note 2.
Court—Directions by, during deliberation. See Note 2.	Police—Presence of. See Note 2.
Dispersal of jury before verdict. See Note 1.	Separation of jury before verdict. See Note 1.
Enquiry as to acts of jurors — Statements of jurors. See Note 1.	Verdict. See Notes to S. 301.

* 1882 : S. 300; 1872 : S. 263; 1861 : S. 352.

Note 3

1. ('98) 22 Bom 112 (132), *Queen-Empress v. Bal Gangadhar Tilak*.
- (1900) 2 Bom L R 286 (298), *Empress v. Laxman Narayan*.
- (1900) 2 Bom L R 304 (307, 308), *Empress v. Vinayak Narayan*.
- ('92) 19 Cal 35 (45), *Queen-Empress v. Jogendra Chunder*.
2. (1865) 3 Suth W R Cr 69 (70), *Queen v. Setul Chunder*.

Note 5

1. (1865) 3 Suth W R Cr 41 (41), *Queen v. Satoo Sheikh*.
 - ('08) 8 Cri L Jour 143 (144) : 10 Bom L R 632, *Emperor v. Chandra Krishna*.
 - ('75) 22 Suth W R Cr 61 (62), *Queen v. Lukhi Narain*.
 - ('10) 11 Cri L Jour 630 (630) : 8 I. C. 373 : 13 Oudh Cas 295, *Shubraati v. Emperor*.
 - ('95) 20 Bom 215 (217, 218), *Queen-Empress v. Devji Govindji*.
 - ('77) 3 Cal 189 (191), *Empress v. Harai Mirdha*.
- See also S. 238 Note 1 and S. 301 Note 2.

Note 6

1. ('36) AIR 1936 Rang 421 (424, 425) : 37 Cri L Jour 1050 : 14 Rang 716 (FB), *Emperor v. Nga E Pe*.
- ('16) AIR 1916 Low Bur 114 (116) : 17 Cri L Jour 49 (50) : 8 Low Bur Rul 306 (FB), *Nga Mya v. Emperor*.

Section 300
Notes 1-2

1. Retirement to consider verdict. — After the Judge has finished his charge, the jury may retire to the jury-room immediately. The section does not contemplate that the jury should be allowed to disperse and then re-assemble in the jury-room to consider their verdict. Hence, where owing to the indisposition of the foreman of the jury, the jurors were allowed to disperse for a few hours and then they returned to the Court and considered and delivered their verdict, it was held that the procedure was illegal.¹

The jury must not separate until they have considered and delivered their verdict. They should all be in the retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken by the presiding Judge. Hence, where out of nine members who constituted the jury, five first came out of the jury-room and sat in the Court but the remaining four stayed in the jury-room for half an hour more when they came and sat in the Court and the foreman delivered the verdict, it was held that the verdict was vitiated.²

In considering their verdict, the jury ought to be guided, on questions of law, by the directions of the presiding Judge. They are not entitled to consult a commentary on the law during their deliberation.³

When the verdict is attacked on the ground of anything that happened in the jury-room while the jurors were considering their verdict, it is not desirable to receive in evidence the statements of individual jurors in order to impeach the verdict.⁴

2. Prohibition of communication with non-jurors. — The second paragraph of the section prohibits non-jurors from speaking to or holding any communication with the jurors without the leave of the Court before they have delivered their verdict. If it is proved that a non-juror communicated with a member of the jury contrary to this provision, it is sufficient to upset the verdict and it is not necessary to enquire into the nature of the communication held with the juror.¹ Hence, proper precautions must be taken by the Sessions Judge to see that no non-juror holds any communication with the jurors when they have retired to consider their verdict.² But where a juror addressed to a police-officer a casual remark unconnected with the case and the

Section 300 — Note 1

1. ('25) AIR 1925 Pat 595 (596) : 26 Cri L Jour 861, *Sariman Ahir v. Emperor*.
2. ('30) AIR 1930 Cal 446 (447) : 31 Cri L Jour 1090, *Kasruddin v. Emperor*.
3. ('95) 1895 Rat 736 (737), *Empress v. Bharmia*. (Reference to Mayne's Penal Code.) ('97) 14 Cal 164 (166), *Jaspath Singh v. Queen-Empress*.
See also S. 297 Note 9 and S. 299 Note 2.
4. ('17) AIR 1917 Cal 149 (153) : 18 Cr. L. J. 311 (315) : 44 Cal 723 (S B), *In re Bonomally Gupta*. (Crown clerk sent to jury-room during deliberations to ascertain if jurors request further help from Court — Trial is not invalidated.) ('13) 14 Cr. L. J. 392 (395) : 40 Cal 693 : 20 I. C. 216, *Hara Kumar v. Emperor*. (Verdict attacked as arrived at by casting lots.)
See also S. 304 Note 1.

Note 2

1. ('19) AIR 1919 Cal 512(513):46Cal 207:19 Cr.L.J. 737, *Benimadhab v. Emperor*.
2. ('19) AIR 1919 Cal 512(514): 46 Cal 207:19 Cr.L.J. 737, *Benimadhab v. Emperor*.

police-officer made no reply, it was held that the provisions of the section were not infringed.³ Similarly, the mere presence of a police-officer in the jury-room does not vitiate the verdict unless it is shown that he spoke to or held any communication with any of the jurors.⁴ But it is undesirable to post a police-officer in the jury room or at any place from where he can hear the deliberations of the jury.⁵

Section 300
Note 2

The section does not prohibit the Judge from giving fresh directions to the jury if the latter require such directions for correctly understanding the case. Fresh directions should, however, be given in open Court and not in chambers.⁶ In a sessions trial by the High Court, the Clerk of the Crown can be sent to the jury-room to enquire if the jury require further assistance from the Judge.⁷

The prohibition contained in this section does not in terms apply to stages of the trial before the Judge *has finished his charge* to the jury. Hence, where during an adjournment of the case before the Judge's charge to the jury was finished, one of the jurors was seen conversing with a non-juror but the fact was not brought to the notice of the Court then and there, the High Court in appeal refused to interfere with the verdict of the jury.⁸ But it is highly undesirable that jurors should have communication with non-jurors upon the subject of a pending trial.⁹ Hence, where before the Judge had summed up his case, one of the jurors, in a room occupied by the clerks of pleaders in answer to questions put to him, said that in his opinion the accused was guilty of the charge, it was held that there should be a fresh trial before a fresh jury.¹⁰ See also the undermentioned cases.¹¹ See also sections 282 and 296 and Notes thereunder.

(25) AIR 1925 Pat 595 (596) : 26 Cri L Jour 861, *Sariman Ahir v. Emperor*.

3. ('17) AIR 1917 Cal 149 (151) : 18 Cr. L. J. 311 (313) : 44 Cal 723 (SB), *In re Bonomally Gupta*.

4. ('17) AIR 1917 Cal 149 (151) : 18 Cr. L. J. 311 (313) : 44 Cal 723 (SB), *In re Bonomally Gupta*.

5. ('17) AIR 1917 Cal 149 (151) : 18 Cr. L. J. 311 (314) : 44 Cal 723 (SB), *In re Bonomally Gupta*.

6. ('23) AIR 1923 Cal 647 (648) : 25 Cr.L.J. 343, *Bilaschandra v. Emperor*. (But mere fact that a question was put by the jury to the Judge not in open Court but in chambers did not vitiate the trial and it was at best a mere irregularity.)

7. ('17) AIR 1917 Cal 149 (152) : 18 Cr. L. J. 311 (314) : 44 Cal 723 (SB), *In re Bonomally Gupta*.

8. ('19) AIR 1919 Mad 222 (222) : 20 Cri L J 790, *In re Subba Reddi*.

9. ('17) AIR 1917 Cal 149 (151) : 18 Cr. L. J. 311 (312) : 44 Cal 723 (SB), *In re Bonomally Gupta*. (But the fact that a juryman on his way to the court house or to the waiting room is addressed by a stranger some remarks on the case to which he does not reply, cannot have the effect of invalidating the trial.)

(27) AIR 1927 Cal 628 (629) : 55 Cal 279 : 28 Cr. L. J. 783, *Bhuban v. Emperor*.

10. ('21) AIR 1921 Cal 631 (631) : 22 Cr.L.J. 510, *Emperor v. Nazar Ali Beg*.

11. ('29) AIR 1929 Cal 57 (58) : 56 Cal 150 : 30 Cri L Jour 435, *Rebati Mohan v. Emperor*. (Where it appeared that the foreman had been talking with the Court Inspector and the Judge on that ground discharged him and took another man present, empanelled him and proceeded with the trial—*Held* that the procedure was not objectionable.)

(29) AIR 1929 Cal 343 (345) : 56 Cal 1032 : 31 Cr.L.J. 366, *Abdur Rashid v. Emperor*. (A jury having once been discharged should not be recalled to do duty as jurors in the same case as it is reasonable to suppose that after discharge those jurors might have mixed freely with the people and talked about the case with others.)

Section 301

301.* When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Synopsis

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| 1. Delivery of verdict. | 3. Special verdict. |
| 2. Verdict as to offence not specifically charged. | 4. Verdict arrived at by casting lots. |

Other Topics (miscellaneous)

- | | |
|--|---|
| Individual opinions of jurors. See Note 1. | Verdict—Meaning of. See Note 1. |
| Jury's observations after verdict. See Note 1. | Verdict of "benefit of doubt." See Note 1. |
| Several accused — Verdict. See Note 1. | Verdict of "not guilty" — Effect. See Note 1. |
| Several charges — Verdict. See Note 1. | Verdict — Repugnancy in. See Note 1. |
| Verdict as to minor offence. See Note 2. | |

1. Delivery of verdict. — By "verdict" should be understood the collective opinion of the jury as a body, arrived at after mutual consultation, and ascertained and announced by the foreman.¹ A recommendation made by the jurors in the verdict is, however, not a part of the verdict.^{1a} In cases where an accused person is tried for various offences arising out of a single act or series of acts, the word "verdict" means the entire verdict on all the charges and is not limited to the verdict on a particular charge.²

As said already, the verdict is the opinion of the jury *as a body*.³ In case of disagreement, the individual opinions of the members of the jury should never be disclosed and the Judge commits an irregularity in recording the individual opinions of the jurors.⁴

The jury must return a verdict on all the charges on which an accused is tried; see S. 303. Where there are several accused persons in a case, the jury must return a verdict as against each.⁵ Where there are several charges, it would be a convenient course to follow to take the verdict of the jury upon each charge *separately*; this would obviate the difficulty in ascertaining what their verdict is on the various charges.⁶ A verdict that the jury gave the accused the benefit

* 1882 : S. 301; 1872 : S. 263; 1861 — Nil.

Section 301—Note 1

1. ('14) AIR 1914 Mad 319 (321) : 36 Mad 585 (589) : 15 Cri L Jour 197, *Public Prosecutor v. Abdul Hameed*.
- (25) AIR 1925 Oudh 746 (746) : 26 Cri L Jour 1346, *Jagannath v. Emperor*.
- 1a. ('34) AIR 1934 Oudh 34 (35), *Emperor v. Vidya Sagar*.
2. ('95) 22 Cal 377 (382), *Krishna Dhan Mandal v. Queen-Empress*.
3. ('01) 24 Mad 523 (536) : 2 Weir 340, *King-Emperor v. Tirumal Reddi*.
4. ('14) AIR 1914 Mad 319 (321) : 15 Cri L Jour 197 : 36 Mad 585 (589), *Public Prosecutor v. Abdul Hameed*.
- (25) AIR 1925 Oudh 746 (746) : 26 Cri L Jour 1346, *Jagannath v. Emperor*.
5. ('12) 13 Cr.L.J. 715 (715) : 16 Ind Cas 523 (Cal), *Jamiruddi Biswas v. Emperor*.
6. ('39) AIR 1939 Cal 321 (323) : 40 Cri L Jour 649, *Nanda Ghosh v. Emperor*. (Accused charged with abduction and kidnapping — Separate verdict on each charge should be taken.)
- (24) AIR 1924 Cal 47 (48) : 50 Cal 658 : 24 Cr.L.J. 838, *Eran Khan v. Emperor*. [See ('38) AIR 1938 Cal 460 (462, 463) : 39 Cr.L.J. 674, *Ebadi Khan v. Emperor*. (Accused charged under Ss. 366 and 376, Penal Code—Jury can convict accused under S. 366 and acquit them under S. 376.)]

Section 301
Notes 1-2

of doubt is not a verdict according to law, although such a verdict is often returned. A verdict of "not guilty" covers every condition from mere hesitating doubt to conviction of innocence.⁷ But it is a very dangerous principle to adopt to regard a verdict of 'not guilty' as not fully establishing the innocence of the person to whom it relates.^{7a} Mere repugnancy in a verdict is not sufficient to quash a conviction based on such verdict.⁸

Where, after delivering the verdict the foreman attempted to add something and the Judge stopped him from doing so, it was held that it was not proper to stop the jury at such a stage because, it may so happen that before the verdict is recorded the foreman of the jury may make some observations in respect of that verdict which may show that the jury have not properly understood the case, in which case it would be necessary to re-charge the jury so as to lay the case properly before them.⁹ See also Notes under ss. 302 and 303.

There is no particular form in which the jury are to deliver their verdict.^{9a} The mere fact that the jury add to their verdict their finding on the facts on which the verdict is based does not vitiate the verdict.^{9b}

As to interpretation of verdicts, see the undermentioned cases.¹⁰

A verdict of the jury after they have been discharged is not legal.¹¹

2. Verdict as to offence not specifically charged. — Sections 237 and 238 lay down the circumstances under which an accused person who is charged with one offence can be convicted of a different offence though not specifically charged with it. The principle of these sections applies also to the verdict of a jury and the jury can return a verdict of guilty in respect of an offence different from that specifically charged against the accused provided the circumstances of the case fall within

7. ('33) AIR 1933 Cal 404 (405): 34 Cr.L.J. 608, *Emperor v. Panchanon Sarkar*.

7a. ('38) AIR 1938 Cal 51 (70): 39 Cr. L. J. 161: 1 L.R. (1938) 1 Cal 290, *Goloke Behari v. Emperor*. ((1902) 2 K.B. 339, *Rex v. Plummer*, Followed.)

8. ('24) AIR 1924 Cal 1031 (1032): 52 Cal 112: 26 Cr. L. J. 11, *Umadasi Dasi v. Emperor*.

('14) AIR 1914 Cal 456 (469): 41 Cal 350: 15 Cr.L.J. 385, *Romesh Chandra v. Emperor*.

('14) AIR 1914 Cal 886 (887): 41 Cal 754: 15 Cr.L.J. 402, *Manindra v. Emperor*. See also S. 267 Note 1.

9. ('02) 30 Cal 485 (487, 488), *Narayan Changa v. Emperor*.

9a. ('35) AIR 1935 Cal 31 (31, 32): 36 Cri L Jour 480, *Kasimuddin v. Emperor*.

9b. ('35) AIR 1935 Cal 31 (31, 32): 36 Cr.L.J. 480, *Kasimuddin v. Emperor*. (It is enough if it is complete and exhaustive.)

10. ('06) 10 Cal W.N. xxxvii (xxxviii) (P.C.), *Wehner v. The King*. (Where jury found that accused had caused death but that he was not responsible for his actions owing to influence of liquor, held this did not amount to verdict of guilty.)

('08) 7 Cri L Jour 362 (365): 12 C.W.N. 530 (F.B.), *Emperor v. Khudiram Dass*. (A verdict, such as 'guilty, but not voluntarily' for a charge under S. 326, Penal Code, is one of 'not guilty'.)

('29) AIR 1929 Sind 145 (145): 23 Sind L.R. 397: 30 Cr. L. J. 877, *Mir Ahmed Shah v. Emperor*. (Inference from verdict of 'not guilty' is that the guilt of accused is not established.)

('32) AIR 1932 P.C. 275 (278) (P.C.), *Paul Pronck v. Winnipeg Rly. Co.* (The language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly.)

11. ('34) AIR 1934 P.C. 227 (227) (P.C.), *Warren Ducane Smith v. The King*.

Section 301
Notes 2-3

the purview of these sections. Thus, where on a charge of murder, the jury finds that the accused was deprived of his self-control by grave and sudden provocation, they can return a verdict of culpable homicide not amounting to murder.¹ (See S. 233.) Similarly, on a charge of rape the jury can return a verdict of attempt to commit rape (S. 238).² On a charge of dacoity the jury can return a verdict of theft (S. 238)³ or of abetment of dacoity or robbery (S. 237).⁴ On a charge under S. 149 read with S. 325, Penal Code, it is open to the jury, if it disbelieves the evidence as to the unlawful assembly, to convict the accused under S. 325 alone though there was no separate charge under that section.⁵ See also the undermentioned cases.^{5a}

Where the jury returned a verdict of not guilty on the charges framed, but by the same verdict found the accused guilty of an offence triable with assessors only, and the Judge convicted the accused on such finding, it was held that in the absence of any miscarriage of justice the conviction will not be set aside.⁶

3. Special verdict. — A special verdict is one where the jury merely state certain *facts* as proved and leave it to the Judge to draw the legal inference from them.¹ Such a verdict is recognised as a proper verdict under the English law.² But there is a conflict of decisions as to whether a special verdict would be a legal verdict under the Code. On the one hand, it has been held by the Bombay High Court, that a

Note 2

1. ('96) 20 Bom 215 (217, 218), *Empress v. Devji Govindji*.
2. ('10) 11 Cr.L.J. 630 (630): 13 Oudh Cas 295: 8 I. C. 373, *Shubrati v. Emperor*.
3. ('08) 8 Cri L Jour 143 (144): 10 Bom L R 632, *Emperor v. Chandra Krishna*.
4. ('15) AIR 1915 Low Bur 39 (45): 8 Low Bur Rul 274: 16 Cri L Jour 676 (680), *S. P. Ghosh v. Emperor*.
5. ('80) 5 Cal 871 (873), *Govt. of Bengal v. Mahaddi*.
[But see ('15) AIR 1915 Cal 292 (294, 295): 15 Cri L Jour 155 (158): 41 Cal 662, *Emperor v. Maden Mondol*.]
- 5a. ('38) AIR 1938 Cal 51 (59, 68, 69): 39 Cri L Jour 161: ILR (1938) 1 Cal 290, *Goloke Behari v. Emperor*. (Charge under S. 302 read with S. 120B—Jury cannot return a verdict of guilty either under S. 326 read with S. 120B or under S. 326, as these offences are not minor to the offence of conspiracy to murder.)
- ('37) AIR 1937 Pat 662 (664): 39 Cri L Jour 156, *Emperor v. Haria Dhobi*. (Accused tried under S. 397 — Jury returning verdict of not guilty — Jury can find accused guilty under S. 323 or S. 325 even in absence of charge.)
- ('32) AIR 1932 Cal 297 (298): 59 Cal 1040: 33 Cr.L.J. 546, *Durlav Namasudra v. Emperor*. (Persons charged under Ss. 302 and 201, Penal Code — Jury while acquitting them under S. 302 can find them guilty of minor charge under S. 201.)
- ('14) AIR 1914 Mad 425 (428): 13 Cr.L.J. 739 (741): 37 Mad 236, *In re Adabala Muthiyalu*. (Charge under S. 397—Verdict of guilty under S. 326.)
- ('75) 23 Suth W R Cr 61 (62), *Queen v. Lukhinarain Agoori*. (Charge under Ss. 304, 325, 323—Verdict of guilty under S. 335.)
- (1865) 3 Suth W R Cr 41 (41), *Queen v. Satoo Sheikh*. (Verdict of guilty for a minor offence when offence charged is a major offence.)
6. ('28) AIR 1928 Mad 275 (275): 29 Cri L Jour 351, *Arumuga Kone v. Emperor*. (26 Mad 243, Distinguished.)

Note 3

1. ('94) 19 Bom 735 (736), *Queen-Empress v. Madhav Rao*. (If in a charge of rape, the jury returned a verdict that the accused did the act but with the consent of the woman, it is not necessary to ask them to return a verdict of guilty or not guilty.)
- ('95) 20 Bom 215 (217), *Empress v. Devji Govindji*.
2. ('12) 13 Cr.L.J. 586 (587): 15 I.C. 1002 (Mad), *Arunachala Thevan v. Emperor*.

special verdict would be a legal verdict under the Code.³ The High Court of Calcutta is inclined to the same view.⁴ On the other hand, the Madras High Court has held that such a verdict is not a legal verdict.⁵

In dealing with special verdicts, a Judge is confined to the facts positively stated in the verdict and cannot himself supply by intendment or implication any defect in the statement.⁶ But if the special verdict is ambiguous or incomplete, it is open to him to question the jury under s. 303 and have their verdict supplemented.⁷

4. Verdict arrived at by casting lots. — As seen in Note 1, the verdict of a jury is the collective opinion of the jury as a body arrived at after mutual consultation and ascertained and announced by the foreman. Hence, a verdict arrived at by casting lots among the jurors would not be legal. But the sworn statement of a juror is not admissible for the purpose of showing that a verdict was arrived at by casting lots.¹

302.* If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

1. Scope of the section. — This section empowers the Judge, when the jury are not unanimous in their verdict, to require them to retire for further consideration.¹ Hence, when the jury differ in their opinion, the proper course for the Judge is to direct them under this section to re-consider their verdict.² But the section is intended to be applied as soon as the Judge ascertains that there is a difference of opinion among the jurors and before the verdict is delivered. The section does not apply to cases where the verdict has actually been delivered.³ When directing the jury to re-consider their verdict under

* 1882 : S. 302; 1872 : S. 263; 1861 : S. 352.

3. ('91) 15 Bom 452 (465), *Queen-Empress v. Dada Ana*.

('95) 19 Bom 735 (736, 737), *Queen-Empress v. Madhav Rao*.

('96) 20 Bom 215 (217), *Empress v. Devji Govindji*.

4. ('24) AIR 1924 Cal 257 (284): 25 Cr.L.J. 817 (FB), *Emperor v. Barendra Kumar*.

5. ('12) 13 Cr. L. J. 586 (587, 588): 15 I. C. 1002, (Mad), *Arunachala v. Emperor*.

6. ('94) 1894 Rat 710 (714), *Queen-Empress v. Abdul Razak*.

7. ('94) 1894 Rat 710 (713), *Queen-Empress v. Abdul Razak*.

('76) 14 Suth W R Cr 59 (62), *Queen v. Hurry Prosad Gangooly*.

('06) 3 Cr. L. J. 1 (3): 3 L. B. R. 75 : 11 Bur LR 298 (FB), *Hla Gyi v. Emperor*.

Note 4

1. ('13) 14 Cr.L.J. 392 (395) : 40 Cal 693 : 20 I. C. 216, *Hara Kumar v. Emperor*.

Section 302 — Note 1

1. ('98) 1898 Rat 982 (983, 984), *Empress v. Chunilal Vithal*.

2. ('82) 8 Cal 739 (754) : 12 C L R 233, *In re Jhubbao Mahton*.

- ('95) 1895 Rat 736 (737), *Empress v. Bharmia*.

3. ('14) AIR 1914 L B 244 (245) : 15 Cr. L. J. 678 : 7 L. B. R. 140, *Kya Nyun v. Emperor*. (Section does not prevent mere ascertainment of actual majority.) ('84) 10 Cal 140 (144) : 13 C L R 358, *Hurri Churn v. Empress*. (After asking what is the actual majority and their opinion Judge cannot proceed under section.)

Section 301
Notes 3-4

Section 302

Section 302
Note 1

this section, it is open to the Judge to give them fresh directions on matters of law.⁴

If the jury are unanimous, their verdict must be received unless it is contrary to law.⁵ Hence, where the verdict is ambiguous, the proper procedure is to question the jury under S. 303, and clear up the matter and not to direct the jury to re-consider the verdict.⁶ But where the verdict is not in accordance with the law⁷ or where from the observations of the foreman of the jury it is clear that the jury have not understood the case,⁸ the Judge can give them fresh directions and ask them to retire for further consideration of the verdict.

Section 303

303.* (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Questions and answers to be recorded. (2) Such questions and the answers to them shall be recorded.

Synopsis

1. Verdict to be on all the charges.
2. Form of verdict.
3. "May ask them such questions as are necessary to ascertain what their verdict is."
4. Questions and answers to be recorded.
5. Re-consideration of the verdict.

Other Topics (miscellaneous)

Effect of no finding on some charges. See Note 1.
Object of the section. See Note 3.
Questions as to nature in a finding of provocation. See Note 3.
Question only when the verdict is ambiguous. See Note 3.
Reasons for the verdict. See Note 3.

1. Verdict to be on all the charges. — Where there are several charges against an accused and evidence has been heard on all the

* 1882 : S. 303; 1872 : S. 263; 1861 — Nil.

4. ('95) 1895 Rat 736 (737), *Empress v. Bharmia*.
- ('04) 1 Cri L Jour 265 (268) : 6 Bom L R 258, *Emperor v. Bharmia*.
5. ('80) 5 Cal 871 (873, 874), *Government of Bengal v. Mahaddi*.
- ('28) AIR 1928 Cal 228 (228) : 29 Cr. L. J. 228, *Superintendent & Legal Remembrancer v. Juhay Sheikh*.
- ('06) 3 Cr. L. J. 1 (3) : 3 L. B. R. 75 : 11 Bur L R 298 (FB), *Hla Gyi v. Emperor*.
6. ('06) 3 Cr. L. J. 1 (3, 4) : 3 L. B. R. 75 : 11 Bur L R 298 (FB), *Hla Gyi v. Emperor*.
7. (1864) 1 Suth W R Cr 50 (51), *Queen v. Uckoor Ghose*. (Jury not entitled to pronounce on the law or to give their own definition of "murder.")
- ('80) 5 Cal 871 (873, 874), *Government of Bengal v. Mahaddi*.
8. ('03) 30 Cal 485 (487, 488), *Narayan Changa v. Emperor*.
- ('94) 2 Weir 514 (514), *In re Veerappan*.
- ('30) AIR 1930 Cal 320 (320) : 57 Cal 61 : 31 Cr. L. J. 761, *Hamid Ali v. Emperor*.
(If the verdict is absurd, the Judge can ask them to reconsider it—Not bound to accept it either as a verdict of guilty or not guilty.)
See also S. 297 Note 18 and S. 304 Note 1.

charges, the jury should submit a verdict on *all* the charges.¹ A failure to give a verdict on one of the charges framed does not, however, amount to an acquittal on that charge, and the accused can be ordered to be re-tried again on the charge on which the verdict was silent.²

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Notes 1-3

2. Form of verdict. — The law does not prescribe any special form in which the jury are to return their verdict. They are at liberty to deliver it in any form they like and if that finding is not exhaustive as to the facts in issue which go to make up the charge, it is the duty of the Judge to put such questions as shall elicit a complete finding.¹ In a trial for an offence under S. 408, Penal Code, in respect of a gross sum said to have been misappropriated within a year and composed of more than three items, the proper form in which the verdict should be given is a verdict in respect of an offence under S. 408 and not in respect of each of the items alleged to be misappropriated.²

3. "May ask them such questions as are necessary to ascertain what their verdict is." — It is not open to the Judge to make surmises or conjectures as to what is the verdict of the jury.¹ A Judge is, therefore, empowered to put questions to the jury where they are necessary to ascertain *what their verdict is*.² It is only in cases where the jury have failed to return a complete verdict *on all the charges* or heads of charge³ or the verdict returned is *ambiguous* and not clear⁴ that the Judge may ask questions in order to find out

Section 303 — Note 1

1. ('39) AIR 1939 Cal 321 (323) : 40 Cri L Jour 649, *Nanda Ghosh v. Emperor*. (Accused charged with kidnapping and abduction — Separate verdict on each charge should be taken.)
- ('86) 1886 Rat 286 (286, 287), *Queen-Empress v. Lingo*.
- (1865) 3 Suth W R Cr 29 (31), *Queen v. Sheikh Gulam Mustuffa*.
- ('80) 5 Cal 871 (873), *Govt. of Bengal v. Mahaddi*. (Verdict on offence proved though not independently charged is proper.)
- ('28) AIR 1928 Mad 207 (208) : 28 Cri L Jour 1007, *In re Virumandi Thevan*.
- ('26) AIR 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ram Prasad v. Emperor*.
- ('95) 1895 Rat 746 (747), *Queen-Empress v. Berkia Mankia*.
2. ('24) AIR 1924 Cal 809 (810, 811) : 25 Cr.L.J. 1048, *Emperor v. Osman Surdar*.

Note 2

1. ('70) 14 Suth W R Cr 59 (62) : 8 Beng L R 557, *Queen v. Hari Prosad Gangooly*.
- ('06) 3 Cr.L.J. 1 (3) : 3 Low Bur Rul 75 : 11 Bur L R 298 (FB), *Hla Gyi v. Emperor*.
2. ('30) AIR 1930 Cal 717 (719) : 32 Cri L Jour 321, *Rahim Bux v. Emperor*.

Note 3

1. ('36) AIR 1936 Oudh 164 (165) : 37 Cr. L.J. 182 : 11 Luck 687, *Satdeo v. Emperor*.
2. ('36) AIR 1936 Oudh 164 (165) : 37 Cr.L.J. 182 : 11 Luck 687, *Satdeo v. Emperor*.
- ('35) AIR 1935 All 1020 (1022) : 36 Cri L Jour 1377, *Dori v. Emperor*. (Beyond putting questions the Judge has no jurisdiction to enter into a discussion of the facts of the case with the jury.)
- ('05) 2 Cr. L. J. 259 (264) : 32 Cal 759 : 9 C W N 520, *Emperor v. Abdul Hamid*.
- ('31) AIR 1931 Cal 636 (636) : 33 Cri L Jour 29, *Emperor v. Karim Dai*.
- ('74) 21 Suth W R Cr 1 (2), *Queen v. Sustiram Mandal*.
- ('04) 1 Cri L Jour 265 (268) : 6 Bom L R 258, *Emperor v. Bharmia*.
- ('04) 1 Cri L Jour 331 (332) : 28 Bom 412 : 6 Bom L R 361, *Emperor v. Kondiba*.
- ('28) AIR 1928 Pat 203 (205) : 7 Pat 55 : 29 Cr.L.J. 466, *Ramjag Ahir v. Emperor*.
- ('83) 9 Cal 53 (61) : 11 Cal L R 169, *In re Dhunum Kazee*.
3. ('86) 1886 Rat 289 (290), *Queen-Empress v. Sida*.
- ('24) AIR 1924 Cal 47 (47) : 50 Cal 658 : 24 Cri L Jour 838, *Eran Khan v. Emperor*. (Incomplete verdict.)
- ('70) 14 Suth W R Cr 59 (62) : 8 Beng L R 557, *Queen v. Hari Prosad Gangooly*.
4. ('35) AIR 1935 All 1020 (1022) : 36 Cri L Jour 1377, *Dori v. Emperor*.

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Note 3

what exactly the verdict is. Thus, where the verdict is not exhaustive as to the facts in issue which go to make up the charge or charges, it is competent to the Judge to ask questions so as to elicit a complete finding.⁵ Similarly, where the jury return a verdict of guilty of an offence under S. 304, Penal Code, the Judge can ask questions for the purpose of finding out under which part of the section they find the accused guilty.⁶ So also, where, in a charge of murder the verdict was "guilty of murder under grave and sudden provocation," the Judge can ask questions under this section for the purpose of ascertaining if the provocation was sufficient to destroy self-control.⁷ Likewise, where, in a charge under S. 326, Penal Code, the jury returned a verdict of "guilty but not voluntarily" the Judge can ask the jury to explain their verdict inasmuch as voluntariness of the act is the gist of the offence under that section.⁸ Where the jury return a verdict of not guilty of culpable homicide, it is the duty of the Sessions Judge to require the jury to find expressly whether or not any minor offence had been committed.⁹ Where in a trial under S. 489B, Penal Code, for uttering forged notes, the jury returns a verdict that the accused uttered the notes, the Judge should ascertain from the jury their opinion as to whether the said notes had been uttered with the knowledge of their being forged.¹⁰ In a trial under S. 366, Penal Code,

(194) 21 Cal 955 (973, 974), *Wafadar Khan v. Queen-Empress*. (Jury leaving it uncertain what the common object of unlawful assembly was.)

(170) 14 Suth W R Cr 59 (62), *Queen v. Hari Prosad Gangooly*.

(131) AIR 1931 Cal 636 (636) : 33 Cri L Jour 29, *Emperor v. Karim Dai*.

(104) 1 Cri L Jour 331 (332) : 28 Bom 412 : 6 Bom L R 361, *Emperor v. Kondiba*.

(126) AIR 1926 Cal 895 (896) : 27 Cri L Jour 926, *Emperor v. G. C. Wilson*.

(Verdict was confused and unintelligible.)

(103) 7 Cal W N 135 (137), *King-Emperor v. Chidghan Gossain*.

(125) AIR 1925 Cal 260 (262) : 26 Cri L Jour 532, *Khirode Kumar v. Emperor*.

(Case under S. 408, Penal Code — Jury's verdict as to amount embezzled is not definite — Judge bound to question jury.)

(105) 2 Cr. L. J. 259 (264) : 32 Cal 759 : 9 C W N 520, *Emperor v. Abdul Hamid*.

(The verdict in this case was held to be clear and not perverse.)

(196) 20 Bom 215 (217), *Queen-Empress v. Devji Govindji*.

(131) AIR 1931 Mad 775 (776) : 55 Mad 256 : 32 Cr. L. J. 1276, *Sundaram Iyer v. Emperor*.

5. (170) 14 Suth W R Cr 59 (62), *Queen v. Hari Prosad Gangooly*.

6. (195) 19 Bom 741 (743), *Empress v. Rego Montopoulo*.

(134) AIR 1934 Cal 173 (174) : 61 Cal 256 : 35 Cr. L. J. 496 (SB), *Sadek Mandal v. Emperor*.

(105) 9 Cal W N cccxii (cccxi), *Amanatulla Mandal v. Emperor*. (In the absence of such a question to the jury it was held that the accused committed an offence under the latter part of S. 304, Penal Code.)

(171) 15 Suth W R Cr 17 (18) : 6 Beng L R App 86, *Queen v. Kali Churn Dass*.

(1865) 2 Suth W R Cr L 11 (11).

(169) 12 Suth W R Cr 35 (35, 36) : 6 Beng L R App 87n, *Queen v. Amir Khan*.

(Otherwise it will be assumed that jury had found that the lesser form of offence had been committed.)

(190) 1890 Rat 530 (530), *Queen-Empress v. Ladkya*.

(127) AIR 1927 Rang 68 (70) : 4 Rang 488 : 28 Cr. L. J. 213 (FB), *Emperor v. Nga Tin Gyi*.

7. (196) 20 Bom 215 (217), *Queen-Empress v. Devji Govindji*.

8. (108) 7 Cr L J 362 (365) : 12 C W N 530 (FB), *Emperor v. Khudiram Dass*.

9. (1900) 2 Bom L R 334 (334), *Queen-Empress v. Pandukul Patil*.

(127) AIR 1927 Rang 68 (70) : 4 Rang 488 : 28 Cr. L. J. 213 (FB), *Emperor v. Nga Tin Gyi*.

10. (136) AIR 1936 Oudh 164 (165) : 37 Cr. L. J. 182 : 11 Luck 687, *Satdeo v. Emperor*.

it is the duty of the Judge to put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject of the charge.¹¹

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Notes 3-4

On the other hand, where the verdict is clear, complete and unambiguous, the Judge is bound to accept the same,¹² or, if he disagrees with it, to make a reference to the High Court under S. 307.¹³ He has no power to ask questions of the jury,¹⁴ as to their *reasons* for the verdict.¹⁵ As to whether, for the purpose of making a reference under S. 307 the Judge can question the jury as to their reasons for the verdict, see S. 307 Note 13.

The mere fact that the jury were unable to give reasons for their verdict cannot be held to show that they had no adequate reasons for their verdict.¹⁶

4. Questions and answers to be recorded. — A Judge who does not record the questions put to the jury and their answers thereto but gives only a substance of the result, cannot be deemed to have

11. ('36) AIR 1936 Cal 675 (676) : 38 Cri L Jour 176, *Samarali v. Emperor*.
12. ('83) 9 Cal 53 (61), *In re Dhunum Kazee*. (The verdict if simple and clear may be erroneous but it cannot be ambiguous.)
- ('07) 6 Cri L Jour 373 (373, 374) : 30 Mad 469 : 17 M L J 476, *In re Seranadu*.
13. ('35) AIR 1935 All 1020 (1022) : 36 Cri L Jour 1377, *Dori v. Emperor*.
- ('14) AIR 1914 Low Bur 244 (245) : 7 L B R 140 : 15 Cr. L. J. 678, *Kya Nyun v. Emperor*.
- ('34) AIR 1934 Cal 173 (174) : 61 Cal 256:35 Cr. L. J. 496 (SB), *Sadek Mandal v. Emperor*.
- ('31) AIR 1931 Mad 775 (776) : 55 Mad 256 : 32 Cr.L.J. 1276, *Sundaram Iyer v. Emperor*.
14. ('35) AIR 1935 All 1020 (1022) : 36 Cri L Jour 1377, *Dori v. Emperor*.
- ('20) AIR 1920 Cal 406 (407) : 21 Cri L Jour 829, *Edon Karikar v. Emperor*.
- ('06) 3 Cri L Jour 371 (372) : 29 Mad 91, *Emperor v. Chellan*.
- ('89) 1889 Rat 442 (448, 449), *Queen-Empress v. Desai Daji*.
- ('05) 2 Cal L Jour 75n (75n), *Emperor v. Ann Parui*.
- ('91) 15 Bom 452 (466), *Queen-Empress v. Dada Ana*.
- ('05) 2 Cri L Jour 357 (358) : 2 A L J 475, *Emperor v. Chirkua*. (The unanimous verdict was neither ambiguous nor perverse in this case.)
- ('23) AIR 1923 Cal 647(648, 649):25 Cr.L.J. 343, *Bilashandra Banerjee v. Emperor*.
- ('28) AIR 1928 Cal 228 (228) : 29 Cri L Jour 228, *Superintendent and Legal Remembrancer v. Jahay Sheikh*. (The Judge questioned the jury and he proceeded to recharge them — This was held to be illegal.)
- ('84) 10 Cal 140 (144) : 13 C L R 358, *Hurry Charan Chuckerbutty v. Empress*. (If the jury are not unanimous, the Judge should not make enquiries to learn the nature of the majority and its opinion.)
- ('30) AIR 1930 Pat 203 (208) : 31 Cri L Jour 54, *Emperor v. Bhukhan Dubey*. (Clear verdict giving benefit of doubt—Judge cannot question as to nature of doubt.)
15. ('28) AIR 1928 Pat 203 (205): 7 Pat 55:29 Cr.L.J. 466, *Ramjag Ahir v. Emperor*.
- ('31) AIR 1931 Mad 775 (776) : 55 Mad 256 : 32 Cr. L. J. 1276, *Sundaram Aiyer v. Emperor*.
- ('30) AIR 1930 Cal 443 (444) : 31 Cr. L. J. 1150, *Emperor v. Derajtullah Sheikh*.
- ('04) 1 Cri L Jour 331 (332) : 28 Bom 412 : 6 Bom L R 361, *Emperor v. Kondiba*.
- ('31) AIR 1931 Cal 636 (636) : 33 Cri L Jour 29, *Emperor v. Karim Dai*.
- ('12) 13 Cr.L.J. 586 (587, 588): 15 I.C. 1002 (Mad), *Arunachalla Thevan v. Emperor*.
- ('20) AIR 1920 Mad 170 (170, 171) : 43 Mad 744 : 21 Cri L Jour 466, *In re Subbiah Thevan*.
- ('04) 1 Cri L Jour 265 (268) : 6 Bom L R 258, *Emperor v. Bharmia*.
- ('12) 13 Cri L Jour 285 (285) : 14 Ind Cas 669 (Mad), *In re Rama Naicker*.
- ('06) 3 Cr. L. J. 371 (372) : 29 Mad 91, *Emperor v. Chellan*. (The jury may give reasons if they like.)
- ('23) AIR 1923 Pat 474 (474) : 26 Cri L Jour 856, *Emperor v. Ali Hyder*.
- ('73) 20 Suth W R Cr 50 (50), *Queen v. Meajan Sheikh*.
16. ('25) AIR 1925 Cal 525 (529, 530): 26 Cr.L.J. 805, *Emperor v. Nishi Kanta*.

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Notes 4-5

complied with the direction of law under this section.¹ The provisions of this and the next section imply that the jury are cognizant of the record as made by the Judge, of the questions put to them and answers given by them. It is extremely desirable that such record should be immediately read over to the jury and this should always be done.² The omission to record the verdict of the jury in the terms prescribed by the Code is not however such an irregularity as requires the trial to be quashed and a new one to be ordered.³

5. Re-consideration of the verdict. — Where the jury have delivered a clear and legal verdict, the Judge *cannot ask them to re-consider their verdict*; if he disagrees with the verdict he should act under S.307.¹ Thus, where in a case of robbery the jury disbelieving the evidence as to the use of force gave a verdict of guilty of theft only, it was held that such a finding was not contrary to law and that the Judge could not direct a reconsideration of the verdict.² Similarly, where the jury returned a verdict of guilty under S. 325, Penal Code, although it was not the subject of a separate charge but was entered in a charge coupled with S.149 of that Code, it was held that the verdict was according to law and that the Judge could not direct reconsideration of the verdict.³

But where there is no *legal verdict* at all⁴ or where the verdict is silent on a particular part of the case, as where the foreman replies that they have not considered a particular part of the case as to which the Judge wanted their opinion,⁵ they can be sent back to reconsider the verdict. In the case of an obviously and admittedly inconsistent verdict, the Judge can make a further charge to the jury instead of referring the case to the High Court under S. 307.^{5a} So also, where in a trial for murder the jury at first stated that their unanimous verdict was “guilty of culpable homicide not amounting to murder” and the Judge, in order to ascertain which degree of the offence the jury

Note 4

1. ('82) 8 Cal 739 (754), 12 Cal L R 233, *In re Jhubboo Mahton*.
- ('11) 12 Cri L Jour 140 (141) : 9 Ind Cas 788 (Mad) *Palaresa Thevan v. Emperor*.
- ('26) AIR 1926 Nag 53 (54) : 26 Cri L Jour 1090, *Ramprosad v. Emperor*.
2. ('31) AIR 1931 Cal 345 (348) : 58 Cal 1138 : 32 Cr.L.J. 598, *Ifatulla v. Emperor*.
3. ('71) 15 Suth W R Cr 11 (14), *In re Sheikh Tenoo*.

Note 5

1. ('14) AIR 1914 Low Bur 244 (245) : 7 Low Bur Rul 140 : 15 Cri L Jour 678, *Kya Nyun v. Emperor*.
- ('14) AIR 1914 Mad 319 (322) : 36 Mad 585 : 15 Cr. L. J. 197, *Public Prosecutor v. Abdul Hamid*.
- ('31) AIR 1931 Mad 775 (776, 777) : 55 Mad 256 : 32 Cr.L.J.1276, *Sundaram Aiyer v. Emperor*.
- ('35) AIR 1935 All 1020 (1022) : 36 Cr.L.J. 1377, *Dori v. Emperor*. (If the verdict is clear the Judge cannot charge the jury afresh.)
- [See ('25) AIR 1925 Cal 260 (261, 262) : 26 Cr.L.J. 532, *Khirode Kumar v. Emperor*.]
2. (1864) 1 Suth W R Cr Letters 13 (13).
- (1865) 2 Suth W R Cr 13 (13), *Queen v. Sakhaut Sheikh*.
3. ('80) 6 Cal L R 349 (350, 351), *Empress v. Mahuddi*.
4. (1864) 1 Suth W R Cr 50 (50, 51), *Queen v. Uckoor Ghose*.
- See also S. 304 Note 1.
5. ('27) AIR 1927 All 721 (723) : 50 All 365 : 28 Cr.L.J. 950, *Sur Nath v. Emperor*.
- 5a. ('33) AIR 1933 Cal 640 (640, 641) : 60 Cal 729 : 34 Cri L Jour 1084, *Rafat Sheikh v. Emperor*.

intended, asked them questions and from their answers found that they were in doubt as to what they meant and sent them back to reconsider their verdict, it was held that until the jury had intimated under which part of S. 304, Penal Code, their verdict fell, there was no complete verdict capable of being accepted and recorded, that their subsequent answers showed that they had come to no unanimous verdict and that it was the duty of the Judge to send them back for further consideration of their verdict.⁶

See also the undermentioned cases.⁷

Section 303
Note 5

304.* When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

Section 304

1. Grounds for amendment.—A verdict can be amended by the jury only where by *accident* or *mistake* a wrong verdict is delivered. The section contemplates cases where the verdict delivered is not in accordance with what was really intended *to be delivered* by the jury. Where there is no mistake or accident in the delivery of the verdict but the verdict is erroneous by reason of the jury having misunderstood the law, it can be corrected only under S. 307 by a reference to the High Court.¹ Similarly, where the jury delivered a verdict of not guilty of murder but guilty of culpable homicide not amounting to murder and the Judge asked them under what part of S. 304, Penal Code, they found the accused guilty, it was held that the jury could not review their former verdict or amend it unless by mistake or accident a wrong verdict had been delivered.² So also, where the jury delivered a unanimous verdict of not guilty but in answer to some questions by the Judge they said that they had been misled by the notes of their foreman and wanted to reconsider their verdict, it was held that the verdict could not be said to have been delivered by accident or mistake and could not be amended under this section.³

But where there has been no legal verdict at all, as where the jury gave a verdict to the effect "we have no doubt that the accused killed the deceased, we think that the deceased gave no provocation, but we do not think it murder, because the prisoner had no object in killing,"

* 1882 : S. 304; 1872 and 1861—Nil.

6. ('27) AIR 1927 Rang 68 (70) : 4 Rang 488 : 28 Cr. L. J. 213 (F B), *Emperor v. Nga Tin Gyi*.

7. ('94) 2 Weir 514 (514), *In re Verappan*. (Jury got confused and did not understand the remarks of the Judge — Direction to reconsider the verdict was proper.)

('86) 2 Weir 497 (498), *In re Dorasawmy Aiya Tevan*.

('76) 25 Suth W R Cr 36 (36), *Queen v. Gokool Kahar*.

Section 304 — Note 1

1. ('04) 1 Cr. L. J. 331 (332) : 28 Bom 412 : 6 Bom LR 361, *Emperor v. Kondiba*.

('31) AIR 1931 Mad 775 (776) : 55 Mad 256 : 32 Cr. L. J. 1276, *Sundaram v. Emperor*.

2. ('98) 1898 Rat 982 (983), *Queen-Empress v. Chumilal Vithal*.

3. ('12) 13 Cri L Jour 285 (285) : 14 Ind Cas 669 (Mad), *In re Rama Naiker*.

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the jury could be asked to re-consider their verdict.⁴ It has also been held that the Judge will not be acting wrongly in asking the jury to re-consider their verdict where it is absurd or confused or not clear and definite.⁵

All the evidence on both sides should be concluded before the case can be submitted to the jury. There is no power in the Judge to present a case to the jury subject to any conditions and once they deliver the verdict they cannot re-consider the same except under this section. Thus, where a Judge presented a case to the jury before the defence evidence was heard and they gave a verdict of guilty, and then further defence evidence was taken and the jury submitted a fresh verdict, it was held that the second verdict was a nullity and the judgment thereon was without jurisdiction.⁶

Even after formally delivering the verdict the jury ought to be allowed if they wish to do so, to say immediately after their verdict what they had in their mind in order that the delivery of the verdict may be complete.⁷

2. Time for amendment. — This section provides for an amendment of a wrong verdict but it clearly contemplates that such a verdict can be amended only *before or immediately after it is recorded*, in other words, before the jurors have left the Court and while they are still under the observance of the presiding Judge.¹ Where the foreman publicly announced the verdict as the unanimous verdict of all the members, in the hearing of all and without any dissent on the part of any of them, and the verdict was recorded and the accused acquitted, the Court refused to set aside the verdict when it was learnt some days after that the verdict was not the unanimous verdict of the jury.²

3. Final verdict to stand. — Where there is some uncertainty in the minds of the jury, the Judge can question them. In such a case, there is no verdict delivered and there could be no verdict formally

4. (1864) 1 Suth W R Cr 50 (50, 51), *Queen v. Uckoor Ghose*.

See also S. 303 Note 5.

5. ('30) AIR 1930 Cal 320 (320) : 57 Cal 61 : 31 Cri L Jour 761, *Hamid Ali v. Emperor*. (Absurd verdict cannot be taken as a verdict of not guilty.)

('94) 2 Weir 514 (514), *In re Veerappan*. (Jury confused — Verdict can be reconsidered.)

('34) AIR 1934 Oudh 34 (35), *Emperor v. Vidya Sagar*. (Verdict not clear and definite may be sent to jurors for a clear one.)

('32) AIR 1932 Cal 118 (118, 119) : 58 Cal 1335 : 33 Cr. L. J. 135, *Girishchandra Namadas v. Emperor*. (Conviction based on fresh verdict is not illegal where the original one was based on a misconception.)

See also S. 297 Note 18 and S. 302 Note 1.

6. ('24) AIR 1924 Lah 17 (20, 21) : 4 Lah 382 : 25 Cri L Jour 377, *John Thomas Lyme v. Emperor*. (It is immaterial that the second verdict is in effect the same as the first.)

7. ('03) 30 Cal 485 (487, 488), *Narayan Changa v. Emperor*.

Note 2

1. ('12) 13 Cr. L. J. 815 (817) : 1913 Pun Re No. 6 Cr : 17 I. C. 559 (FB), *Emperor v. Brein Bonham Carter*.

('31) AIR 1931 Cal 345 (348, 349) : 58 Cal 1138 : 32 Cr. L. J. 598, *Ifatullah v. Emperor*.

2. ('12) 13 Cr. L. J. 815 (821) : 17 I. C. 559 : 1913 Pun Re No. 6 Cr (FB), *Emperor v. Brein Bonham Carter*.

recorded until the last of the questions has been answered¹ and it is the verdict as ultimately amended that should stand. An amendment of the charge under S. 227 can be made at any time till the final verdict of the jury in this sense is returned.² See also S. 227 Note 6.

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Note 3

305.* (1) When in a case tried before a High Court the jury are unanimous in their opinion, or when as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

Section 305

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

1. Scope of the section. — Under this section, if the jury return a unanimous verdict, the Judge must pass judgment in accordance with it, whether or not he agrees with the opinion of the jury.¹ If the jury are not unanimous but six of them are of one opinion and the Judge agrees with them, such opinion has the same legal force as a unanimous verdict of the jury and the Judge must pass judgment in accordance therewith.² When the Judge disagrees with the opinion of the majority of the jury under sub-s.(3), it is competent to him to express his view as to the innocence or guilt of the accused.³ When the verdict of the jury is a majority verdict of only five to four, it is ineffective either to acquit or convict the accused even if the Judge agrees with the verdict.⁴ In such cases the Judge shall discharge the jury under sub-s.(4).

As to the procedure to be adopted when the Judge discharges the jury under this section, see S. 308.

* 1882 : S. 305; 1872 and 1861 — Nil.

Note 3

1. ('74) 21 Suth W R Cr 1 (2), *Queen v. Sustiram Mandal*.

2. ('84) 8 Bom 200 (211, 212), *Queen-Empress v. Appa Subhana*.

Section 305 — Note 1

1. ('15) AIR 1915 Low Bur 39 (41) : 8 Low Bur Rul 274 : 16 Cr. L. J. 676 (679), *S. P. Ghosh v. Emperor*.

2. ('15) AIR 1915 Cal 773 (784) : 16 Cri L Jour 561 (566, 571, 572) (FB), *Emperor v. Upendra Nath Das*.

3. ('35) AIR 1935 Sind 189 (191) : 36 Cri L Jour 1359, *Premchand v. Emperor*. (Judge disagreeing with majority — Jury not insulted by such disagreement.)

4. ('35) AIR 1935 Sind 189 (189) : 36 Cr. L. J. 1359, *Premchand v. Emperor*.

Section 306

306.* (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 562, pass sentence on him according to law.

Synopsis

- | | |
|--|---|
| 1. Legislative changes. | 3. Judgment to be according to the verdict. |
| 2. Verdict to prevail where Judge does not disagree with it. | 4. Sentence to be according to law. |
| | 5. Judgment of acquittal. |

1. **Legislative changes.** — The words “unless he proceeds in accordance with the provisions of S. 562” were added by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

2. **Verdict to prevail where Judge does not disagree with it.** — In a trial by jury, the position of a Judge in India differs from that of a Judge in England who is merely an instrument for passing a sentence or directing a release, once a verdict is given. In India the Judge must under this section and the next, *make up his mind whether he agrees or disagrees with the verdict*,¹ and the duty of deciding whether the verdict is to be accepted or not lies upon him alone.² In the former case, he should act under this section, and in the latter case, under the next section.³ This does not mean that whenever he disagrees with the verdict he is bound to make a reference to the High Court. He must be of opinion that it is necessary in the ends of justice to submit the case to the High Court.⁴ The Judge may disagree with the verdict and yet not think it necessary to express disagreement, and in such a case this section requires that he shall accept the verdict.⁵

* 1882 : S. 306; 1872 : S. 263; 1861 : S. 380.

Section 306 — Note 2

1. ('32) AIR 1932 Lah 345 (848) : 13 Lah 573 : 33 Cr.L.J. 220, *Emperor v. Barwick*. (The provisions of Ss. 306 and 307 are mandatory.)
2. ('37) AIR 1937 Cal 540 (541) : I L R (1937) 2 Cal 694 : 38 Cri L Jour 1075, *Afsar Shaikh v. Emperor*. (High Court cannot direct Judge to make a reference to it.)
3. ('80) 5 Cal 871 (874), *Govt. of Bengal v. Mahaddi*.
4. ('37) AIR 1937 Cal 540 (541) : I L R (1937) 2 Cal 694 : 38 Cr.L.J. 1075, *Afsar Shaikh v. Emperor*.
- (29) AIR 1929 Cal 415 (416) : 56 Cal 473 : 30 Cr.L.J. 1036, *Ibrahim Molla v. Emperor*.
- (29) AIR 1929 Pat 313 (314) : 8 Pat 344 : 30 Cr.L.J. 721, *Ramdas Rai v. Emperor*.
5. ('37) AIR 1937 All 195 (196) : I L R (1937) All 419 : 38 Cr. L. J. 465, *Manjia v. Emperor*. (Judge doubtful and of opinion that benefit of doubt should be given to accused but not thinking it necessary to express disagreement — Case falls under s. 306.)
- (37) AIR 1937 Cal 540 (542) : I L R (1937) 2 Cal 694 : 38 Cri L Jour 1075, *Afsar Sheikh v. Emperor*.

Where the Sessions Judge does not think it necessary to express disagreement, it would be proper for him not to advertise the fact of his disagreement as it would be unnecessary and irrelevant.⁶ He cannot record evidence in the absence of the jury and rely on it for the purpose of determining whether or not he should disagree with the verdict.⁷

The Judge has no power to control the jury and direct them to give a specified verdict. It is for the jury alone to convict or acquit the accused as they think proper⁸ and where the verdict entirely depends on oral evidence, weight should be attached to the verdict of the jury whose function it is to decide the questions of fact.⁹

Where the verdict of the jury is in accordance with the general trend of the charge of the Judge, there is no need for the Judge to give any reasons for accepting the verdict. But where the verdict is not only inconsistent in itself in view of the evidence but is also clearly against the trend of the charge, the Judge owes a duty not only to the appellate Court but also to his own judicial conscience to state his reasons for accepting the verdict.¹⁰

3. Judgment to be according to the verdict. — Where the Judge does not consider it necessary to express disagreement with the verdict of the jury, he is bound to give judgment accordingly. It is not open to him, when he has once accepted the verdict and postponed the case for passing sentence, to reconsider his order and refer the case to the High Court under section 307 of the Code.¹ When a charge triable with the aid of assessors is tried with the aid of the jury, the trial is not, in view of S. 536, illegal and the verdict must be accepted as a legal one. If the Judge disagrees with the verdict he must proceed under section 307, and cannot treat the verdict as the opinion of the assessors and record a finding in opposition to that verdict.²

4. Sentence to be according to law. — The Judge in passing sentence after conviction according to the verdict should give no

(‘35) AIR 1935 Bom 165 (166) : 37 Cr.L.J. 26, *Mhasku Malu v. Emperor*. (S. 306 does not require that the Judge should agree with the verdict before accepting it, but only that he should not think it necessary to express disagreement.)

6. (‘37) AIR 1937 Cal 540 (542) : 1 L R (1937) 2 Cal 694 : 38 Cr. L. J. 1075, *Afsar Shaikh v. Emperor*.

(‘29) AIR 1929 Cal 415 (416) : 56 Cal 473 : 30 Cri L Jour 1036, *Ibrahim Molla v. Emperor*. (See observations of Rankin, C. J.)

7. (‘06) 3 Cri L Jour 42 (43) : 7 Bom L R 979, *Emperor v. Ningappa Sayadappa*.

8. (‘67) 7 Suth W R Cr 22 (23), *Queen v. Joy Kisto Gossamy*.

9. (‘33) AIR 1933 Pat 273 (273) : 34 Cri L Jour 731, *Emperor v. Sitalu Ahir*.

(‘76) 25 Suth W R Cr 25 (26), *Queen v. Wuzir Mundal*. (It is the province of the jury to decide the credibility of witnesses.)

10. (‘37) 1937 M W N 737 (738), *Nachappa Goundan v. Emperor*. (His failure to give reasons makes it impossible for the appellate Court to regard such acceptance as a judicial act.)

Note 3

1. (1900) 4 Cal W N 683 (683), *Queen-Empress v. Mojahur Rahman*.

See also S. 307 Note 3.

2. (‘01) 25 Bom 680 (682) : 3 Bom L R 278 (FB), *King-Emperor v. Parbhu Sankar*.

(‘99) 23 Bom 696 (697) : 1 Bom L R 114, *Queen-Empress v. Jayram*.

(‘79) 4 Cal L R 405 (408, 409), *In re Bhootnath Day*.

(‘98) 25 Cal 555 (557), *Surja Kurmi v. Queen-Empress*.

See also S. 269 Note 3, S. 307 Note 15 and S. 309 Note 13.

Section 306
Notes 4-5

weight whatever to any doubts he had personally entertained as to the propriety of the verdict of the jury; he cannot mitigate the sentence on that account. Having accepted the verdict he is bound to pass sentence according to law as if he had agreed with the verdict.¹ The sentence again must be suitable to the offence of which the accused is found guilty though the Judge thinks a graver offence has been committed.² When a number of persons are charged under ss. 149 and 302 of the Penal Code and it is not possible to say who struck the fatal blow, it cannot be assumed that there is no case for a capital sentence.³

5. Judgment of acquittal. — The prisoner is entitled to be discharged from custody immediately a judgment of acquittal is pronounced when there is no other charge pending against him. His further detention is illegal and no formal warrant of release from the Judge to the Superintendent of the jail is necessary.¹

Section 307

307.* (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the

Procedure where Sessions Judge disagrees with verdict.

* Code of 1882 : S. 307.

Same except that for the words "so completely that he considers," the words "and is clearly of opinion that" in sub-s.(1) were substituted in original section of 1898 Code.

Code of 1872 : S. 263 paras. 5 and 6.

263.

If the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it *may* submit the case to the High Court, and may either remand the prisoner to custody, or admit him to bail.

The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so, shall pass such sentence as might have been passed by the Court of Session.

Code of 1861 — Nil.

Note 4

1. ('39) AIR 1939 Cal 610 (612) : 40 Cr. L. J. 880, *Mohsena Khatun v. Emperor*. (Judge accepting verdict of guilty of murder is not justified in passing a lesser penalty on the ground that it was a suspicious case.)
- ('29) AIR 1929 Pat 313 (316) : 8 Pat 344 : 30 Cri L Jour 721, *Ramdas Rai v. Emperor*. (1865) 3 Suth W R Cr 29 (30), *Queen v. Sheikh Ghulam*. (The Judge may take other steps to get the release of the accused if he thinks the charge against him is not made out.)
2. ('17) 21 Cal W N cxxxix (cxxxix), *Azu Sheikh v. King-Emperor*.
3. ('29) AIR 1929 All 160 (161) : 30 Cri L Jour 559, *Parshadi v. Emperor*.

Note 5

1. ('69-70) 5 Mad H C R App ii (ii, iii).

grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

Section 307

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

The words "any accused person" in sub-s. (1) and the words "such accused" in sub-ss. (2) and (3) were substituted for the words "the accused," and the words "in respect of such accused person," and the words "and in such case one of conviction" in sub-s. (1) were inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

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| 1. Scope and object of the section. | 12. Reference in case falling under S. 449. See S. 449 Note 7. |
| 2. Who can refer. | 13. "After giving due weight to the opinions of the Sessions Judge and the jury." |
| 3. "Disagrees with the verdict." | 14. Power of High Court to order re-trial or order additional evidence to be taken. |
| 4. "Is clearly of opinion that it is necessary for the ends of justice." | 15. Verdict of jury in cases not triable by jury — Applicability of this section. |
| 5. "Submit the case." | 16. Acquit or convict of any offence, etc. |
| 6. "In respect of such accused person." | 17. Procedure at the hearing of reference. |
| 7. Grounds of opinion to be recorded. | 18. Notice of reference. |
| 8. Reference against verdict of acquittal. | 19. Difference between Judges hearing reference — Procedure. |
| 9. Charge under S. 310. | 20. Appeal. |
| 10. "Shall not record judgment of acquittal or of conviction." | |
| 10a. Bail pending reference to High Court. | |
| 11. Powers of the High Court under this section. | |

Section 307
Note 1

Other Topics (miscellaneous)

- Acceptance of verdict on some charges. See Notes 3 and 5.
 Applicability of S. 537. See Note 11.
 Considerations for High Court. See Note 11.
 Contents of reference. See Note 7.
 Conviction for offence not charged. See Note 16.
 District Magistrate—Reference by. See Note 2.
 High Court on reference whether exercises original jurisdiction. See Note 14.
 High Court's direction to refer a case. See Note 1.
 Irregular references — No interference. See Note 1.
 Judge's speculations or jury's conclusions. See Note 13.
 Legislative changes. See Notes 2 and 11.
 No reference — No interference by High Court. See Note 1.
 No reference to materials not placed before jury. See Note 7.
 Questions of fact—Findings. See Note 11.
 Reasons for opinion of jury. See Note 13.
 Reference — When made. See Notes 1 and 4.
 Reference—When not to be made. See Notes 1 and 4.
 Reference of whole case. See Notes 5, 6 and 15.
 Reflections on jurors. See Note 7.
 Relative weight to Judge's and jury's views. See Note 13.
 Right to begin. See Note 17.
 Several accused—Reference as to same. See Note 6.
 Sind Judicial Commissioner — High Court and not Sessions Court. See Note 2.
 "Subject thereto"—Effect. See Note 11.
 Trial Judge and his successor. See Note 2.
 Verdict and opinion. See Note 11.

1. Scope and object of the section.—This section provides for a reference to the High Court, in cases tried by jury, where the Judge—
 (1) *disagrees* with the verdict, and
 (2) is *clearly of opinion* that it is necessary for the ends of justice to submit the case to the High Court.¹

A Judge in this country is not, like a Judge in an English Court, an instrument for passing a sentence or directing a release once the verdict is given (compare provisions of S. 305, in regard to Sessions trials in High Court); he must make up his mind whether he agrees or disagrees with the verdict, and, in the latter case, he must form an opinion whether in the interests of justice it is necessary to submit the case to the High Court.² To this extent the matter may be said to be in the discretion of the Court. But where the two conditions are satisfied, the section requires that the Judge *shall* make the reference; the reference is no longer a matter of discretion, but is one of *obligation*.³ The object of the section is really to provide a safeguard, in trials by jury, against possible miscarriage of justice.⁴

Section 307 — Note 1

1. ('40) AIR 1940 Nag 17 (26) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*.
2. ('37) AIR 1937 Cal 540 (541) : 38 Cr. L. J. 1075 : I L R (1937) 2 Cal 694, *Afsar Shaikh v. Emperor*.
3. ('04) 1 Cr. L. J. 743 (744) : 6 Bom L R 599, *Emperor v. Irya Doddappa*.
4. ('29) AIR 1929 All 338 (338) : 30 Cri L Jour 1078, *Emperor v. Jukhan*.
5. ('33) AIR 1933 Cal 472 (474) : 34 Cri L Jour 965, *Emperor v. Makhanlal*. (Disagreement with opinion of jury is one of the conditions precedent to making reference under S. 307.)
6. ('32) AIR 1932 Lah 345 (348) : 13 Lah 573 : 33 Cr. L. J. 220, *Emperor v. Barwick*.
7. ('40) AIR 1940 Nag 17 (26) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*.
8. ('25) AIR 1925 Cal 795 (796) : 26 Cr. L. J. 1006, *Saroda Charan Mistri v. Emperor*.
9. ('31) AIR 1931 Cal 15 (17) : 57 Cal 1183 : 32 Cr. L. J. 452, *Jogi Kar v. Emperor*. (That a Judge had he been a member of jury might have given another verdict is no ground for reference.)
10. ('29) AIR 1929 Cal 415 (416) : 56 Cal 473 : 30 Cr. L. J. 1036, *Ebrahim v. Emperor*.
11. ('87) 9 All 420 (425) : 1887 A W N 39, *Queen-Empress v. McCarthy*.

Where the Judge, either does *not disagree* with the verdict or is *not clearly of opinion* that it is necessary in the ends of justice to make the reference, he is neither bound⁵ nor entitled⁶ to submit the case to the High Court under this section. Where a reference is made in such cases, the High Court will not act on it or interfere with the verdict on the basis of such reference.⁷

Where no reference is made by the Sessions Judge under this section, the High Court cannot interfere with the verdict of the jury⁸ unless it is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him, in which case the High Court can interfere on appeal (S. 423 (2)) or in revision.⁹ Nor can the High Court direct the Judge to make a reference.¹⁰

Where the jury have returned a clear and unambiguous verdict, it is not open to the Judge to re-charge the jury and ask them to return a fresh verdict merely because he disagrees with their verdict. The Judge can only refer the case to the High Court under this section, if he thinks fit to do so.¹¹

- (‘31) AIR 1931 Cal 15 (17) : 57 Cal 1183 : 32 Cr. L. J. 452, *Jogi Kar v. Emperor*.
 (‘31) AIR 1931 Cal 601 (603) : 33 Cr. L. J. 11, *Bhondar v. Emperor*.
 (‘34) AIR 1934 Cal 847 (849) : 62 Cal 337 : 36 Cr. L. J. 358, *Ilu v. Emperor*. (The powerful weapon conferred by this section is not available even to a Judge trying a sessions case with a jury in the High Court.)
 5. (‘28) AIR 1928 Pat 120(123, 124):6 Pat 817:29 Cr.L.J. 81, *Bajit Mian v. Emperor*. (No disagreement with the verdict—Judge not bound to make a reference.)
 (‘26) AIR 1926 Cal 728 (729): 27 Cri L Jour 398, *Hari Charan v. Emperor*. (Mere disagreement without considering that it is in the ends of justice to make a reference.)
 (‘97) 2 Cal W N 49 (54), *Queen-Empress v. Chatradhari Goala*. (Judge thinking that it was not necessary for the ends of justice to submit the case is not bound to submit.)
 (‘24) AIR 1924 Cal 47 (48) : 50 Cal 658 : 24 Cri L Jour 838, *Eran Khan v. Emperor*. [See (‘91) 14 Mad 36 (37) : 2 Weir 390, *Queen-Empress v. Chinna Tevan*. (Judge disagreeing with the verdict but not submitting the case under S. 307—High Court has no power to interfere with the verdict when there is no misdirection.)
 (‘09) 9 Cri L Jour 93 (94) (Mad), *In re Kaiyan*.]
 6. (‘15) AIR 1915 Cal 292 (294): 41 Cal 662 : 15 Cr. L. J. 155, *Emperor v. Madan Mondal*. [See also (‘30) AIR 1930 Pat 208 (208) : 31 Cri L Jour 54, *Emperor v. Bhukhan Dubey*. (Different view taken by Sessions Judge is no ground for reference.)]
 7. (‘23) AIR 1923 Cal 453 (455) : 50 Cal 41 : 24 Cr. L. J. 763, *Emperor v. Profulla*.
 8. (‘28) AIR 1928 Pat 120 (123, 124):6 Pat 817:29 Cr.L.J. 81, *Bajit Mian v. Emperor*.
 (‘26) AIR 1926 Cal 728 (729, 730): 27 Cr. L. J. 398, *Hari Charan Das v. Emperor*. (Where the verdict is vitiated by misdirection causing a failure of justice the High Court will interfere.)
 (‘09) 9 Cri L Jour 93 (93, 94) (Mad), *In re Kaiyan*.
 (‘91) 14 Mad 36 (37) : 2 Weir 390, *Queen-Empress v. Chinna Tevan*.
 (‘90) 13 Mad 343 (344) : 2 Weir 389, *Queen-Empress v. Guruvadu*.
 9. (‘37) AIR 1937 Pat 440 (443) : 38 Cr. L. J. 919: 16 Pat 413, *Rameshwar Singh v. Emperor*. (High Court interfered in revision.)
 10. (‘37) AIR 1937 Cal 540 (541) : 38 Cri L Jour 1075 : I L R (1937) 2 Cal 694, *Afsar Shiekh v. Emperor*.
 (‘37) AIR 1937 Pat 440 (443) : 38 Cri L Jour 919: 16 Pat 413, *Rameshwar Singh v. Emperor*. (AIR 1925 Cal 795, dissented from.)
 (‘24) AIR 1924 Cal 47 (48) : 50 Cal 658 : 24 Cr. L. J. 838, *Eran Khan v. Emperor*.
 (‘97) 2 Cal W N 49 (54), *Queen-Empress v. Chatradhari Goala*.
 (‘28) AIR 1928 Cal 444 (445, 446) : 29 Cri L Jour 819, *Bepin Chandra v. Emperor*. [But see (‘25) AIR 1925 Cal 795 (796) : 26 Cr. L. J. 1006, *Saroda Charan Mistri v. Emperor*.]
 11. (‘35) AIR 1935 All 1020 (1022) : 36 Cri L Jour 1377, *Dori v. Emperor*.

Section 307
Notes 1-3

As to applicability of the section to cases erroneously tried by jury, see Note 15.

2. Who can refer. — The words “in any such case” refer to cases tried before a Court of Session and consequently the word “Judge” must mean the Sessions Judge.

A reference under this section is not invalid in consequence of its having been made by a Judge who held the trial, but who, at the time of the reference had ceased to be a Judge.¹

It has been held by the Judicial Commissioner’s Court of Sind that the Judicial Commissioner’s Court of Sind is a *High Court* and not a Court of Session for the purposes of this section and that consequently, a Judge of that Court holding a sessions trial by jury has no power to make a reference under this section.²

Under the Code as it stood before 1923, there were certain provisions such as S. 451, under which a District Magistrate was empowered to make a reference under this section to the High Court.³ These have now been repealed.

3. “Disagrees with the verdict.” — As has been seen in Note 1, the Judge cannot make a reference under this section unless he *disagrees* with the verdict. Under the Code of 1882 the disagreement was required to be *so complete* that it was necessary in the ends of justice to make a reference. The words “so completely that” have been omitted in the present Code, with the result that the fact that the Judge disagrees with the verdict need not always involve the proposition that it would be in the ends of justice to make a reference: the words “ends of justice” mean something more than mere disagreement, and the necessity of submitting the case depends upon the gravity of the offence, and its prevalence and other considerations of a similar nature.¹ A contrary view, namely that unless the disagreement is such as to involve the necessity of making, in the ends of justice, a reference under this section, it is not a disagreement at all, has

Note 2

1. ('05) 2 Cr. L. J. 386 (387) : 2 C L J 48, *Emperor v. Dil Mohommad Sheikh*. (The Judge who makes a reference must be one who heard the evidence and held the trial and not his successor.)

2. ('39) AIR 1939 Sind 209 (218) : 41 Cr. L. J. 28 : 1 LR (1940) Kar 249, *Shewaram Jethanand v. Emperor*.

('28) AIR 1928 Sind 149 (152, 157, 161) : 22 Sind LR 349 : 29 Cr. L. J. 945 (FB), *Emperor v. Jianand*.

('25) AIR 1925 Sind 34 (34, 35) : 25 Cr. L. J. 428, *Emperor v. Mittoo*.

[But see ('21) AIR 1921 Sind 145 (146) : 26 Cr. L. J. 609 (609) : 16 Sind LR 143, *Emperor v. Pir Mohamed Bux*.]

See also S. 266 Note 4.

3. ('02) 29 Cal 128 (132) : 6 C W N 253, *Emperor v. Lyall*.

('14) AIR 1914 L. B. 23 (24) : 7 L. B. R. 319 : 15 Cr. L. J. 243, *Emperor v. A. J. Cooke*.

[See ('87) 9 All 420 (423) : 1887 A W N 39, *Queen v. McCarthy*. (Clause 6, S. 8 of the Act III of 1884 confers upon the District Magistrate the same powers of reference as the Sessions Judge.)]

Note 3

1. ('33) AIR 1933 Cal 404 (405) : 34 Cr. L. J. 608, *Emperor v. Panchanon Sarkar*.

however been taken in the undermentioned cases.^{1a} It is submitted that this view is not correct.

The word "disagrees" in this section means that the Judge thinks it necessary to *express* disagreement. In other words, the section requires that the Judge must not only disagree, but must think it necessary to express disagreement, for, otherwise, he would be bound to give judgment according to the verdict under S. 306.² Cases can be conceived of in which the Judge thinks it necessary for the ends of justice to submit the case but yet does not think it necessary to *express* disagreement with the verdict. Thus, where the jury bring in a verdict of guilty but the Judge feels satisfied of the innocence of the accused, it may be said that the ends of justice require a reference to be made. But still, the Judge may think that the High Court is not likely to interfere as the verdict is not perverse and may therefore refrain from expressing disagreement with the verdict of the jury and proceed under S. 306.³ Thus, the mere fact that the ends of justice may, in the opinion of the Judge, require a reference to be made, does not mean that the Judge should think it necessary to express disagreement with the verdict of the jury. But at the same time, it may be taken that if the ends of justice do not require a reference to be made, the Judge will not think it necessary to express disagreement with the verdict. See also the case cited below.⁴

The disagreement contemplated by the section is with the *verdict* and not merely with the *grounds* on which the verdict was given: thus, where the jury gave a verdict of acquittal and the Judge was of the opinion that the jury ought to have given the benefit of doubt to the accused rather than have believed the defence version, it was held that this did not amount to disagreement with the verdict.⁵ But where the jury return a verdict of guilty and the Judge is doubtful about the absolute innocence of the accused but is distinctly of opinion that the benefit of doubt should be given to the accused, there is sufficient disagreement so as to entitle him to make a reference.⁶

Where the Judge directs the jury that if they find the accused not guilty of the offence charged, they might find him guilty of a lesser offence, and the jury give a verdict of not guilty but the Judge is of opinion that the accused is guilty of the minor offence, it has

1a. ('37) AIR 1937 Pat 440 (443) : 38 Cr. L. J. 919 : 16 Pat 413, *Rameshwar Singh v. Emperor*.

('32) AIR 1932 Pat 246 (247) : 11 Pat 669 : 33 Cr. L. J. 877, *Emperor v. Rafi Mian*.

('29) AIR 1929 Cal 415 (416) : 56 Cal 473 : 30 Cr. L. J. 1036, *Ebrahim v. Emperor*.

('25) AIR 1925 Cal 795 (795) : 26 Cr. L. J. 1006, *Saroda Charan v. Emperor*.

2. ('37) AIR 1937 Cal 540 (541, 542) : 38 Cr. L. J. 1075 : I L R (1937) 2 Cal 694, *Afsar Shaikh v. Emperor*.

3. ('37) AIR 1937 Cal 540 (541, 542) : 38 Cr. L. J. 1075 : I L R (1937) 2 Cal 694, *Afsar Shaikh v. Emperor*.

4. ('40) AIR 1940 Nag 17 (25) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB), *Dattatray Sadashiv v. Emperor*. (Per Niyogi and Bose, JJ., in Order of Reference: Ss. 298 and 299 show that Judge is entitled to disagree only when he considers that no reasonable jury would have reached the conclusion in question.)

5. ('33) AIR 1933 Cal 404 (405) : 34 Cr. L. J. 608, *Emperor v. Panchanon Sarkar*.

6. ('37) AIR 1937 All 195 (196) : 38 Cr. L. J. 465 : I L R (1937) All 419, *Manjira v. Emperor*.

Section 307
Notes 3-4

been held that it is sufficient disagreement within the meaning of this section.⁷

Where, however, on a charge of an offence under S. 326, *read with* S. 149, Penal Code, the jury acquitted the accused on the charge of rioting, and the Judge agreed with such verdict, it was held that the Judge could not say that he disagreed with the verdict so far as an offence under S. 326 alone was concerned, and make a reference under this section.⁸

Where once the verdict is accepted, the Judge cannot at the time of passing the sentence, change his mind and disagree with the verdict, so as to make a submission under this section.⁹

See also Note 4.

4. "Is clearly of opinion that it is necessary for the ends of justice."—There is a difference of opinion on the question whether the power of the Judge to make a submission under this section is limited to cases where he is satisfied that the verdict is *perverse* or *manifestly wrong* or is *unreasonable*. According to the High Courts of Lahore¹ and Patna,^{1a} the power is not so limited but it is sufficient if he be clearly of opinion that a reference is necessary *for the ends of justice*. A Full Bench of the High Court of Madras has, on the other hand, held that in order to enable the Judge to make a submission, he should come to the conclusion that the verdict is one which is *unreasonable*.² A Full Bench decision of the Nagpur High Court also contains an opinion that the condition as to the Judge being clearly of opinion that it is necessary for the ends of justice to submit the case would be satisfied only if in the opinion of the Judge, the jury had arrived at a perverse verdict.^{2a} The decisions of the Calcutta High Court are conflicting.^{2b} See also Note 8. It may be conceded that when

7. ('29) AIR 1929 Nag 114 (115) : 30 Cr. L. J. 793, *Emperor v. Harilal Tamboli*.

('23) AIR 1923 Cal 108 (110) : 24 Cr. L. J. 674, *Emperor v. Hari Das Mitra*.

('08) 8 Cr. L. J. 143 (144) : 10 Bom L R 632, *Emperor v. Chandra Krishna*.

8. ('15) AIR 1915 Cal 292 (294) : 41 Cal 662 : 15 Cr. L. J. 155, *Emperor v. Madan Mondal*.

9. (1900) 4 Cal W N 683 (683), *Queen-Empress v. Mojahur Rahman*.

See also S. 306 Note 3.

Note 4

1. ('32) AIR 1932 Lah 345 (348) : 13 Lah 573 : 33 Cr. L. J. 220, *Emperor v. Barwick*.

1a. ('29) AIR 1929 Pat 313 (314) : 8 Pat 344 : 30 Cr. L. J. 721, *Ramdas Rai v. Emperor*.

('32) AIR 1932 Pat 246 (247) : 11 Pat 669 : 33 Cri L Jour 877, *Emperor v. Rafi Mian*. (Case law discussed.)

('37) AIR 1937 Pat 440 (442) : 38 Cri L Jour 919 : 16 Pat 413, *Rameshwar Singh v. Emperor*. (Judge must apply his mind to case and decide whether ends of justice demand reference—No hard and fast rule can be laid down.)

2. ('28) AIR 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cr. L. J. 317 (FB), *Veerappa Goundan v. Emperor*.

2a. ('40) AIR 1940 Nag 17 (26) : 41 Cri L Jour 289 : ILR (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (Per Stone, C. J., and Grille, J.—Per Niyogi and Bose, JJ., in the Order of Reference — Judge not entitled to disagree unless the verdict is such that no reasonable jury would return it.)

[See however ('37) AIR 1937 Nag 50 (52) : ILR (1937) Nag 277 : 38 Cri L Jour 303, *Sakhawat Imami v. Emperor*.]

2b. ('19) AIR 1919 Cal 536 (536) : 19 Cri L Jour 830, *Ismail Sarkar v. Emperor*. (Power of reference not limited to cases where verdict is perverse or manifestly wrong.)

('25) AIR 1925 Cal 795 (796) : 26 Cr. L. J. 1006, *Saroda Charan v. Emperor*. (Do.)

the verdict is perverse or unreasonable or is not supported by evidence, it should ordinarily be in the ends of justice to make a submission. In such cases the Judge *should* always make a reference.³ It may also be stated as a rule of guidance that where a verdict cannot be said to be unwarranted by the evidence in the case⁴ or is one which reasonable men might find on the evidence placed before them,⁵ no reference *should* be made. But to say that the power is limited to cases where the verdict is considered *perverse* or *unreasonable* is to import conditions which are not found in the section and is not correct.

In view of the provisions of this section it is necessary that the trial Judge should for himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the verdict of the jury.⁶

Where the same body of persons sit as jurors as well as assessors in a case (see S.269, sub-s.(3)), the Judge ought not to use their reasons given for their opinions delivered as *assessors* as material for saying that their verdict as *jury* is perverse.⁷

Where the jury consider the accused guilty of offence X while the Judge considers him guilty of offence Y but is punishable with the same amount of punishment as X, the question whether the accused should be convicted of the one or the other offence is in the nature of an academic one and hardly worth a reference under this section.⁸

5. "Submit the case." — Sub-section (2) of this section provides that where a case is submitted under this section the Judge shall not record a judgment on any of the charges on which a particular accused has been tried. It is clear from this that a submission must be of the

(26) AIR 1926 Cal 1107 (1108): 27 Cr. L. J. 1402, *Jahur Sheikh v. Emperor*. (Do.)
(14) AIR 1914 Cal 65 (69): 14 Cri L Jour 660 (664): 41 Cal 621, *Emperor v. Surnamoyee Biswas*. (Verdict of jury should be manifestly wrong before reference is made—Opinion of Macpherson, J., in 20 Suth W R Cr 73, followed.)

(36) AIR 1936 Cal 451 (451): 38 Cri L Jour 174, *Emperor v. Abdul Hussain*. (Verdict of jury must not be disturbed unless it is perverse.)

3. ('26) AIR 1926 Mad 370 (370): 27 Cri L Jour 176, *In re Ambalam*. (Trial of several accused for the same offence before the same Judge and jury — Evidence the same against all and summing up of Judge for the acquittal of all — Jury giving verdict of not guilty to one only and guilty to the rest—Verdict is perverse and reference should be made.)

('90) 13 Mad 343 (344): 2 Weir 389, *Queen-Empress v. Guruvadu*. (Verdict not supported by evidence.)

(31) AIR 1931 Cal 15 (17): 57 Cal 1183: 32 Cr. L. J. 452, *Jogi Kar v. Emperor*.

(30) AIR 1930 Pat 174 (175): 30 Cri L Jour 1114, *Emperor v. Lal Mohammad*. (Verdict which would not be come to by a reasonable man.)

(31) AIR 1931 Mad 775 (776): 55 Mad 256: 32 Cri L Jour 1276, *Sundaram Aiyer v. Emperor*. (Jury misunderstanding the law, and giving an erroneous verdict.)

4. ('02) 7 Cal W N 135 (140), *King-Emperor v. Chidghan Gosain*.

5. ('96) 20 Bom 215 (218), *Queen-Empress v. Devji Govindji*.

6. ('34) AIR 1934 Cal 847 (849): 62 Cal 337: 36 Cr. L. J. 358, *Ilu v. Emperor*.

7. ('29) 1929 Mad WN 281 (281)(FB), *Sessions Judge of South Arcot v. Jailabuddin*.

8. ('40) AIR 1940 Nag 17 (25): 41 Cr. L. J. 289: ILR (1940) Nag 394, *Dattatraya Sadashiv v. Emperor*. (Per Niyogi and Bose, JJ., in Order of Reference—Where Judge can award suitable punishment reference not necessary although he may consider that the conviction should be for a different offence.)

(37) AIR 1937 Bom 60 (61): 38 Cri L Jour 327, *Emperor v. Md. Adam Chohan*. (Jury finding accused guilty under S. 326, Penal Code — Court disagreeing and holding offence under S. 304.)

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whole case against the particular accused and not merely of those charges on which he disagrees,¹ since, by this limited reference the High Court will be precluded from considering the entire evidence on the record against such accused.² In other words, the Judge should not divide the verdict of the jury, accept a part and make a submission with reference to the other part.³ See also Note 15.

6. "In respect of such accused person." — This section does not intend that when there are *several* accused and the Sessions Judge is not prepared to accept the verdict of the jury against *all* but only against *some*, he should refer the whole case to the High Court. It contemplates only a reference in the case of those persons in respect of whom the Judge declines to accept the verdict. In respect of any other accused against whom the Judge agrees with the verdict of the jury, the Judge should convict and sentence or acquit him as the case may be.¹

7. Grounds of opinion to be recorded. — The Judge referring a case under this section must first of all record *his opinion*. If he does not record it, it is not possible for the High Court to pass orders on the reference.¹ The letter of reference should further state the case, the verdict of the jury and concisely the *ground* upon which the Judge differs from the jury and considers it necessary for the ends of justice to submit the case to the High Court.² It should, in other words, be

Note 5

1. ('17) AIR 1917 Cal 833 (835) : 18 Cr.L.J. 551 (553), *Emperor v. Annada Charan*. ('33) AIR 1933 Cal 47 (48) : 60 Cal 427 : 34 Cri L Jour 164, *Emperor v. Dwarika Nath Goswami*. ('33) AIR 1933 Cal 665 (666, 667) : 34 Cr.L.J. 918(SB), *Emperor v. Bisnoo Chandra*. ('28) AIR 1928 Pat 596 (596) : 30 Cri L Jour 390, *Emperor v. Wazira Mahto*. ('30) AIR 1930 All 489 (489) : 52 All 881 : 32 Cr. L. J. 81, *Emperor v. Nawal Behari*. ('32) AIR 1932 Pat 156 (157) : 11 Pat 395:33 Cr.L.J.505, *Emperor v. Hazari Lal*. ('99) 27 Cal 144 (148), *Queen-Empress v. Deodhar Singh*. ('26) AIR 1926 Cal 925 (925) : 27 Cr. L. J. 617, *Emperor v. Ekabbor*. [See ('35) AIR 1935 Pat 357 (357) : 14 Pat 717 : 36 Cr. L. J. 856, *Ramjanam Tewari v. Emperor*.]
2. ('17) AIR 1917 Cal 833 (835) : 18 Cr.L.J. 551, *Emperor v. Annada Charan Roy*. ('32) AIR 1932 Pat 156 (157) : 11 Pat 395:33 Cr.L.J.505, *Emperor v. Hazari Lal*. ('26) AIR 1926 Cal 925 (926) : 27 Cr. L. J. 617, *Emperor v. Ekabbor*. [See ('15) AIR 1915 Cal 292 (294) : 41 Cal 662 : 15 Cr. L. J. 155, *Emperor v. Madan Mondal*.]
3. ('23) AIR 1923 Cal 453 (456) : 50 Cal 41 : 24 Cri L Jour 763, *Emperor v. Prafulla Kumar Majumdar*. ('35) AIR 1935 Pat 357(357) : 36 Cr.L.J.856: 14 Pat 717, *Ramjanam v. Emperor*.

Note 6

1. ('38) AIR 1938 Mad 686 (686, 687) : 39 Cr. L. J. 864, *In re Bojji Reddi*. ('15) AIR 1915 Cal 731 (731, 732) : 16 Cr. L. J. 321 (322) : 42 Cal 789, *Emperor v. Babar Ali Gazi*.

Note 7

1. ('21) AIR 1921 Cal 252 (253) : 23 Cr.L.J. 244, *Emperor v. Taribullah Sheikh*. (It is impossible in such a case to give due weight to the opinion of the Judge.) ('04) 1 Cri L Jour 743 (744) : 6 Bom L R 599, *Emperor v. Irya Doddappa*. [See also ('32) AIR 1932 Pat 246 (247) : 11 Pat 669 : 33 Cr. L. J. 877, *Emperor v. Rafi Mian*. (Where the verdict of the jury is of acquittal, the Judge should state the offence which he considers to have been committed.)]
2. ('31) AIR 1931 Cal 15 (16, 17) : 57 Cal 1183: 32 Cr.L.J. 452, *Jogikar v. Emperor*. ('05) 9 Cal WN lxvi (lxvi), *Rajeswari Bairagi v. Emperor*. (Sessions Judge not stating whether reference is necessary for ends of justice and whether he agrees with the verdict — Reference bad in law.)

complete in itself and the High Court should not be required to refer to the order sheet in order to gather the particulars the section requires to supply.³ It was observed in the undermentioned case⁴ that the referring order should be in *the nature of a judgment* which would give the High Court a proper summary of the evidence and reasons of the learned Judge for holding it to be credible or otherwise. Merely repeating remarks made in the charge to the jury and adding such vague remarks as "for these and other reasons I submit the case for the orders of the High Court" are not sufficient.⁵ The Judge should state exactly what material portion of the evidence he believes to be true and his reasons for arriving at his conclusions.⁶ The reference should, further, be based upon the *evidence placed before the jury* and not on case not so presented to them. The High Court should not be asked to consider the case on matters not placed before the jury.⁷

Where a reference shows that the Judge's opinion is that the verdict is perverse, but this is not clearly stated, the High Court will presume that the reference has been made on the ground that the verdict is perverse.⁸

It is unfair for the Judge to make reflections on the conduct of the jurors which are not supported by the record.⁹

8. Reference against verdict of acquittal.—Where the Judge disagrees with a *verdict of acquittal* he should in his letter of reference state the *offence which he considers to have been committed* by the accused.¹ But a mere omission to do so will not entail a rejection of

(129) AIR 1929 Pat 16 (16, 18) : 30 Cri L Jour 210, *In re Sakthichand Kumhar*. (Referring Judge should state his opinion regarding the evidence and especially that part on which he relies for conviction.)

(108) 10 Bom L R 173 (173) : 7 Cri L Jour 192, *Emperor v. Chandra Krishna*.

[See ('67) 7 Suth W R Cr 6 (7), *Queen v. Chand Bagdee*. (It is the duty of the Sessions Judge to record distinctly, whether he agrees with the verdict of the jury or not.)]

3. ('21) AIR 1921 Cal 252 (253) : 23 Cr.L.J. 244, *Emperor v. Taribullah Sheikh*.

4. ('28) AIR 1928 All 622 (623, 624) : 50 All 540 : 29 Cr.L.J. 342, *Emperor v. Sheo Din*.

5. ('04) 1 Cr.L.J. 586 (586) : 6 Bom L R 519, *Emperor v. Dyamanaik Annappanai*.

6. ('08) 7 Cri L Jour 192 (193) : 10 Bom L R 173, *Emperor v. Chandra Krishna*. (Judge's view of the evidence and credibility should be given.)

(103) 7 Cal W N 345 (347), *King-Emperor v. Bhut Nath Ghose*. (Merely asking the High Court to take the charge as part of the letter of reference is insufficient.)

(122) AIR 1922 Pat 348 (350) : 23 Cri L Jour 421, *Emperor v. Punit Chain*.

(104) 1 Cri L Jour 743 (744) : 6 Bom L R 599, *Emperor v. Irya Doddappa*.

(129) AIR 1929 Pat 16 (17) : 30 Cri L Jour 210, *In re Sakthichand Kumhar*.

7. ('99) 27 Cal 295 (304) : 4 C W N 129, *Queen-Empress v. Jadub Das*. (In reference under S. 307, High Court has to consider the correctness of the verdict on the evidence before the jury.)

[See ('04) 1 Cri L Jour 743 (744) : 6 Bom L R 599, *Emperor v. Irya Doddappa*. (Result of another trial not relevant.)]

8. ('29) AIR 1929 Oudh 280 (281) : 30 Cr. L. J. 570, *Emperor v. Bhagwan Din*.

(128) AIR 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cr. L. J. 317 (FB), *Veerappa Goundan v. Emperor*.

9. ('24) AIR 1924 Cal 323 (326) : 51 Cal 418 : 25 Cri L Jour 776, *Mamfru Chowdhury v. Emperor*.

(124) AIR 1924 Cal 321 (322) : 51 Cal 347 : 25 Cr.L.J. 758, *Emperor v. Dhananjay Roy*. (Judge remarking that verdict of jury had been affected by the fact that accused has connexions of considerable influence and position.)

Note 8

1. ('33) AIR 1933 Cal 404 (406) : 34 Cr.L.J. 608, *Emperor v. Panchanon Sarkar*.

(178) 3 Cal 623 (624, 625) : 2 Cal L R 304, *Empress v. Sahae Rac*.

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the reference.² It has been held that where the verdict of the jury is one of acquittal there is a much greater onus on the Judge to satisfy the High Court as to the necessity of interference than in cases of a verdict of guilty³ and that unless the verdict is manifestly wrong or perverse or unreasonable the Judge is not entitled to submit the case to the High Court in such cases.⁴ In some cases it has been held that a submission on a pure question of fact is not permissible where the verdict is one of acquittal.⁵ It is apprehended that this also means that unless the verdict is unreasonable or perverse (in which case it will be bad in *law*⁶) the case cannot be submitted to the High Court. The question raised forms part of the larger question discussed in Note 4 *viz.*, whether the power of reference under this section is limited to cases where the verdict is perverse or unreasonable and as there does not seem to be any special rule of law applicable to cases of acquittal alone in this respect, it is submitted that the considerations set forth in the above Note will also apply to such cases if the matter is regarded as one of *law*, although special considerations may arise in the case of acquittals, as a matter of *practice*.⁷

9. Charge under section 310. — Prior to the amendment of the section in 1923, it was held that in cases of reference under this section, there was no conviction or acquittal in the Sessions Court and that it was for the High Court to convict or acquit the accused and that, therefore, it was not until after conviction by the High Court that the accused could be asked to plead to prior conviction.¹ The present section as amended makes provision for proceeding under S. 310 where there is a charge under that section, even before the decision of the High Court.

10. "Shall not record judgment of acquittal or of conviction." — It was held under the Code of 1861, in which there was no section corresponding to this, that the Sessions Judge was bound to pass judgment even though he disagreed with the jury.¹ It

(21) AIR 1921 Cal 252 (253) : 23 Cri L Jour 214, *Emperor v. Tari Bulla Sheikh*.

2. ('33) AIR 1933 Cal 404 (406) : 34 Cr.L.J. 608, *Emperor v. Panchanon Sarkar*.

3. ('36) AIR 1936 Cal 407 (408) : 37 Cr. L. J. 1149, *Emperor v. Gostho Sardar*.

4. ('37) 38 Cr. L. J. 758 (758) : 169 I.C. 342 (Cal), *Emperor v. Sherati Badayakar*.

5. ('37) 41 Cal W N 610 (612), *Emperor v. Monibala Dassi*.

(36) AIR 1936 Cal 407 (408) : 37 Cri L Jour 1149, *Emperor v. Gostho Sardar*.

(Jury holding statement of approver and retracted confession not sufficiently corroborated and acquitting accused — It is apprehended that the Judge has no right to put up to the High Court a report which is intended to substitute his own judgment on a pure question of fact for the opinion of the jury.)

6. ('40) AIR 1940 Nag 17 (35) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB), *Dattatraya Sadashir v. Emperor*. (See observations of Bose, J.)

7. See ('38) AIR 1938 All 227 (229) : 39 Cri L Jour 559 : I L R (1938) All 483, *Emperor v. Bansi*. (In this case, distinction is made, as a matter of practice, between cases of acquittal and conviction, as regards the powers of the High Court on reference under this section.)

Note 9

1. ('07) 5 Cri L Jour 422 (423) : 30 Mad 134, *Emperor v. Kandasami Goundan*. (1900) 2 Bom L R 336 (337), *Queen-Empress v. Govind Jhavarya*.

Note 10

1. ('72) 18 Suth W R Cr 45 (46), *Queen v. Nidheeram Bagdee*. (The remedy was to apply to the Local Government for remission of sentence.)

is now clear that no judgment should be recorded where the Judge refers the matter to the High Court.

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10a. Bail pending reference to High Court. — Where the jury returns a unanimous verdict of guilty on a serious charge like that of murder, but the Judge disagreeing with the verdict thinks it proper to refer the case to the High Court, it is desirable that the accused is kept in custody pending the reference and not released on bail.¹

11. Powers of the High Court under this section. — Sub-section (3) specifies the powers which the High Court may exercise where a reference is made to it under this section. The High Court may exercise any of the powers *which it may exercise on an appeal*, and *subject thereto*, it shall, after considering the *entire evidence* and after giving *due weight to the opinions of the Sessions Judge and the jury*, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it.

The words "subject thereto" were introduced into the section only in the year 1896. Before the said introduction, it had been held that the powers of the High Court on a reference were not in any way affected or curtailed by S. 418 or S. 423 of the Code which limits the powers of the appellate Court, in cases tried by jury, to interference on *matters of law*, and that, therefore, the High Court could go into questions of *fact* as well as questions of law.¹ It has been held that the introduction of the words "subject thereto" is not inconsistent with the said view, the object of such introduction being to clothe the High Court, when acting under this section, with all the powers, as *regards procedure*, of a Court of appeal if for good reasons it desires to exercise any of them.²

(1864) 1 Suth W R Cr L 9 (9). (Do.)

(1866) 6 Suth W R Cr 6 (6), *Queen v. Bissonath Mitter*. (Do.)

Note 10a

1. ('35) AIR 1935 Cal 407 (412) : 62 Cal 900 : 36 Cri L Jour 944 (SB), *Emperor v. Bent Permainick*.

Note 11

1. ('87) 9 All 420 (425) : 1887 A W N 39, *Queen-Empress v. McCarthy*. ('73) 20 Suth W R Cr 1 (4) : 11 Beng L R 14, *Queen v. Koonjo Leth*. See also S. 418 Note 1.
2. ('40) AIR 1940 Nag 17 (28) : 41 Cr.L.J. 289 : I L R (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (Per Stone, C. J. and Grille, J.—S. 423 (2) does not apply to High Court's powers under this section—Bose, J. dissenting.) ('40) AIR 1940 Pat 513 (514) : 41 Cri L Jour 457 (458), *Emperor v. Dullu Kuer*. (Powers of the High Court in a reference under S. 307 are not limited by S. 423 (2).) ('38) AIR 1938 All 227 (229) : 39 Cr. L. J. 559 : I L R (1938) All 463, *Emperor v. Bansi*. (Powers of High Court under S. 307 (3) are very wide and are not limited by S. 423 (2).) ('37) AIR 1937 Nag 33 (35) : 38 Cri L Jour 355, *Dattu Deoman v. Emperor*. (High Court's powers under this section are untrammelled and it can exercise all the powers of an appellate Court.) ('37) AIR 1937 Nag 50 (52) : 38 Cri L Jour 330 : I L R (1937) Nag 277, *Sakhawat Inami v. Emperor*. ('22) AIR 1922 Bom 368 (369) : 25 Cr.L.J. 315 : 47 Bom 31, *Emperor v. Shankar Balkrishna*. ('28) AIR 1928 All 207 (210) : 50 All 625 : 29 Cr.L.J. 353 (FB), *Emperor v. Shera*. ('33) AIR 1933 Cal 47 (48) : 60 Cal 427 : 34 Cr. L. J. 164, *Emperor v. Dwarika Nath*. (When a case is referred under S. 307, High Court is entitled to open the whole case.)

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There is, however, a difference of opinions as to the *extent* of the powers of the High Court to interfere on matters of fact. One view is —

- (1) that the guiding principle in exercising this power should be that the decision of the tribunal appointed by law to determine the guilt or innocence of the accused should not be touched except under strong circumstances;³
- (2) that where two views are *possible* on the evidence and the jury has taken one of such views, the High Court has no power to interfere even though it may itself take a contrary view;⁴
- (3) that, therefore, the High Court cannot interfere unless the verdict is —
(a) perverse,⁵ or

3. ('87) 9 All 420 (425) : 1887 A W N 39, *Queen-Empress v. McCarthy*.
(1936) AIR 1936 Cal 451 (451) : 38 Cr. L. J. 174, *Emperor v. Abul Hossain Sikdar*. (When the only ground for making reference was that giving effect to the verdict of the majority of the jury will lead to the anomalous result of letting off the principal offender who evaded a regular trial for a pretty long time ever since the alleged occurrence, it is quite insufficient, and the reference should be rejected.)
(1975) 1 Bom 10 (12, 13), *Reg. v. Khandcrav Bajiraw*.
(1992) 1892 Rat 626 (626), *Queen-Empress v. Vithal*.
(1973) 20 Suth W R Cr 70 (71) : 13 Beng L R App 20, *Queen v. Nobin Chunder*.
(1924) AIR 1924 Cal 956 (959) : 25 Cr. L. J. 1284, *Emperor v. Golam Kadar*. (The test to be applied in setting aside the verdict is to see whether it was impossible for the jury to have arrived at the verdict.)
(1933) AIR 1933 Cal 665 (668) : 34 Cr. L. J. 918 (S B), *Emperor v. Bisnoo Chandra*. (Interference with verdict of jury except in cases of flagrant and patent miscarriage of justice is liable to lead to condemnation of the innocent.)
(1928) AIR 1928 Pat 120 (124) : 6 Pat 817 : 29 Cr. L. J. 81, *Bajit Mian v. Emperor*.
(1925) AIR 1925 Cal 394 (395) : 26 Cri L Jour 677, *Emperor v. Farattulla Mondal*. (Evidence fully oral—Opinion of jury should be held final.)
[See also (1928) AIR 1928 Cal 444 (446) : 29 Cr. L. J. 819, *Bepin Chandra Mandal v. Emperor*. (Sessions Judge when referring a case should pay due regard that the constitutional tribunal to decide questions of fact is the jury and not the Judge.)]
4. (1914) AIR 1914 Cal 65 (69) : 14 Cr. L. J. 660:41 Cal 621, *Emperor v. Surnamoyee Biswas*. (View of Macpherson, J. in 20 Suth W R Cr 73 emphasized and endorsed.)
(1973) 20 Suth W R Cr 73 (73) : 13 Beng L R App 19, *Queen v. Sham Bagdec*. (If the High Court were to interfere in every case of doubt, in every case in which the evidence would have properly warranted a different verdict, then real trial by jury is at an end and the verdict of a jury would have no more weight than the opinion of assessors.)
(1905) 2 Cri L Jour 357 (358) : 2 A L J 475, *Emperor v. Chirkua*.
(1924) AIR 1924 Cal 317 (320) : 24 Cri L Jour 897, *Emperor v. Nritya Gopal Roy*.
(1924) AIR 1924 All 411 (411) : 46 All 265 : 25 Cr. L. J. 981, *Emperor v. Panna Lal*.
(1932) 33 Cri L Jour 745 (745) : 139 Ind Cas 272 (Bom), *Emperor v. Bai Lali*.
(1924) AIR 1924 Cal 956 (959) : 25 Cri L Jour 1284, *Emperor v. Golam Kadar*.
(1922) AIR 1922 Pat 348 (351) : 23 Cr. L. J. 421, *Emperor v. Punit Chain*. (Something more than mere estimate of the evidence of fact is necessary.)
(1924) AIR 1924 Cal 449 (451) : 51 Cal 271 : 25 Cr. L. J. 773, *Emperor v. Akbar Moola*.
(1929) AIR 1929 Pat 313 (314) : 8 Pat 344 : 30 Cr. L. J. 721, *Ramdas Rai v. Emperor*.
5. (1940) AIR 1940 Mad 509 (509) : 41 Cr. L. J. 581, *In re Boya Lingadu*. (Fact that record does not disclose reason for disbelieving prosecution witnesses or Judge disagrees with jury's opinion does not render verdict perverse or unreasonable.)
(1938) AIR 1938 Cal 295 (296) : 39 Cr. L. J. 479, *Emperor v. Nibharesh Mandal*.
(1937) 38 Cr. L. J. 758 (758) : 169 Ind Cas 342 (Cal), *Emperor v. Sherali Badyakar*.
(1936) AIR 1936 Cal 451 (451) : 38 Cr. L. J. 174, *Emperor v. Abul Hossain Sikdar*.
(1932) AIR 1932 Mad 21 (22) : 33 Cr. L. J. 215, *Venkatachala v. Emperor*. (Waller, J., however, pointed out that in disposing of references under the section the High Court should not be influenced by any conventional regard for the verdict of a jury.)
(1928) AIR 1928 Mad 1186 (1190) : 30 Cr. L. J. 317 : 51 Mad 956 (FB), *Veerappa Goundan v. Emperor*. (The Sessions Judge must be assumed to consider that the verdict of the jury is unreasonable or perverse when he makes the reference under this section and the High Court in disposing of such reference is only

(b) manifestly wrong,⁶ or

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concerned with the question whether the Sessions Judge is correct in his view that the verdict is perverse or unreasonable.)

- (29) AIR 1929 Nag 36 (37) : 29 Cri L Jour 963, *Ramadhin Brahmin v. Emperor*.
(05) 2 Cr. L. J. 357 (358) : 2 A. L. J. 475, *Emperor v. Chirkua*.
(24) AIR 1924 All 411 (412) : 46 All 265 : 25 Cr.L.J. 981, *Emperor v. Panna Lal*.
(75) 1 Bom 10 (13), *Reg v. Khandarav*.
(33) AIR 1933 Bom 144 (144) : 34 Cri L Jour 660, *Emperor v. Dagadu Kondaji*.
(The verdict must be perverse before the High Court can interfere. But in dealing with the weight and volume of the evidence the two cases (of acquittal and conviction) differ because of the presumption of innocence. Where a jury have convicted, the High Court has to see not merely that there is evidence of guilt but that the evidence is strong enough to preclude any reasonable doubt in the minds of the jury as to the guilt of the accused.)
(83) 9 Cal 53 (56, 57) : 11 C L R 169, *In re Dhunum Kasee*.
(07) 6 Cri L Jour 359 (360) : 6 Cal L Jour 253, *Emperor v. Kamar Ali*.
(31) AIR 1931 Cal 601 (603) : 33 Cri L Jour 11, *Bhondar v. Emperor*.
(32) AIR 1932 Cal 656 (658) : 33 Cri L Jour 593 (FB), *Emperor v. Nashai Sardar*.
(84) 2 Weir 388 (389), *In re Pamanna*.
(26) AIR 1926 Nag 308 (309) : 22 Nag L R 42 : 27 Cri L Jour 773, *Emperor v. Kankaya*.
(26) AIR 1926 Oudh 57 (58) : 26 Cri L Jour 1576, *Emperor v. Mahammad Shaji*.
(The High Court is not to decide what would appeal to it as true or false but it has to consider whether the view taken by the jury was such as could not be supported on any consideration of the case whatsoever.)
(24) AIR 1924 Cal 1029 (1030) : 52 Cal 172 : 26 Cri L Jour 350, *Emperor v. Abinash Chandra Bose*.
(29) AIR 1929 Oudh 86 (86, 87) : 3 Luck 456 : 29 Cr.L.J. 452, *Emperor v. Behari*.
(33) AIR 1933 Oudh 181 (181, 182) : 8 Luck 439 : 34 Cr.L.J. 795, *Emperor v. Chheda*.
(32) 33 Cri L Jour 745 (745) : 139 Ind Cas 272 (Bom), *Emperor v. Bai Lali*.
(19) AIR 1919 Cal 1016 (1017) : 20 Cri L Jour 20, *Emperor v. Asgar Mandal*.
(Verdict not perverse — No interference.)
(23) AIR 1923 Cal 579 (581), *Emperor v. Ahirannessa Bibi*. (Do.)
[See (33) AIR 1933 All 94 (95) : 34 Cri L Jour 432, *Harischandra v. Emperor*.
(26) AIR 1936 Cal 407 (408) : 37 Cri L Jour 1149, *Emperor v. Gostho Sardar*.
(Verdict not perverse or unreasonable — High Court refused to interfere.)]
[See also (1900) 27 Cal 295 (304) : 4 C W N 129, *Queen-Empress v. Jadub Das*.
(02) 1902 All W N 143 (144), *King-Emperor v. Rahmatullah*. (Verdict not perverse.)
(11) 12 Cr.L.J. 193 (197) : 10 I. C. 684 (Cal), *Rashidazzaman v. Emperor*. (Do.)]
6. (38) AIR 1938 Cal 295 (296) : 39 Cr.L.J. 479, *Emperor v. Nibharesh Mandal*.
(29) AIR 1929 Nag 36 (37) : 29 Cri L Jour 963, *Ramadhin Brahmin v. Emperor*.
(24) AIR 1924 All 411 (412) : 46 All 265 : 25 Cr.L.J. 981, *Emperor v. Panna Lal*.
(91) 15 Bom 452 (458, 475, 486), *Queen-Empress v. Dada Ana*.
(96) 20 Bom 215 (218), *Queen-Empress v. Deoji Govindji*.
(04) 1 Cri L Jour 265 (268) : 6 Bom L R 258, *Emperor v. Bharmia*.
(29) AIR 1929 Bom 296 (302) : 53 Bom 479 : 31 Cri L Jour 65, *Emperor v. C. E. Ring*. (Verdict not manifestly wrong — No interference.)
(73) 20 Suth W R Cr 33 (33) *Queen v. Ramchurn Ghose*.
(73) 20 Suth W R Cr 70 (71), *Queen v. Nobin Chunder*.
(73) 20 Suth W R Cr 73 (73) : 13 Beng L R App 19, *Queen v. Sham Bagdee*. (Verdict not clearly wrong — No interference.)
(74) 21 Suth W R Cr 4 (4) : 14 Beng L R App 2n, *Queen v. Hurro Manji*. (Do.)
(76) 25 Suth W R Cr 25 (27), *Queen v. Wuzir Mundal*. (Do.)
(84) 11 Cal 85 (91), *Queen-Empress v. Jacquiet*.
(74) 14 Beng L R App 1 (3), *Queen v. Mt. Itwarya*. (Verdict not patently wrong — No interference.)
(14) AIR 1914 Cal 65 (69) : 41 Cal 621 : 14 Cr.L.J. 660, *Emperor v. Surnamoyee Biswas*. (Verdict of the jury not in defiance of the probabilities of the case — Verdict not disturbed.)
(24) AIR 1924 Cal 317 (320) : 24 Cr. L. J. 897, *Emperor v. Nritya Gopal*. (Do.)
(24) AIR 1924 Cal 321 (322) : 51 Cal 347 : 25 Cr.L.J. 758, *Emperor v. Dhananjay Roy*. (Do.)
(29) AIR 1929 Cal 737 (738) : 31 Cr. L. J. 698, *Meajan v. Emperor*. (Jury justified in bringing a verdict of not guilty — Reference under S. 307 rejected.)
(30) AIR 1930 Cal 141 (142) : 31 Cr.L.J. 667, *Emperor v. Balai Ghose*. (Verdict not wrong—Reference rejected.)
(11) 12 Cri L Jour 48 (49) : 9 I. C. 288 (Mad), *In re Lal Singh*. (Do.)

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- (c) unreasonable,⁷ or
 (d) definitely contrary to evidence,⁸ or
 (e) not supported by any evidence.⁹

- ('32) AIR 1932 Mad 21 (22) : 33 Cr.L.J. 215, *Venkatachala Goundan v. Emperor*.
 ('29) AIR 1929 Pat 313 (314) : 8 Pat 344 : 30 Cr.L.J. 721, *Ramdas Rai v. Emperor*.
 ('29) AIR 1929 Nag 113 (114) : 30 Cr.L.J. 789, *Ramdayal v. Emperor*. (Verdict not wrong—No interference.)
 ('26) AIR 1926 Nag 308 (309) : 22 N L R 42 : 27 Cri L Jour 773, *Emperor v. Kankaya*. (Do.)
 ('10) 11 Cri L Jour 630 (630) : 13 Oudh Cas 295 : 8 Ind Cas 373, *Shubrati v. Emperor*. (Accused charged with rape—Jury giving a verdict of guilty of attempt to commit rape—Verdict not interfered with in appeal.)
 ('86) 10 Bom 497 (502), *Queen-Empress v. Mania Dayal*.
 ('80) 6 Cal L R 431 (434, 436), *Empress v. Behari Lall Bose*. (Unanimous verdict of jury there being palpable grounds for it, is justified and ought not to be interfered with.)
 [See also ('90) 14 Bom 331 (343), *Queen-Empress v. Chagan Dayaram*. (Obiter.)]
 7. ('29) AIR 1929 Nag 36 (37) : 29 Cr. L. J. 963, *Ramadhin v. Emperor*.
 ('78) 2 Cal L R 518 (519), *In re Hurrec Narain Mookerjee*. (Verdict of jury not unreasonable—No interference.)
 ('25) AIR 1925 Cal 876 (884) : 52 Cal 987 : 26 Cr.L.J. 1256, *Emperor v. Premananda Dutt*. (Do.)
 ('31) AIR 1931 Cal 15 (16) : 57 Cal 1183 : 32 Cr.L.J. 452, *Jogikar v. Emperor*. (Do.)
 ('28) AIR 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cri L Jour 317 (FB), *Veerappa Goundan v. Emperor*. (Verdict must be confirmed if not unreasonable.)
 ('29) AIR 1929 Mad 135 (137) : 30 Cr.L.J. 843, *Mottaya Pillai v. Emperor*. (Do.)
 ('29) 1929 Mad WN 281 (282) (FB), *Sessions Judge of Arcot v. Jailabuddin*. (Do.)
 ('28) AIR 1928 Pat 497 (500) : 8 Pat 74 : 29 Cr.L.J. 1035, *Emperor v. Vidyasagar*.
 ('34) 35 Cri L Jour 285 (286) : 147 Ind Cas 53 (Oudh), *Emperor v. Chupai*.
 ('34) 35 Cri L Jour 33 (33) : 146 Ind Cas 303 (Oudh), *Emperor v. Ashgar Hussain*. (Verdict not unreasonable—No interference.)
 ('29) AIR 1929 Cal 287 (288) : 56 Cal 132 : 30 Cr.L.J. 584, *Emperor v. Nagarali*. (Do.)
 ('29) 30 Cri L Jour 804 (806) : 117 Ind Cas 602 (Cal), *Izazuddin v. Emperor*. (Do.)
 ('29) AIR 1929 Oudh 280 (281) : 30 Cri L Jour 570, *Emperor Bhagwandin*. (Do.)
 ('27) AIR 1927 Oudh 607 (607) : 28 Cri L Jour 895, *Emperor v. Sharikat Husain*. (Do.)
 ('29) 30 Cri L Jour 125 (128) : 113 Ind Cas 285 (Cal), *Emperor v. Khuday Gazi*. (Verdict such as reasonable men, properly instructed would come to — Reference rejected.)
 ('27) AIR 1927 Cal 848 (850) : 54 Cal 708 : 28 Cri L Jour 903, *Emperor v. Har Mohan Das*. (The test that has to be applied in estimating the weight of the verdict of the jury is whether the opinion is such as could on the particular facts and evidence of the case have been held by reasonable men however much the Judge may differ from that view.)
 ('24) AIR 1924 Cal 956 (959) : 25 Cri L Jour 1284, *Emperor v. Gulam Kadar*. (Verdict not unreasonable — No interference.)
 ('20) AIR 1920 Cal 78 (79) : 21 Cri L Jour 266, *Emperor v. Pramatha Nath*. (Unanimous verdict of jury not unreasonable — No interference.)
 ('89) 1889 Rat 442 (446, 447), *Queen-Empress v. Desai Daji*.
 [See ('36) AIR 1936 Cal 407 (409) : 37 Cr. L. J. 1149, *Emperor v. Gostho Sardar*.]
 8. ('28) AIR 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cr. L. J. 317 (FB), *Veerappa Goundan v. Emperor*.
 ('29) AIR 1929 Cal 737 (738) : 31 Cri L Jour 698, *Meajan Howladar v. Emperor*.
 ('29) AIR 1929 Pat 313 (314) : 8 Pat 344 : 30 Cr. L. J. 721, *Ramdas Rai v. Emperor*.
 9. ('25) AIR 1925 Cal 795 (796) : 26 Cr. L. J. 1006, *Saroda Charan v. Emperor*. (Verdict not supported by evidence — High Court acquitted accused in appeal.)
 ('05) 2 All L Jour 271n (271n), *King-Emperor v. Ishri*.
 ('90) 13 Mad 343 (344), *Queen-Empress v. Guruvadu*. (Verdict of guilty by jury not supported by evidence but no reference was made by Sessions Court — The High Court could not interfere in appeal, since there could be no appeal on facts.)
 ('26) AIR 1926 Pat 535 (536) : 5 Pat 573 : 27 Cri L Jour 1308, *Emperor v. Govind Singh*. (Verdict of jury not unsupported by evidence — Reference rejected.)

The second view is —

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- (1) that the sanctity of a verdict really rests on the absence of the disagreement of the Judge, and that if that disagreement is expressed (as it must be where a reference is made under this section), the special sanctity of the verdict disappears and it has no greater force than the decision of any other tribunal of fact;¹⁰
- (2) that the *whole case* is opened up on a reference,¹¹ that the functions of both the Judge and the jury are cast upon the High Court,¹² and that the High Court is entitled to act up to its *own view* of the case, though in forming its view it should give *due weight* to the opinions of the Judge and the jury;¹³

10. ('40) AIR 1940 Nag 17 (28): 41 Cr.L.J. 289: ILR (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (Per Stone, C. J. and Grille, J. — Bose, J. dissenting.)
- ('32) AIR 1932 Pat 246 (247): 11 Pat 669: 33 Cr.L.J. 877, *Emperor v. Rafi Mian*.
- ('32) AIR 1932 Mad 21 (21, 22): 33 Cri L Jour 215, *Venkatachala Goundan v. Emperor*. (Sessions Judge expressing opinion that verdict of jury plainly unjust — Verdict set aside.)
- ('06) 3 Cr L J 371 (372, 374, 375): 29 Mad 91, *Emperor v. Chellan*. (It becomes then only a mere opinion.)
- [See also (1888) 15 Cal 269 (278, 279), *Queen-Empress v. Itwari Saho*. (The opinion of the Judge who has also had an opportunity of watching the whole course of trial must have due weight given to it.)]
11. ('40) AIR 1940 Nag 17 (28, 37, 38): 41 Cr.L.J. 289: ILR (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (Per Stone, C. J. and Grille, J.: Per Bose, J. — The High Court must decide, in the first instance, whether the verdict is perverse or not and the whole case is opened up to the extent that it is necessary to enable it to reach such a conclusion, but it cannot reach its own decision on the facts unless and until it comes to the conclusion that the verdict was perverse or that it otherwise militates against the provisions of S. 423 (2).)
- ('37) AIR 1937 Nag 33 (35): 38 Cri L Jour 355, *Dattu Deoman v. Emperor*.
- ('37) AIR 1937 Nag 50 (52): 38 Cri L Jour 330: I L R (1937) Nag 277, *Sakhawat Imami v. Emperor*.
- ('22) AIR 1922 Bom 368 (369): 25 Cr. L. J. 315: 47 Bom 31, *Emperor v. Shankar*.
- ('02) 29 Cal 128 (133): 6 Cal W N 253, *Emperor v. H. Lyall*.
- ('08) 8 Cri L Jour 143 (144): 10 Bom L R 632, *Emperor v. Chandra Krishna*.
- ('09) 10 Cr.L.J. 32 (39, 40): 2 I. C. 497: 36 Cal 629, *Emperor v. Annada Charan*.
- ('33) AIR 1933 Cal 47(48): 60 Cal 427: 34 Cr.L.J. 164, *Emperor v. Dwarika Nath*.
- [See ('37) AIR 1937 All 195 (196, 197): I L R (1937) All 419: 38 Cri L Jour 465, *Manjia v. Emperor*. (In reference under S. 307, High Court can consider the case on its merits and substitute its own view and pass suitable orders—*Obiter*.)]
- [See also ('24) AIR 1924 Cal 960 (963): 25 Cri L Jour 1217, *Emperor v. Sagarmal Agarwalla*. (Where there is a misdirection by Judge to jury the High Court is not to consider as to what would have been the verdict in absence of such direction but to consider the verdict on evidence in the case.)]
12. ('91) 15 Bom 452 (476, 480), *Queen-Empress v. Dada Ana*.
- ('75-77) 1 Bom 10 (13), *Reg v. Khanderao*.
- ('28) AIR 1928 Pat 596 (597): 30 Cri L Jour 390, *Emperor v. Wazira Mahto*.
13. ('88) 66 Cal L J 500 (510), *Emperor v. Maja Khan*. (S. 307 (3) imposes upon the High Court in the clearest terms the duty of considering the entire evidence and of giving due weight to opinions of both the Judge and jury.)
- ('09) 10 Cri L Jour 57 (58): 2 Ind Cas 593 (Cal), *Emperor v. Abdul Rahman*.
- ('22) AIR 1922 Pat 348 (352): 23 Cri L Jour 421, *Emperor v. Punit Chain*. (Per Coutts, J.)
- ('07) 5 Cri L Jour 484 (486): 11 Cal W N 715, *Emperor v. Sri Narain Prasad*. (Verdict set aside.)
- ('25) AIR 1925 Cal 525 (529): 26 Cri L Jour 805, *Emperor v. Nishi Kanta*.
- ('25) AIR 1925 Cal 909 (911): 26 Cri L Jour 1298, *Emperor v. Mofizel Peada*.
- ('99) 22 Mad 15 (18), *Queen-Empress v. Anga Valayan*.
- ('29) AIR 1929 Nag 84 (85): 30 Cri L Jour 310, *Emperor v. Tukaram*. (Verdict of jury set aside.)
- ('20) AIR 1920 Pat 674 (676): 21 Cri L Jour 278, *Emperor v. Mt. Zohra*. (In case of divided verdicts, opinions of majority as well as minority should be considered.)

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(3) that, therefore, where the verdict appears to the High Court to be one which ought not to be upheld, it is entitled to interfere even though the verdict is *neither unreasonable nor perverse*.¹⁴ It has, however, been held that in cases where there has been a verdict of not guilty, it is the practice not to reverse the verdict unless it is perverse or manifestly wrong.¹⁵ A Full Bench of the High Court of Nagpur has held that even though the whole case is open on a reference under the section, the High Court *ought* not to interfere with the verdict of the jury unless the High Court considers such verdict to be wrong beyond any reasonable doubt.^{15a}

It is submitted that the first view is not correct. There is nothing in the section to limit the power of the High Court to interfere in cases where the verdict is perverse or unreasonable. Where the High Court considers on the evidence that the verdict ought not to be upheld, it will in fact amount to a miscarriage of justice if the verdict is to be upheld by reason of a sort of conventional respect for the jury. Further, it may be noted that the section speaks of the *opinion* of the jury, and not of the *verdict*.¹⁶ The principle of the sanctity of the verdict need not be applied with strictness to the *opinion* of the jury.

It is, however, necessary before the High Court can interfere under this section that it should come to the conclusion on the evidence that the decision of the jury is *wrong*. Where the decision is correct or cannot be said to be wrong, there is no room for any interference.¹⁷

(21) AIR 1921 Pat 191 (192) : 23 Cri L Jour 11 : 6 Pat L Jour 264, *Emperor v. Bhuitolan Singh*. (Verdict set aside.)

(34) AIR 1934 Pat 533 (535) : 36 Cri L Jour 262, *Emperor v. Suar Gola*.

(14) AIR 1914 Low Bur 197 (198) : 15 Cri L Jour 513, *Emperor v. Kotiya*.

14. ('40) AIR 1940 Nag 17 (29) : 41 Cri L Jour 289 : ILR (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (Per Stone, C. J., and Grille, J. — Bose, J., dissenting.)

(38) AIR 1938 All 227 (229) : 39 Cri L Jour 559 : ILR (1938) All 483, *Emperor v. Bansi*. (Verdict of guilty — High Court considering verdict of jury as not sustainable though it is not perverse or wrong can reverse it.)

(02) 29 Cal 128 (133) : 6 C W N 253, *Emperor v. H. Lyall*.

(09) 10 Cr. L. J. 32 (36, 39):2 I. C. 497:36 Cal 629, *Emperor v. Annada Charan*.

(22) AIR 1922 Pat 348 (352) : 23 Cri L Jour 421, *Emperor v. Punit Chain*. (Per Coutts, J. — Verdict not interfered with.)

(32) AIR 1932 Lah 345 (348) : 13 Lah 573:33 Cr.L.J. 220, *Emperor v. Barwick*.

(78) 1 Cal L R 275 (281, 282), *Empercss v. Mukhun Kumar*.

(92) 2 Weir 390 (391), *In re Nagan*.

(32) AIR 1932 Cal 658 (659) : 33 Cr. L. J. 476 (SB), *Mabajjan Bibi v. Emperor*.

(74) 11 Bom H C R Cr 137 (138), *Reg. v. Balvant*.

(05) 2 Cal L Jour 77n (78n), *Emperor v. Purna Hazra*. (The fact that the verdict of jury has the assent of one of the Judges of the High Court is sufficient to show that verdict should not be reversed.)

15. ('38) AIR 1938 All 227 (229) : 39 Cr.L.J. 559 : I L R(1938) All 483, *Emperor v. Bansi*.

15a. ('40) AIR 1940 Nag 17 (29): 41 Cr.L.J. 289: ILR (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*.

16. ('06) 3 Cr. L. J. 371 (373, 374): 29 Mad 91, *Emperor v. Chellan*.

(24) AIR 1924 Mad 232 (233): 25 Cr.L.J. 145, *Nanni Kudumban v. Emperor*.

17. ('16) AIR 1916 Mad 783 (784) : 16 Cr. L. J. 440 (441), *In re Irula Sadayan*.

(27) AIR 1927 Cal 820 (821) : 28 Cri L Jour 874, *Emperor v. Irjan*. (Verdict in accordance with facts of the case—No retrial ordered though the jury was not properly constituted.)

(79) 1879 Pun Re No. 36 Cr, p. 105 (114), *Empress v. Joseef Casorati*.

Where, on the other hand, the decision is perverse or unreasonable or against the evidence or is not supported by evidence, the High Court will interfere,¹⁸ though as it has been said before, its powers are not limited to the perversity or unreasonableness of the verdict.

- ('30) AIR 1930 Oudh 334 (334): 31 Cri L Jour 719 : 5 Luck 720, *Emperor v. Chiranjil Lal*. (Verdict cannot be said to be wrong—No reversal.)
- ('31) 32 Cr.L.J. 1028 (1029): 133 Ind Cas 475 (All), *Emperor v. Madan Gopal*.
- ('34) AIR 1934 Pat 533 (536): 36 Cri L Jour 262, *Emperor v. Suar Gola*. (Verdict cannot be said to be wrong—Verdict not set aside.)
- ('28) 30 Cri L Jour 820 (824): 117 Ind Cas 680 (Cal), *Emperor v. Yunus Ali*. (The fact that one of the Judges of the High Court agrees with the verdict is sufficient for its not being set aside.)
- ('35) AIR 1935 Pat 433 (434, 435), *Emperor v. Bhagwat Sahu*. (Verdict depending mainly on the question whether the testimony of witnesses is to be believed—Verdict not perverse—Such verdict is to be upheld.)
- [See also ('40) AIR 1940 Nag 17 (30): 41 Cr. L. J. 289 : I L R (1940) Nag 394 (F B), *Dattatraya Sadashiv v. Emperor*. (Per Stone, C. J. and Grille, J.—If the Court is not absolutely certain that the jury's opinion is wrong but is of opinion that it is wrong, the proper course is to accept that opinion or possibly in certain circumstances to order a new trial. If the Court inclines to an opinion that the jury is wrong but has no decided opinion one way or other the right course is to accept the jury's opinion.)]
18. ('38) AIR 1938 All 227 (229): 39 Cr. L. J. 559 : I L R (1938) All 483, *Emperor v. Bansi*. (Verdict of jury not sustainable upon evidence—High Court will interfere.)
- ('37) AIR 1937 Nag 33 (35) : 38 Cri L Jour 355, *Dattu Doman v. Emperor*.
- ('29) AIR 1929 All 338 (339): 30 Cri L Jour 1078, *Emperor v. Jukhan*. (Perverse.)
- ('96) 20 Bom 215 (224, 227), *Queen-Empress v. Devji Govindji*. (Per Jardine, J.—Verdict manifestly wrong and unreasonable—Per Ranade, J.; verdict perverse.)
- ('73) 19 Suth W R Cr 45 (46), *Queen v. Doorjodlum*. (Verdict reasonable — No interference.)
- ('05) 2 Cri L Jour 259 (264) : 32 Cal 759 : 9 C W N 520, *Emperor v. Abdul Hamid*. (Jury refusing to believe expert witness—Verdict cannot be said to be unreasonable—Verdict not set aside.)
- ('22) AIR 1922 Cal 382 (386): 49 Cal 358 : 24 Cri L Jour 221, *Emperor v. Balaram Das*. (Verdict incomprehensible.)
- ('23) AIR 1923 Cal 97 (99): 25 Cri L Jour 748, *Emperor v. Sristidhar Mazumdar*. (Verdict not unreasonable—No interference.)
- ('24) AIR 1924 Cal 960 (963) : 25 Cri L Jour 1217, *Emperor v. Sagarmal*. (Jury overlooking direct evidence.)
- ('28) AIR 1928 Cal 233 (233), *Emperor v. Komoruddin*. (Verdict against the evidence.)
- ('34) AIR 1934 Cal 432 (433) : 35 Cr. L. J. 1311, *Dharanidhar Mandal v. Emperor*. (Verdict not supported by evidence.)
- ('84) 2 Weir 388 (389), *In re Kamanna*. (Perverse.)
- ('23) AIR 1923 Pat 474 (474): 26 Cri L Jour 856, *Emperor v. Ali Hyder*. (Verdict against evidence.)
- ('26) AIR 1926 Pat 566 (568) : 27 Cri L Jour 1041, *Emperor v. Zahir Hyder*.
- ('33) AIR 1933 Pat 273 (273) : 34 Cr. L. J. 731, *Emperor v. Sitalu Ahir*. (Verdict not perverse—No interference.)
- ('33) AIR 1933 Pat 481 (484) : 34 Cri L Jour 828, *Emperor v. Kameshwar Lal*. (Verdict correct—No interference.)
- ('34) 35 Cri L Jour 285 (286) : 147 Ind Cas 53 (Oudh), *Emperor v. Chupai*. (Verdict perverse and against the weight of evidence.)
- ('25) AIR 1925 Oudh 311 (311, 312) : 26 Cr. L. J. 310: 28 Oudh Cas 69, *Emperor v. Ali Raza*. (Verdict not perverse.)
- ('28) AIR 1928 Oudh 277 (280) : 3 Luck 494 : 29 Cr. L. J. 983, *Mohammad Hadi Husain v. Emperor*. (Verdict unreasonable and also perverse.)
- ('24) 25 Cri L Jour 165 (166) : 76 Ind Cas 389 (Cal), *Emperor v. Sukhu Bewa*. (Verdict reasonable—Reference rejected.)
- ('21) AIR 1921 Sind 145 (149) : 26 Cri L Jour 609 (611, 612) : 16 Sind L R 143, *Emperor v. Pir Mahomed Bux*. (Verdict perverse.)
- ('32) 33 Cr. L. J. 465 (466): 137 Ind Cas 346 (Oudh), *Emperor v. Ramdas*. (Verdict palpably perverse and against the entire weight of evidence.)
- ('34) AIR 1934 Oudh 399 (400) : 35 Cri L Jour 1130, *Emperor v. Abdul Rahim*. (Unanimous verdict—Perverse and against evidence—Interference proper.)

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It has been held by the High Court of Bombay in the undermentioned case¹⁰ that the powers of the High Court under this section are controlled by S. 537 and that consequently where there is no failure of justice, the High Court cannot interfere.

12. Reference in case falling under S. 449. — See Section 449 Note 7.

13. "After giving due weight to the opinions of the Sessions Judge and the jury."— In arriving at a conclusion, the High Court is required to give due weight to the opinions of the Sessions Judge and the jury. There is a difference of opinion as to the relative weight to be given to such opinions, one view being that the opinion of the jury must stand unless the evidence and opinion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed;¹ a second view being that more weight should be given to the opinion of the Sessions Judge inasmuch as, in addition to the fact that he has, equally with the jury, heard the witnesses, he has been trained to appreciate evidence and gives reasons for his opinion;² a third view is that the opinion of the one is not entitled to more weight than that of the other and that they are both entitled to equal weight.³ In the undermentioned case⁴ it was held that the measure of the relative weight to be attached to the opinions cannot be crystallized into an inflexible formula, but depends upon the facts of each case, though the trend of opinion is to prefer the opinion of the jurors.

There is also a difference of opinions on the question whether the opinion of the jury includes the reasons for the verdict, or whether it means the verdict only. On the one hand, it has been held that the Judge has no power to ask the jury, under S. 303, the reasons for their verdict, and that consequently the opinion of the jury does not include the reasons, but only the verdict.⁵ On the other hand, it has been held that, for the purpose of satisfying himself as to the advisability of making a reference under this section, the Judge is entitled to question

{ '35) AIR 1935 All 970 (970, 973, 974): 37 Cri L Jour 135, *Emperor v. Srikishen*. (Evidence conclusively pointing to guilt of accused — Jury returning verdict of not guilty—Verdict is perverse.)

{ '29) AIR 1929 Oudh 86 (87) : 3 Luck 456 : 29 Cri L Jour 452 (453), *Emperor v. Maharaj Behari*. (Amazingly perverse and patently bad verdict.)

19. { '22) AIR 1922 Bom 368 (369, 370): 47 Bom 31: 25 Cri L Jour 315, *Emperor v. Shankar Ballkrishna*.

See also S. 537 Note 3.

Note 13

1. { '24) AIR 1924 Cal 701 (703) : 51 Cal 160 : 25 Cri L Jour 1000, *Emperor v. Jamalali Fakir*.

2. { '28) AIR 1928 Cal 732 (733) : 55 Cal 879 : 29 Cri L Jour 823, *Emperor v. Ramchandra*.

3. { '24) AIR 1924 Oudh 314 (314): 27 Oudh Cas 29 : 25 Cr. L. J. 785, *Emperor v. Ramcharan*.

{ '13) 14 Cri L Jour 556 (558) : 21 Ind Cas 156 (Cal), *Emperor v. Neamattulla*.

4. { '24) AIR 1924 Cal 321 (322): 51 Cal 347: 25 Cr. L. J. 758, *Emperor v. Dhananjay*.

5. { '06) 3 Cri L Jour 371 (375) : 29 Mad 91, *Emperor v. Chellan*.

{ '28) AIR 1928 Pat 203 (205): 7 Pat 55: 29 Cr. L. J. 466, *Ram Jag Ahir v. Emperor*.

{ '91) 15 Bom 452 (457), *Queen-Empress v. Dada Ana*.

{ '24) AIR 1924 Mad 232 (233): 25 Cri L Jour 145, *Nanni Kudumban v. Emperor*. (It becomes an opinion on disagreement.)

{ '14) AIR 1914 Cal 394 (395) : 15 Cri L Jour 31, *Emperor v. Tara Pada*.

the jury as to their reasons for their verdict, and that the reasons so given are included in the word "opinion" and can be considered by the High Court.⁶ It has also been held that the word 'opinions' in this section is wider than the word 'verdict' in S. 423, sub-s.(2) and includes not only the final decision of the majority, but also the opinion of the minority.⁷ The opinion of the Sessions Judge means the opinion expressed in the reference or at the hearing.⁸ It does not include his speculations as to what external considerations, such as the conduct of the jury, might have affected the verdict of the jury.⁹

See also Note 11.

14. Power of High Court to order re-trial or order additional evidence to be taken. — The High Court can, in a reference under this section, not only determine the facts itself but may also order a re-trial.¹ It may also call for additional evidence under S. 428 of the Code.²

The jurisdiction exercised in such cases is not, however, original criminal jurisdiction³ although it is not also that of a Court of appeal.⁴

15. Verdict of jury in cases not triable by jury — Applicability of this section. — Where by mistake an offence which is triable with the aid of assessors is tried by jury, the Judge, when he discovers the mistake, may treat the trial as legal and refer the case to the High Court under this section if he disagrees with the verdict of

6. ('40) AIR 1940 Nag 17 (36) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (Per Bose J.)
- ('20) AIR 1920 Mad 170 (171) : 43 Mad 744 : 21 Cri L Jour 466, *In re Subbiah Thevan*. (Per Sadasiva Aiyar, J.—Spencer, J., dissenting.)
- ('20) AIR 1920 Pat 674 (676) : 21 Cri L Jour 278, *Emperor v. Mt. Zohra*.
- ('09) 10 Cr. L. J. 32 (35) : 36 Cal 629 : 2 I. C. 497, *Emperor v. Annada Charan*.
- ('22) AIR 1922 Pat 348 (351) : 23 Cri L Jour 421, *Emperor v. Punit Chain*. (Per Jwala Prasad, J. — Coutts, J., *contra*.)
- ('26) AIR 1926 Nag 308 (309) : 22 Nag L R 42 : 27 Cr. L. J. 773, *Emperor v. Kankaya*.
- ('29) AIR 1929 Nag 84 (85) : 30 Cri L Jour 310, *Emperor v. Tukaram*.
- ('33) 34 Cri L. J. 411 (412) : 142 I. C. 785 (Nag), *Emperor v. Baliram Krishnaji*.
[See also ('15) AIR 1915 Lah 135 (136) : 16 Cri L Jour 587 (588), *Emperor v. Walter Turner*.]
7. ('40) AIR 1940 Nag 17 (36) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*. (Per Bose, J.)
8. ('24) AIR 1924 Mad 232 (233) : 25 Cr. L. J. 145, *Nanni Kudumban v. Emperor*.
9. ('24) AIR 1924 Cal 321 (322) : 51 Cal 347 : 25 Cr. L. J. 758, *Emperor v. Dhananjay Roy*.

Note 14

1. ('35) AIR 1935 Cal 184 (189) : 62 Cal 572 : 36 Cr. L. J. 808 (FB), *Rafiqueuddin Ahmad v. Emperor*.
- ('40) AIR 1940 Nag 17 (29) : 41 Cri L Jour 289 : ILR (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*.
- ('37) AIR 1937 All 195 (196) : 38 Cri L Jour 465 : ILR (1937) All 419, *Manjia v. Emperor*. (Obiter.)
- ('37) AIR 1937 Bom 60 (62) : 38 Cri L Jour 327, *Emperor v. Md. Adam Chohan*.
- ('95) 19 Bom 749 (762), *Queen-Empress v. Ramachandra Govind Harshe*. (Obiter.)
- ('79) 1879 Pun Re No. 36 Cr, p. 105 (127), *Empress v. Joseph Casorati*.
2. ('29) AIR 1929 Cal 244 (246) : 56 Cal 566 : 30 Cr. L. J. 1031, *Debendra Narayan v. Emperor*. (In this case further evidence was not called.)
See also S. 428 Note 2.
3. ('02) 29 Cal 286 (297, 303) : 6 C W N 254 (FB), *In the matter of Horace Lyall*.
4. ('28) AIR 1928 All 207 (210) : 50 All 625 : 29 Cr. L. J. 353 (FB), *Emperor v. Shera*.

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Notes 15-16

the jury.¹ Where a charge is triable with the aid of the jury as assessors (S. 269, sub-s.(3)), but is tried by the jury and a verdict is given, the procedure, though irregular, is legal and a reference is competent under this section.²

Sub-section (2) of this section which forbids recording of judgment of acquittal or of conviction, applies only to charges which are tried by jury and not to charges which are tried with the aid of assessors. Thus, where a case is triable with regard to some of the charges by a jury and with regard to others with the jury as assessors under S. 269, sub-s.(3), the mere fact that a reference is made with regard to the charges triable by jury does not absolve the Court from proceeding under S. 309 to judgment in respect of the other charges. The whole case should not be submitted.³ It has been held that in such a case the High Court can on the reference set aside the sentence passed by the Judge with regard to the offence triable with the aid of assessors (though not appealed against).⁴

See also Note 13 to section 309.

16. Acquit or convict of any offence, etc. — It has been seen in Note 11 that the whole case is open to the High Court and it can come to its own conclusion therein. In hearing a reference under this section the High Court can acquit the accused or convict him of any offence of which the jury could have convicted the accused on the

Note 15

1. ('35) AIR 1935 Pat 433 (435) : 36 Cri L Jour 1502, *Emperor v. Bhagwate Sahu*. (Offence under S. 396, Penal Code.)

2. ('99) 23 Bom 696 (697) : 1 Bom L R 114, *Queen-Empress v. Jayram Haribhai*. (Offence of criminal misappropriation.)

('98) 25 Cal 555 (557), *Surja Kurmi v. Queen-Empress*.

('79) 4 Cal L R 405 (409), *In re Bhootnath Day*. (Offence under S. 82 of Registration Act triable by jurors as assessors.)

See also S. 269 Note 3, S. 306 Note 3 and S. 309 Note 13.

3. ('19) AIR 1919 Mad 19 (19) : 20 Cri L Jour 352, *In re Kambala Narayana*. ('40) AIR 1940 All 260 (261) : 41 Cri L Jour 676 : ILR (1940) All 365, *Emperor v. Ganga Ram*. (S. 307 (2) does not include those charges which are not triable by jury at all but are triable by the Judge with the aid of assessors.)

('38) AIR 1938 Mad 686 (686) : 39 Cri L Jour 864, *In re Bojji Reddi*. (Judge is not competent to refer under S. 307 the case of offences triable by assessors to High Court, nor can his reference give High Court jurisdiction to dispose of them.)

('32) AIR 1932 Bom 61 (62, 63) : 33 Cri L Jour 172, *Emperor v. Chanbasappa Baslingappa*.

('32) AIR 1932 Mad 512 (512) : 55 Mad 715 : 33 Cr. L. J. 533, *Panchaimuthu v. Emperor*.

('06) 4 Cri L Jour 192 (193) : 8 Bom L R 599, *Emperor v. Kalidas Bhudar*.

('34) AIR 1934 Pat 424 (425) : 36 Cri L Jour 469, *Emperor v. Lachman Gangota*. (Reference of whole case to High Court when charges triable with the aid of assessors are not disposed of is premature.)

('08) 7 Cr.L.J. 236 (238) : 9 Bom L R 1057, *Emperor v. Vyankatsingh Sambhusingh*. [See however ('37) AIR 1937 Pat 662 (665) : 39 Cri L Jour 156, *Emperor v. Haria Dhobi*. (Inconvenience of above procedure pointed out.)]

See also S. 269 Note 7.

4. ('22) AIR 1922 Bom 284 (287) : 24 Cr. L. J. 923, *Emperor v. Hasrat Mohani*. [See however ('38) AIR 1938 Mad 686 (686) : 39 Cri L Jour 864, *In re Bojji Reddi*. (Reference of case including offences triable by jury and those triable with the aid of assessors—Reference cannot give jurisdiction to High Court to dispose of latter offences.)]

charges framed and placed before them.¹ In cases falling within ss. 237 and 238, the accused can be convicted of an offence different from the one for which he was charged. So the High Court can, on hearing a reference under this section, convict the accused of an offence different from the one he was charged with, within the limits imposed by those two sections.^{1a} Thus, in a case under s. 302 of the Penal Code the High Court can convict the accused of an offence under s. 304A of that Code, even though the accused was not specifically charged under that section since such a case comes under ss. 237 and 238 of this Code.² On a case submitted under this section the High Court can acquit the accused if it so thinks fit on facts notwithstanding that the jury have found the prisoner guilty³ and it can convict the accused notwithstanding that the jury have found the prisoner not guilty.⁴

See also the undermentioned case.⁵

17. Procedure at the hearing of reference. — The High Court under this section on a reference against the verdict of acquittal must deal with the case as an appeal by the prosecution.¹ In such a case the Crown is the party who asks for a conviction and the prosecutor *must begin the case* and satisfy the High Court that there is a case calling upon the prisoner for an answer.²

18. Notice of reference. — This section is silent as to whether any notice of reference to the accused is necessary. It is, however, fair to him that such notice should be given and that he should have

Note 16

1. ('19) AIR 1919 Cal 195 (197): 20 Cr.L.J. 223, *Emperor v. Chhanoo Lal Bania*.
- 1a. ('77) 3 Cal 189 (191, 192), *Empress v. Harai Mircha*. (Charge under s. 302/149 and s. 326/149—Can be convicted under s. 143, Penal Code.)
- ('14) AIR 1914 Mad 425 (428): 37 Mad 236: 13 Cri L Jour 739, *In re Adabala*. (Can convict under s. 326, Penal Code, where the charge was only under s. 397, Penal Code.)
- ('24) AIR 1924 Bom 450 (451): 26 Cr.L.J. 211, *Emperor v. Charles John Walker*. (Charge under s. 304, conviction under s. 304A.)
- ('95) 22 Cal 1006 (1009, 1010), *Queen v. Sitanath*. (Can convict under s. 365, Penal Code, even though the charge was only under ss. 366 and 376, Penal Code.)
- See also s. 238 Note 5.
2. ('15) AIR 1915 Bom 297 (298): 16 Cr.L.J. 305, *Emperor v. Ramava Channappa*.
3. ('73) 20 Suth W R Cr 1 (4): 11 Beng L R 14, *Empress v. Koonjo Leth*.
- ('26) AIR 1926 Cal 1034 (1037): 27 Cr.L.J. 1341, *Emperor v. Yakub*. (Unanimous verdict of guilty set aside and accused acquitted.)
- ('87) 14 Cal 42 (46) (F B), *In re Gibbons*.
4. ('35) AIR 1935 All 970 (970): 37 Cri L Jour 135, *Emperor v. Sri Kisan*. (The High Court has undoubted jurisdiction to disregard the verdict of the jury and to convict the accused if it is of opinion that the verdict of the jury was perverse.)
- ('73) 19 Suth W R Cr 38 (39), *Queen v. Oottum Dhoba*.
- ('78) 2 Cal L R 1 (2), *In the matter of Tiluckdharce*.
- ('78) 3 Cal 623 (625): 2 C L R 304, *Empress v. Sahae Rae*.
- ('24) AIR 1924 Cal 718 (721): 51 Cal 469: 26 Cr.L.J. 24, *Emperor v. Bansi Sheikh*.
- ('75) 24 Suth W R Cr 80 (81), *Queen v. Nityo Gapal Dass*.
- ('21) AIR 1921 Sind 145 (147): 16 S L R 143: 26 Cr.L.J. 609, *Emperor v. Md. Bux*.
5. ('27) AIR 1927 Cal 949 (950): 28 Cri L Jour 449, *Kasem Ali v. Emperor*. (Two accused charged under s. 120-B, Penal Code—Charge not showing complicity of any other person in conspiracy—One of the accused convicted of conspiracy and the case of the other accused referred under s. 307—Latter acquitted on reference—Conviction against the other accused cannot remain and must be set aside.)

Note 17

1. ('73) 20 Suth W R Cr 70 (71): 13 Beng L R App 20, *Queen v. Nabin Chunder*.
2. ('73) 20 Suth W R Cr 33 (33), *Queen v. Ram Churn Ghose*.

Section 307
Notes 18-20

time to bring forward any objection he may have to recommendations of the Sessions Judge.¹

19. Difference between Judges hearing reference — Procedure. — Where a reference is heard by two Judges and they differ in their opinions, the decision is not to be governed by the opinion of the senior Judge; the matter must be referred to a third Judge in the manner required by section 429.¹

20. Appeal. — Inasmuch as no judgment of acquittal or of conviction is to be recorded where a reference is made under this section, there can be no appeal as from a Sessions Judge to the High Court.¹ But where no reference is made, it is clear that the judgment that must follow the verdict will be appealable under ss. 417² and 418.

A judgment passed by the High Court on a reference under this section is itself not open to appeal to the High Court.³

G. — Re-trial of Accused after Discharge of Jury.

Section 308

308.* Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

1. Legislative changes. — There was no section corresponding to this in the Codes of 1861 and 1872. This section was first introduced in the Code of 1892.

2. "Whenever the jury is discharged." — See Section 282 Note 2.

3. Re-summoning of a jury. — In the undermentioned case,¹ Rankin, J., observed as follows:

"With reference to the question, whether, had we thought that the discharge of the jury was illegal, we would have ordered a re-summoning of the old jury, I only desire to say for myself that it would require very strong circumstances indeed to make me give an order for the re-summoning of a jury that have been at large since the 16th of August. Taking one thing with another, it would require

* 1882 : S. 308; 1872 and 1861 — Nil.

Note 18

1. ('73) 19 Suth W R Cr 38 (39), *Queen v. Oottam Dhoba*.
- ('73) 20 Suth W R Cr 33 (33), *Queen v. Ram Churn Ghose*.

Note 19

1. ('94) 15 Bom 452 (474, 475), *Queen-Empress v. Dada Ana*.
- ('05) 2 Cal L Jour 77n (77n), *Emperor v. Purna Hazra*.
- ('16) AIR 1916 Mad 783 (785) : 16 Cri L Jour 440, *In re Irula Sadayan*.

Note 20

1. ('29) AIR 1929 Mad 135 (137) : 30 Cr. L. J. 843, *Mottayya Pillai v. Emperor*.
2. ('78) 2 Bom 526n (526n), *In re Hari Ghanu*.
3. ('94) 1894 Rat 691 (691), *Queen-Empress v. Adveppa*.

Section 308 — Note 3

1. ('27) AIR 1927 Cal 199 (200) : 28 Cri L Jour 141, *Emperor v. Monmotha Nath*.

some little further time before the case possibly could be re-started and it would be improper and inconvenient for persons to be re-summoned who have been released from their oath as jurors by an order of discharge and who, therefore, have been perfectly entitled in the *interim* to discuss the matter either with their friends or with the accused or with anybody they like. Such an order as that, I hope, will never be made by this Court except in very exceptional circumstances."

Section 308:
Notes 3-4

4. "The Judge shall make an entry." — In an order under this section that the accused should not be re-tried, the Judge cannot pass remarks implying the guilt of the accused.¹ But the Judge can record his opinion that the accused is innocent.²

H.—Conclusion of Trial in Cases tried with Assessors.

309.* (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally on all the charges on which the accused has been tried, and shall record such opinion, and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded.

Section 309:

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

(3) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 562, pass sentence on him according to law.

The words "on all the charges on which the accused has been tried" and the words "and for that purpose . . . shall be recorded" in sub-s.(1) and the words "unless he proceeds in accordance with the provisions of S. 562" in sub-s.(2) were inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

*** Code of 1898, original S. 309.**

309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence, for the prosecution and defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

(3) If the accused is convicted, the Judge shall pass sentence on him according to law.

1882 : S. 309; 1872 : Ss. 255, 261, 262; 1861 : S. 324.

Note 4

1. ('29) AIR 1929 Sind 145(146):23 SLR 397:30 Cr.L.J. 877, *Mir Ahmad v. Emperor*.
2. ('35) AIR 1935 Sind 189 (191) : 36 Cri L Jour 1359, *Premchand v. Emperor*.

Section 309
Note 1

Synopsis

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Scope of the section. 2. Summing up of evidence by Judge to assessors. 3. Delivery of opinions of assessors. 4. Retirement of assessors to consider their opinions. 5. Each assessor to be asked his opinion. 6. Assessor's opinions to be stated orally. 7. Opinion to be given on all the charges. 8. Conviction for offence different from that on which opinions of assessors were taken. | <ol style="list-style-type: none"> 9. Recording of opinions. 10. Questioning assessors. 11. Reasons for opinions, if may be asked. 12. "The Judge shall then give judgment." 13. Judge not bound to conform to the opinions of the assessors. 14. Opinions of assessors recorded by one Judge — Judgment delivered by his successor — Legality. 15. Sentence. |
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Other Topics (miscellaneous)

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| <p>Assessors case tried as jury case — Procedure. See Note 13.</p> <p>Assessors not to be cross-examined. See Note 11.</p> <p>Assessors' opinion based on evidence and not on personal knowledge. See Note 13.</p> <p>Consultation by assessors. See Note 4.</p> <p>Double capacity of jurors and assessors to be explained. See Note 2.</p> <p>Duty of Judge to assist assessors. See Note 10.</p> <p>Further opinion. See Note 10.</p> <p>Individual opinion and not concurrence. See Note 5.</p> <p>Judge unable to record—Procedure. See Note 2.</p> <p>Judge's opinion not to be forced on assessors. See Notes 2, 3 and 11.</p> | <p>Legislative changes. See Note 2.</p> <p>Medical evidence after opinion. See Note 12.</p> <p>No amendment of charge after taking opinion of assessors. See Note 8.</p> <p>No cancellation of trial after opinion. See Note 12.</p> <p>No local inspection after opinion. See Note 12.</p> <p>No trial after taking opinion. See Note 12.</p> <p>Object of summing up. See Note 2.</p> <p>Omission to ask for or record opinion—Effect. See Notes 3 and 5.</p> <p>Opinion and not bare result. See Note 9.</p> <p>Opinion of committing Magistrate. See Note 12.</p> <p>Record of summing up. See Note 2.</p> <p>Weight to assessors' opinion. See Note 13.</p> |
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1. **Scope of the section.** — The Code provides for two modes of trial before the Sessions Court —

- (1) trial by jury, and
- (2) trial with the aid of assessors.

Sections 297 to 307 provide for the procedure to be followed at the conclusion of a trial by jury after the arguments on either side have been completed. This section provides for the procedure to be followed at the conclusion of a trial with the aid of assessors. The following are some of the important points of distinction between the verdict of a jury and the opinions of assessors¹:

- (1) The verdict of a jury is *conclusive*, though the Judge disagrees with it, unless he considers it fit to submit the case to the High Court

Section 309 — Note 1

1. ('01) 24 Mad 523 (537, 538) : 2 Weir 340 : 11 M L J 241, *King-Emperor v. Thirumal Reddi*.
- ('12) 13 Cr.L.J. 677 (678) : 16 Ind Cas 325 (Bom), *Emperor v. Shankar Balwant*. (1865) 3 Suth W R Cr 21 (21), *Queen v. Bushmo Anant*.

- under s. 307. But in a trial with the aid of assessors, the Judge is not bound to pronounce judgment in accordance with the opinions of the assessors, although in delivering his judgment he is bound to take into consideration the opinions of the assessors. See Note 13.
- (2) The jury form a *body* and their verdict is the verdict of the body. But in the case of a trial with the aid of assessors, the assessors do not form a body; each acts and expresses his opinion individually. See Note 5.
- (3) In the case of a trial by jury the Judge's charge to the jury is an *essential* part of the procedure; while in a trial with the aid of assessors, it is left to the *discretion* of the Judge whether or not to sum up the evidence to them. See Note 2.
- (4) The jury are entitled to retire for mutual consultation before delivering their verdict; the assessors are not so *entitled*, although the Judge *may permit* such consultation. See Note 4.

2. Summing up of evidence by Judge to assessors. — While it is obligatory on the Judge to charge the jury, summing up the evidence and laying down the law by which they are to be guided (s. 297), this section confers a *discretion* on the Court to sum up the evidence for the prosecution and the defence.¹ This provision was first introduced into the section in the Code of 1882,² but even prior to it, it was held that the Court had a discretion to sum up the evidence for the benefit of the assessors.³ The object of the provision is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form before the assessors so as to assist them in arriving at a reasonable conclusion; the provision should be resorted to only in such cases.⁴ In summing up the evidence, the Judge should not obtrude on the assessors his own opinion on the value of the evidence.⁵ When at the same trial, an accused is tried by jury for some offences and by the Court with the aid of the jurors as assessors for other offences (s. 269, sub-s.(3)), the Judge in summing up the evidence should explain to the jurors the double capacity in which they are acting.⁶ As to the

(1865) 3 Suth W R Cr 6 (6), *Queen v. Mt. Mina Nuggerbhatin*.
[See also ('39) AIR 1939 Lah 475 (476, 477): 41 Cri L Jour 55: I L R (1939) Lah 243, *Emperor v. Pahlu*. (A juror stands on a higher footing, speaks with greater authority and takes a larger share in the decision of a criminal case than does an assessor and it may be taken as axiomatic, therefore, that in the absence of a specific prohibition an objection that could not be upheld regarding a juror would be ruled out in the case of an assessor — Per Ram Lal, J., in Order of Reference.)]

Note 2

1. ('12) 13 Cr. L. J. 497 (497): 40 Cal 163: 15 I. C. 641, *Nazimuddi v. Emperor*.
2. (83) 9 Cal 875 (876): 12 C. L. R. 506, *Shadulla Howladar v. Empress*. ('01) 24 Mad 523 (537): 2 Weir 340: 11 M L J 241, *King-Emperor v. Thirumal Reddi*. ('69) 11 Suth W R Cr 39 (39): 7 Beng L R 67n, *Queen v. Joge Poly*.
3. ('66) 5 Suth W R Cr 70 (71), *Queen v. Burjo Barick*. ('71) 15 Suth W R Cr 25 (26): 7 Beng L R 63, *Queen v. Amiruddin*.
4. ('83) 9 Cal 875 (876): 12 C. L. R. 506, *Shadulla Howladar v. Empress*. ('01) 24 Mad 523 (537): 2 Weir 340: 11 M L J 241, *King-Emperor v. Thirumal Reddi*.
5. ('83) 9 Cal 875 (876): 12 C. L. R. 506, *Shadulla Howladar v. Empress*.
6. ('02) 2 Weir 334 (334), *In re Sivaga*.

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Notes 2-4

recording of the summing up, see the undermentioned case.⁷

3. Delivery of opinions of assessors. — In a trial by a Sessions Court with the aid of assessors, the Judge is not bound to deliver judgment in conformity with the opinions of assessors (see Note 13); but he is bound to take the opinions of the assessors before convicting or acquitting the accused.¹ Even where the accused admits his guilt (after the prosecution evidence, in a case where originally he pleaded not guilty), he cannot be convicted without taking such opinions.² The power (under S. 289) to record a finding of not guilty and acquit the accused at the conclusion of the case for the prosecution without calling on the accused to enter on his defence and without recording the opinions of the assessors, is confined to cases where there is *no* evidence in support of the prosecution. Where such is not the case the Judge is bound to record the opinions of the assessors under this section though he considers the evidence for the prosecution to be unreliable.³ The omission to ask for and record opinions is not a mere irregularity curable under S. 537.⁴ But where a prosecution is withdrawn under section 494, the accused is entitled to be acquitted irrespective of the opinions of the assessors and such opinions need not be recorded before he is acquitted.⁵

4. Retirement of assessors to consider their opinions. — This section makes no provision as to the right of the assessors to retire to consider their opinions (compare S. 300 in the case of jurors). The matter is left to the discretion of the Judge. Though he may, in his discretion, allow the assessors to consult each other before giving their opinions,¹ he is not bound to do so as he is entitled to have

7. ('83) 9 Cal 875 (876, 877) : 12 C. L. R. 506, *Shadulla Howladar v. Empress*. (If the Judge is incapable himself of recording the heads of summing up to the assessors he should avail himself of the services of some court-officer or direct it to be done by some independent person but should not ask the pleader for the prosecution to do so and rely on his work as correct.)

Note 3

1. ('38) AIR 1938 Cal 551 (552) : 39 Cri L Jour 835, *Nirmal Kumar v. Emperor*.
- ('05) 2 Cri L Jour 609 (610) : 7 Bom L R 731, *Emperor v. Bai Nani*.
2. ('05) 2 Cri L Jour 609 (610) : 7 Bom L R 731, *Emperor v. Bai Nani*.
3. ('88) 10 All 414 (416, 417) : 1888 All W N 129, *Queen-Empress v. Munna Lal*.
- ('83) 9 Cal 875 (877) : 12 Cal L R 506, *Shadulla Howladar v. Empress*.
- ('92) 16 Bom 414 (422), *Queen-Empress v. Vajiram*. (10 All 414, followed.)
- ('95) 9 C P L R Cr 24(25), *Empress v. Tularam*. (10 All 414, 16 Bom 414, followed.)
- ('89) 2 Weir 391 (391, 392).

See also S. 289 Note 7.

4. ('88) 10 All 414 (417, 418) : 1888 All W N 129, *Queen-Empress v. Munna Lal*.
- ('12) 13 Cri L Jour 497 (497) : 40 Cal 163 : 15 I. C. 641, *Nazimuddi v. Emperor*.
- ('05) 2 Cri L Jour 609 (610) : 7 Bom L R 731, *Emperor v. Bai Nani*.

[See ('71) 15 Suth W R Cr 3 (3), *Queen v. Bhugwan Lall*. (No legal conviction can take place unless the opinion of the assessors is taken on the whole of the evidence in a case.)]

[But see ('75) 1 All 610 (611), *In the matter of Narain Das*.]

See also S. 289 Note 11.

5. ('86) 1886 Rat 307 (307), *Queen-Empress v. Chenbasapa*.

Note 4

1. ('87) 1887 Pun Re No. 41 Cr, p. 95 (97), *Hassan Khan v. Empress*. (The more correct way in such a case would be to put them in a room where no one could have access to them.)
- ('15) AIR 1915 Mad 1036 (1037) : 16 Cr. L. J. 717 (718), *In re Sennimalai Goundan*. (There is no provision to prevent consultation between assessors.)

before him the independent and individual opinion of each of the assessors.²

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Notes 4-7

5. Each assessor to be asked his opinion. — In a trial by jury, the jury form a body and the verdict is that of the body. But in a trial by the Court with the aid of assessors, the assessors do not form a body; but each assessor acts and expresses his opinion individually.¹ Hence, it is the duty of the Judge to ask each assessor individually his opinion and record it separately.² Where the opinions of some of the assessors are not asked for and recorded, the trial is vitiated by an *illegality*.³ But where the opinions of all the assessors are asked for, the fact that, on its being found that all of them are of the same opinion, such opinion is recorded in a *joint statement*, instead of separately, is only an irregularity curable by section 537.⁴

6. Assessors' opinions to be stated orally. — The section requires the opinions of the assessors to be stated *orally*. The submission of written opinions by the assessors is not contemplated by the section.¹ But the giving of opinions in writing is only an irregularity which will not vitiate the proceedings unless it has occasioned a failure of justice.²

7. Opinion to be given on all the charges. — A distinct opinion on each charge on which the accused has been tried must be taken and recorded.¹ It has been held by the Oudh Chief Court that a failure to

2. ('15) AIR 1915 Mad 1036 (1037) : 16 Cri L Jour 717 (718), *In re Sennimalai Goundan*. (It is no irregularity to refuse consultation.)

('01) 24 Mad 523 (537) : 2 Weir 340 : 11 M L J 241, *King-Emperor v. Thirumal Reddi*. (Assessors are not to retire for consultation and form their opinions.)

Note 5

1. ('01) 24 Mad 523 (536, 537) : 2 Weir 340 : 11 M L J 241, *King-Emperor v. Thirumal Reddi*.

[See ('39) AIR 1939 Lah 475 (477) : 41 Cri L Jour 55 : I L R (1939) Lah 243, *Emperor v. Pahlu*. (An assessor does not form an essential part of the Sessions Court — Per Ram Lal, J., in Order of Reference.)]

2. ('92) 14 All 502 (506) : 1892 A W N 95, *Queen-Empress v. Mulua*. (Record of opinion of one assessor only when there were two—Irrregularity.)

('79) 4 Cal L R 405 (409), *In re Bhootnath Dey*.

('01) 24 Mad 523 (537) : 2 Weir 340 : 11 M L J 241, *King-Emperor v. Thirumal*.

('83) 9 Cal 875 (877) : 12 C L R 506, *Shadulla Howladar v. Empress*.

('87) 1887 Pun Re No. 41 Cr, p. 95 (97, 98), *Hassan Khan v. Empress*. (Where however, the assessors are all of same opinion, it is only a matter of form whether their opinions are taken down once or repeated five times, where there are five assessors.)

(1865) 4 Suth W R Cr L 9 (10). (Each assessor should be asked to state his individual opinion, and not merely signify concurrence with his co-assessor.)

[See ('38) AIR 1938 Cal 551 (552) : 39 Cr. L. J. 835, *Nirmal Kumar v. Emperor*.]

3. ('03) 26 Mad 598 (599) : 2 Weir 333, *Ramakrishna Reddi v. Emperor*. (S. 269 (3)—Opinions of all jurors as assessors not taken — Illegal.)

4. ('87) 1887 Pun Re No. 41 Cr, p. 95 (97, 98), *Hassan Khan v. Empress*.

('92) 14 All 502 (506) : 1892 All W N 95, *Queen-Empress v. Mulua*.

Note 6

1. ('12) 13 Cr. L. J. 433 (433, 434) : 39 Cal 119 : 15 I. C. 65, *Lalit Chandra v. Emperor*.

2. ('25) AIR 1925 P C 130 (131) : 6 Lah 226 : 52 Ind App 191 : 26 Cr. L. J. 1059 (PC), *Begu v. Emperor*. (Such point ought to be raised at the trial.)

Note 7

1. ('28) AIR 1928 Nag 257 (261) : 29 Cri L Jour 561, *Mt. Shevanti v. Emperor*.

('35) AIR 1935 Sind 23 (23, 24) : 28 S. L. R. 295 : 36 Cr. L. J. 504, *Ditto v. Emperor*.

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Notes 7-9

comply with the section in this respect renders the trial illegal.²

8. Conviction for offence different from that on which opinions of assessors were taken. — After the opinions of the assessors have been taken, it is not open to the Court to add to or alter the charge (S. 227.) But if a case falls within the purview of S. 237 or S. 238, the accused can be convicted of an offence different from that on which the opinions of the assessors were taken.¹ Thus, where the accused is charged under S. 302, Penal Code (murder) and the opinions of the assessors are taken on such charge, it is open to the Sessions Judge (in a proper case) under S. 237 to convict the accused under S. 201 of the Penal Code (causing disappearance of evidence of the offence by removing the dead body), though the opinions of the assessors are not taken on such offence.² Similarly, (in a proper case) an accused can be convicted under S. 403, Penal Code (criminal misappropriation), though the charge against him was under S. 395, Penal Code (dacoity), and the opinions of the assessors were taken only on such charge.³

9. Recording of opinions. — The opinions of assessors should be recorded correctly¹ and fully.² They should be recorded in the very words used by each assessor immediately after he delivers his opinion.³ It was held in the undermentioned case⁴ that the failure to record

[See ('74) 22 Suth W R Cr 34 (34, 35), *Queen v. Matam Mal.* (Case decided under 1872 Code — Charge of murder and culpable homicide — Held, intention of Legislature was that assessors should give definite opinions whether prisoner was guilty of either offence.)]

2. ('34) AIR 1934 Oudh 354 (358) : 35 Cr. L. J. 1066 : 10 Luck 119, *Lal Behari Singh v. Emperor.*

Note 8

1. ('25) AIR 1925 P C 130 (131) : 6 Lah 226 : 26 Cr. L. J. 1059 : 52 Ind App 191 (PC), *Begu v. Emperor.* (Ss. 302 and 201, Penal Code.)

('28) AIR 1928 Bom 130 (133, 134) : 52 Bom 385 : 29 Cr. L. J. 403, *Emperor v. Ismail Khadirsab.* (Accused charged under S. 302, Penal Code — Acquittal — Government appeal — Conviction by High Court of offence under S. 193, Penal Code, though opinions of assessors were not recorded in regard to S. 193—Legal.)

('29) AIR 1929 Sind 147 (148) : 30 Cr. L. J. 875, *Haroon v. Emperor.* (Ss. 403, and 395, Penal Code.)

[But see ('24) AIR 1924 Bom 246 (247) : 26 Cri L Jour 394, *Appaya Baslingappa v. Emperor.* (Submitted not good law in view of A I R 1925 P C 130.)

('02) 2 Weir 334 (334), *In re Sivaga.* (Do.)

('98) 2 Weir 301 (301, 302), *In re Perumal Nadan.* (Do.)

(1864) 1 Suth W R Cr 40 (41), *Queen v. Dyee Bhola.* (Do.)]

2. ('25) AIR 1925 P C 130 (131) : 26 Cr. L. J. 1059 : 6 Lah 226 : 52 Ind App 191 (PC), *Begu v. Emperor.*

3. ('29) AIR 1929 Sind 147 (148) : 30 Cr. L. J. 875, *Haroon v. Emperor.*

Note 9

1. ('91) 1891 All W N 145 (146), *Empress v. Barmajit.* (Opinion of assessors recorded as "guilty" when the opinion was "not guilty".)

2. (1900) 2 Bom L R 323 (324), *Queen-Empress v. Fakira.* (Opinions of assessors should be recorded otherwise than by simple statement that assessor No. 1 found all the accused not guilty and that assessor No. 2 concurred in such opinion. But reasons for the opinions should be briefly stated.)

3. ('21) AIR 1921 Pat 109 (115) : 6 Pat L Jour 147 : 22 Cri L Jour 417, *Fatu Santal v. Emperor.*

('86) 1886 All W N 22 (23), *Empress v. Tikaram.* (Opinions of assessors should be recorded as they are expressed, without any influence from the Judge.)

4. ('34) AIR 1934 Pat 561 (564) : 13 Pat 729 : 36 Cr. L. J. 17, *Bhikari v. Emperor.*

the opinions of the assessors vitiated the proceedings and that the conviction must be set aside.

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Notes 9-11

10. Questioning assessors. — This section empowers the Judge to ask the assessors such questions as are necessary to ascertain what their opinions are. Thus, if there is anything obscure in the opinions expressed by the assessors, the Judge can clear up the obscurity by questioning the assessors.¹ Sometimes it may become the *duty* of the Judge to assist the assessors by putting them specific questions concerning the facts of the case. Thus, when there is a mixed question of fact and law to be decided, as for instance, a question of private defence, it may be necessary to ask the assessors specific questions on the facts on which the law will turn.² But the Judge should allow the assessors, in the first instance, to give their opinions in their own way and when they have completed their statements, it would be open to him to question them to elucidate their opinions.³ In questioning the assessors they should first be asked to give their opinions as to what happened and then, if necessary, to give a further opinion on such matters as intention, knowledge, etc.⁴

11. Reasons for opinions, if may be asked. — There is a conflict of decisions as to whether the assessors may be asked to give reasons for their opinions. In a decision of the Madras High Court, it has been held that, as in the case of jurors, so also in the case of assessors, the Judge ought not to ask the assessors to give *reasons* for their opinions beyond what is necessary to decide whether they have understood the case.¹ On the other hand, it has been held by the Bombay High Court that the assessors can and should be asked to give reasons for their opinions.² A similar view was held by the Calcutta High Court in certain old decisions.³ The Chief Courts of the Punjab and Lower Burma were also inclined to the same view.⁴ This view

Note 10

1. ('12) 13 Cr. L. J. 497 (497): 15 Ind Cas 641: 40 Cal 163, *Nazimuddi v. Emperor*. (It is not open to the Judge to cross-examine the assessors.)
2. ('18) AIR 1918 Pat 308 (310, 311): 3 Pat L Jour 653: 19 Cr. L. J. 983, *Sundar Buksh Singh v. Emperor*.
3. ('14) AIR 1914 Cal 456 (459): 41 Cal 350: 15 Cr. L. J. 385, *Romesh v. Emperor*. ('12) 13 Cr. L. Jour 497 (497): 15 Ind Cas 641: 40 Cal 163, *Nazimuddi v. Emperor*. (No power to question assessors until they have delivered their opinions orally and Judge has recorded such opinions.)
4. ('29) AIR 1929 Lah 37 (37): 30 Cr. L. J. 378, *Khewna v. Emperor*. (e. g., whether accused struck the deceased and if so, when, with what intention or knowledge, etc.)

Note 11

1. ('31) 1931 Mad W N 1139 (1140), *In re Kunnammal Krishnan*. (Such procedure is not warranted by this section and R. 245, (now R. 166) Criminal Rules of Practice.)
2. (1900) 2 Bom L R 322 (323), *Queen-Empress v. Mahadu Tukaram*. (1900) 2 Bom L R 323 (324), *Queen-Empress v. Fakira*.
3. (1865) 3 Suth W R Cr Cir, p. 1 (1), *Criminal Circular No. 4, 23rd June 1865*. (1865) 3 Suth W R Cr 6 (6), *Queen v. Mt. Mina Nuggerbhatin*. (1865) 3 Suth W R Cr 21 (21), *Queen v. Bushmo Anent*. (Particularly when their opinion differs from that of Judge.)
4. ('79) 4 Cal L R 405 (410), *In re Bhootnath Dey*. ('05) 1905 Pun Re No. 48 Cr, p. 117 (117): 1905 P L R No. 192: 3 Cr L Jour 132, *Guranditta v. Emperor*. (On difference of opinion between Judge and assessors, grounds of opinions of assessors should be recorded carefully.)

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proceeds on the ground that in the case of a jury their verdict is a simple verdict of guilty or not guilty, while in the case of assessors, they merely give an *opinion* and its weight depends solely on the reason and sense on which it is supported.⁵

In any view it is not open to the Judge to *cross-examine* the assessors; they must be allowed to give their *independent* opinions on the case.⁶ See also Note 13.

12. "The Judge shall then give judgment." — The section requires that on taking the opinions of the assessors, the Judge should proceed to deliver his judgment.¹ He has no power, after the opinions of the assessors have been recorded, to cancel the trial and hold a fresh trial.² Nor can he, at such stage, take fresh evidence³ or make a local inspection⁴ and base his judgment on such evidence or inspection. The judgment must conform to the provisions of S. 307 of the Code, and must accordingly contain the reasons for the decision of the Judge. It is no compliance with that section if the Judge merely states that he agrees with the opinions of the assessors.⁵ In delivering his judgment, though the Judge is not bound to conform to the opinions of the assessors, he is entitled to take into consideration such opinions in arriving at his conclusions : see Note 13. But the Judge is not entitled to refer in his judgment to the opinion of the *committing Magistrate*.⁶

13. Judge not bound to conform to the opinions of the assessors. — Sub-section(2) expressly provides that, in delivering his judgment, the Judge is not bound to conform to the opinions of the assessors.¹ But the Judge can and should take into consideration such

('93-1900) 1893-1900 Low Bur Rul 126 (127), *Nga Shan v. Empress*.

5. (1865) 3 Suth W R Cr 6 (6), *Queen v. Mt. Mina Nuggerbhatin*.

6. ('12) 13 Cr. L. J. 497 (497) : 15 I. C. 641 : 40 Cal 163, *Nazimuddin v. Emperor*.

Note 12

1. ('38) AIR 1938 Cal 551 (552) : 39 Cri L Jour 835, *Nirmal Kumar v. Emperor*.

2. ('15) AIR 1915 Bom 149 (150) : 16 Cr. L. J. 824, *Nathu Rewa v. Emperor*. (S. 537 not applicable.)

3. ('93) 15 All 136 (136) : 1893 A W N 50, *Queen-Empress v. Ramlal*. (Evidence taken after assessors were discharged.)

('88) 1888 Pun Re No. 29 Cr, p. 59 (62), *Hasan v. Empress*. (Though opinions of assessors are again taken after such fresh evidence. Assessors adhering to first opinion — No prejudice.)

('70) 1870 Pun Re No. 14 Cr, p. 26 (26), *Soojawnul v. Crown*.

('34) 35 Cr. L. J. 1002 (1005) : 149 Ind Cas 442 (Lah), *Santa Singh v. Emperor*. (Examination of chemical examiner called as court-witness under S. 540 after assessors' opinions were recorded — Procedure irregular — But conviction not set aside as in circumstances of case, accused had suffered no prejudice.)

('89) 1889 All W N 181 (184), *Empress v. Jia Lal*. (After recording assessors' opinions taking opinion of Civil Surgeon concerning mental condition of accused is illegal.)

4. ('18) AIR 1918 Low Bur 22 (23) : 9 Low Bur Rul 88 : 19 Cr. L. J. 54, *Deya v. Emperor*.

5. ('38) AIR 1938 Cal 551 (552) : 39 Cri L Jour 835, *Nirmal Kumar v. Emperor*.

6. ('75) 22 Cal 805 (810), *Dewan Singh v. Queen-Empress*.

Note 13

1. ('39) AIR 1939 Lah 475 (477) : 41 Cr. L. J. 55 : ILR (1939) Lah 243, *Emperor v. Paklu*. (Opinion of an assessor based on personal knowledge may be ignored.)

('38) AIR 1938 Nag 52 (53) : 39 Cri L Jour 105, *Shaligram Ratanlal v. Emperor*. (Though assessors' opinions are entitled to consideration, they lack legal training which will enable them to distinguish suspicion from proof.)

opinions^{1a} and although there is no express provision in the Code making it obligatory on the Judge to discuss in his judgment the opinions of the assessors, still, as a matter of practice, it is desirable that he should do so.²

The sub-section applies only to cases which are actually tried with the aid of assessors. Where a case which is so triable is, as a matter of fact, tried by jury, the Judge cannot treat the verdict of the jury as the opinions of assessors and pronounce judgment contrary to the verdict; but he must, if he disagrees with it, proceed under S. 307.³

The opinions of the assessors which a Judge can take into account in pronouncing his judgment are opinions based *on the evidence* in the case. The Judge cannot refer in his judgment to the opinion of an assessor based on the latter's *personal knowledge*.⁴

See the undermentioned cases⁵ which bear on the weight to be attached to the opinions of the assessors.

14. Opinions of assessors recorded by one Judge—Judgment delivered by his successor — Legality. — Where after hearing

- (‘01) 24 Mad 523 (537, 538) : 2 Weir 340, *King-Emperor v. Thurumalai Reddi*.
- (‘12) 13 Cr. L. J. 677 (678) : 16 I. C. 325 (Bom), *Emperor v. Shanker Balwant*.
- (‘24) AIR 1924 All 511 (513) : 26 Cri L Jour 324, *Lakhan v. Emperor*.
[See (‘17) AIR 1917 P C 25 (28) : 44 I A 137 : 13 N L R 100 : 44 Cal 876 : 18 Cr L J 471 (P C), *Dal Singh v. Emperor*.]
- 1a. (‘38) AIR 1938 Nag 52 (53) : 39 Cri L Jour 105, *Shaligram v. Emperor*.
(Especially of intelligent assessors and especially when they consider a man guilty for it is so seldom that that happens in capital cases.)
- 2. (‘36) AIR 1936 Cal 527 (528):38 Cr. L. J. 212:ILR (1937) 1 Cal 306, *Jogueswar Ghosh v. Emperor*. (Accused tried at same trial for offence X by jury and for offence Y with the aid of the jurors acting as assessors — Jury returning unanimous verdict of not guilty with regard to offence X and as assessors expressing unanimous opinion in favour of acquittal in regard to offence Y—Judge accepting jury's verdict with regard to offence X but rejecting their opinions as assessors with regard to offence Y without giving any reason, and convicting accused of such offence—Conviction set aside by High Court on appeal.)
- (‘33) AIR 1933 Lah 910 (911) : 35 Cri L Jour 168, *Anup Singh v. Emperor*.
- (‘05) 1905 Pun Re No 48 Cr, p. 117 (117) : 3 Cri L Jour 132:1905 P L R No. 192, *Guranditta v. King-Emperor*.
- (‘93-1900) 1893-1900 Low Bur Rul 126 (127), *Nga Shan v. Queen-Empress*.
[See (‘69) 6 Bom H C R Cr 55 (56), *Reg v. Kala Karson*.
(‘74) 22 Suth W R Cr 34 (35), *Queen v. Matam Mal*.]
- 3. (‘98) 25 Cal 555 (556, 557), *Surja Kurmi v. Queen-Empress*.
- (‘79) 4 Cal L R 405 (408, 409), *In re Bhoothnath Dey*. (Trial by jury upon charges, some of which triable by jury and some with aid of assessors—Jury by majority returned verdict of ‘not guilty’ on all charges—Judge convicted the accused upon the latter charges also — Conviction is illegal.)
See also S. 269 Note 3, S. 306 Note 3 and S. 307 Note 15.
- 4. (‘39) AIR 1939 Lah 475 (478, 479) : 41 Cri L Jour 55 : ILR (1939) Lah 243, *Emperor v. Pahlu*. (Assessor when expressing his opinion that accused is guilty adding that he has personal knowledge of this matter acquired during investigation — *De novo* trial is not necessary — Proper course for the Judge is to ignore such opinion.)
- (‘75) 24 Suth W R Cr 28 (28), *Queen v. Ram Churn Kurmoker*. (Personal knowledge of character of defence witnesses.)
- 5. (‘25) AIR 1925 Oudh 452 (452) : 26 Cri L Jour 1291, *Behari v. Emperor*. (In a case of identification of ornaments of small value the opinions of assessors are of considerable value.)
- (‘34) AIR 1934 Lah 171 (173) : 36 Cri L Jour 491, *Ali Mohammad v. Emperor*. (Approver examined last — Counsel unable to question corroborative witnesses properly — Assessors unable to appreciate corroborative evidence — Opinions of assessors lose their value.)

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part of a case a Judge is transferred or goes on leave, his successor must hear the case *de novo* from the beginning and not only from the point at which the previous Judge left the case.¹ Even where the previous Judge is transferred or goes on leave *after* the opinions of the assessors have been recorded, the successor cannot pronounce judgment without hearing the case *de novo* from the beginning and taking the opinions of the assessors over again.² (Compare S. 350 in the case of Magistrates.)

15. Sentence. — If the accused is convicted, the Court has no discretion, unless it decides to proceed under S. 562, to refuse to pass sentence according to law;¹ and, if the accused is found guilty on several charges, the Court is bound to pass sentence on each of the charges.²

The responsibility for the sentence rests with the Judge alone and where he differs from the assessors as regards conviction, he should not let their opinion weigh with him regarding the sentence. Hence, the fact that the assessors gave their opinions that the accused was not guilty is no reason for passing a lesser sentence.³

I.—Procedure in case of Previous Conviction.

Section 310

310.* In the case of a trial by a jury or with

* Code of 1898, original S. 310.

Procedure in case of previous conviction.

310. In the case of a trial by jury or with the aid of assessors, where the accused is charged with an offence, committed after a previous conviction for any offence, the procedure laid down in sections 271, 286, 305, 306 and 309 shall be modified as follows :

(a) The part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to, or been convicted of, the subsequent offence ;

(b) if he pleads guilty to, or is convicted of, the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge ;

(c) if he answers that he has been so previously convicted, the Judge may proceed to pass sentence on him accordingly ; but, if he denies that he has been so previously convicted, or refuses to, or does not, answer such question, the jury, or the Court and the assessors (as the case may be), shall then hear evidence concerning such previous conviction and in such case (where the trial is by jury) it shall not be necessary to swear the jurors again.

Code of 1882 : S. 310.

Same except the following: In sub-s. (c), the words "hear evidence" were substituted for the word "inquire."

Codes of 1872 and 1861 — Nil.

Note 14

1. ('08) 8 Cri L Jour 121 (123) : 8 C L J 59, *Durga Charan v. Emperor*.
2. ('74) 21 Suth W R Cr 47 (47), *Queen v. Gopi Noshyo*.

Note 15

1. ('95) 22 Cal 805 (809), *Dewan Singh v. Queen-Empress*. (Case before amendment of 1923.)

See also S. 245 Note 6, S. 258 Note 6 and S. 367 Note 10.

2. ('39) AIR 1939 Pesh 23 (24):40 Cr.L.J. 686, *Mian Gulmahmud Shah v. Emperor*. (Accused convicted under Ss. 302, 304 and 324, Penal Code—Judge's refusal to prescribe punishment under Ss. 304 and 324 is illegal.)
3. ('33) AIR 1933 Nag 307 (309) : 34 Cri L Jour 1168 : 30 N L R 9, *Local Government v. Sitrya Arjuna*.

Procedure in case of previous conviction. the aid of assessors when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely:—

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Note 1

- (a) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,
- (i) he has been convicted of the subsequent offence, or
 - (ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.
- (b) In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.

Synopsis

- | | |
|--|---|
| 1. Legislative changes. | 4. Non-compliance with the section. |
| 2. Scope and object of the section. | 5. Evidence as to previous conviction. See section 311. |
| 3. When previous conviction should be referred to. | 6. Proof of previous conviction. See section 311. |

Other Topics (miscellaneous)

- Non-applicability to trials before Magistrate. See Note 2.
- Record to show when reference to prior conviction made. See Note 3.
- Reference under section 307. See Note 1.

1. Legislative changes. — This section has been substituted for the old section by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Under the section as it stood before the amendment the accused could be asked about his previous conviction only if he pleaded guilty to or was *convicted* of the subsequent offence. The Court could not ask him about it where the jury had given a verdict and the Court *without convicting him*, made a reference to the High Court under s. 307.¹ This disability has now been removed.

Section 310 — Note 1

1. ('07) 5 Cri L Jour 422 (423) : 30 Mad 134, *Emperor v. Kandaswami Goundan*.
[See also (1900) 2 Bom L R 336 (337), *Queen-Empress v. Govind Jhavrja*.]

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Notes 2-3

2. Scope and object of the section.—This provision of law has been taken from the English Statute law, 6 & 7 William IV, Chap. 3.¹ It is based on the principle that a prisoner on his trial ought not to be prejudiced by a statement of a previous conviction suffered by him.² The section is imperative.³ It is most essential that the procedure prescribed by it should be conducted with precision, regularity and close adherence to the rules laid down in this section.⁴ This section indicates the importance of the complete exclusion of the knowledge of previous conviction when weighing the evidence as to the truth or otherwise of the main charge.⁵

It has been held in the undermentioned case⁶ that the fact that an accused is a registered member of a criminal tribe under the Criminal Tribes Act, VI of 1924,—a fact from which bad character can be inferred—should not, on the analogy of this section, be disclosed to the jury until after their verdict, lest their minds should be prejudiced.

The section is applicable to trials before the Court of Session only and does not apply to trials before Magistrate.⁷ As to trials before Magistrates, see section 255A.

3. When previous conviction should be referred to.—The accused should not be asked about his previous conviction nor his plea should be taken thereto until after —

- (1) his conviction for the subsequent offence,¹ or
- (2) the jury have delivered their verdict,^{1a} or the opinions of the

Note 2

1. ('87) 14 Cal 721 (727) (F B), *Queen-Empress v. Kartick Chunder*.
2. ('87) 14 Cal 721 (727) (F B), *Queen-Empress v. Kartick Chunder*.
3. ('20) AIR 1920 Pat 351 (352) : 5 Pat L J 706 : 22 Cr. L. J. 219, *Teka Ahir v. Emperor*.
4. ('30) AIR 1930 All 17 (19) : 31 Cri L Jour 8, *Goli v. Emperor*. (An accused person, though he has several convictions behind him, is entitled to have his case treated as if it was not a foregone conclusion that he is guilty.)
5. ('24) AIR 1924 Rang 91 (91) : 1 Rang 520 : 25 Cri L Jour 618, *Maung E Gyi v. Emperor*.
6. ('27) AIR 1927 Lah 774 (775) : 28 Cri L Jour 667, *Raju v. Emperor*.
7. ('90) 1890 All W N 12 (13), *Empress v. Jhinguri*.
8. ('39) AIR 1939 Sind 203 (205) : 40 Cri L Jour 770 : 1 I L R (1939) Kar 677, *Ghous Bakhsh v. Emperor*.
9. ('24) AIR 1924 Rang 91 (91) : 1 Rang 520 : 25 Cr. L. J. 618, *Maung E Gyi v. Emperor*. (This principle is analogous to that of S. 54, Evidence Act.)
10. ('40) AIR 1940 Pat 14 (15) : 40 Cri L Jour 833, *Mosaheb Dome v. Emperor*.
11. ('23) AIR 1923 Cal 707 (707) : 50 Cal 367 : 25 Cr. L. J. 527, *Dehri Sonar v. Emperor*.
12. ('24) AIR 1924 Rang 91 (92) : 1 Rang 520 : 25 Cr. L. J. 618, *Maung E Gyi v. Emperor*.
13. ('05) 2 Cri L Jour 227 (227, 228) (U B), *Nga Te v. Emperor*.

Note 3

1. ('20) AIR 1920 Pat 351 (351) : 22 Cr. L. J. 219 : 5 Pat L Jour 706, *Teka Ahir v. Emperor*.
2. ('90) 1890 All W N 12 (13), *Empress v. Jhinguri*.
3. ('86) 1886 All W N 47 (47), *Empress v. Sukha*.
4. ('07) 5 Cr. L. J. 422 (423) : 30 Mad 134, *Emperor v. Kandaswami Goundan*. (When reference is made to High Court under S. 307, accused cannot be asked to plead to previous conviction until after conviction by High Court.)
5. ('01) 28 Cal 689 (693) : 5 C W N 670, *Yasin v. King-Emperor*.
6. ('66) 5 Suth W R Cr L 10 (10).
7. ('66) 5 Suth W R Cr 67 (68), *Queen v. Jehan Mullick*.
8. (1865) 3 Suth W R Cr 38 (38), *Empress v. Nittar Mundle*. (Previous conviction can only be used after conviction in determining the measure of punishment.)
- 9a. ('90) 1890 All W N 12 (13), *Empress v. Jhinguri*.

assessors have been recorded, on the charge for the subsequent offence.²

The record should invariably show that no reference to the previous conviction was made until one or the other of the conditions mentioned in the section has happened.³

Where a charge of previous conviction is tried, the accused cannot be examined about his previous conviction in such trial, unless there is on the record some legally admissible evidence to show the fact of the previous conviction;⁴ see section 342.

4. Non-compliance with the section.—A non-compliance with the provisions of this section is only an irregularity which will not vitiate the trial unless the accused is shown to have been prejudiced thereby.¹

5. Evidence as to previous conviction. — See Section 311.

6. Proof of previous conviction. — See Section 511.

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Notes 3-6

311. Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the

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When evidence of previous conviction may be given.

[See also ('40) AIR 1940 Pat 14 (15) : 40 Cr.L.J. 833, *Mosahab Dome v. Emperor* (Fact that accused is registered member of criminal tribe should not be disclosed to jury until after their verdict.)]

2. ('20) AIR 1920 Pat 351 (351) : 22 Cr. L. J. 219 : 5 Pat L Jour 706, *Teka Ahir v. Emperor*.

[See also ('66) 6 Suth W R Cr 72 (73), *Empress v. Gopal Thakoor*. (Improper admission of previous conviction—It is, however, not clear whether this was done after the opinions were recorded.)]

('67) 8 Suth W R Cr 11 (12), *Empress v. Phoolchand*. (Do.)]

3. ('39) AIR 1939 Sind 203 (204) : 40 Cr. L. J. 770 : I L R (1939) Kar 677, *Ghous Bakhsh v. Emperor*. (Whole charge including the portion relating to previous conviction read out before the assessors gave their opinions—Accused's statement in the lower court relating to the previous convictions and the subsequent offences treated as a whole and read out before assessors gave their opinions—Held that the accused had been prejudiced and convictions were set aside.)

('83) 12 Cal L R 555 (555), *Kristo Behari Dass v. Empress*.

('35) AIR 1935 Sind 115 (127, 128) : 29 Sind L R 121 : 36 Cr.L.J. 1310, *Bhurasing v. Emperor*. (Evidence as to previous conviction can neither be let in before the verdict, nor referred to by the Judge in his charge to the jury—Provisions in S. 54, Evidence Act, and Ss. 221 (7) and 310, Cr.P.C. compared by Ferrers, J. C.)

[See also ('40) AIR 1940 Pat 14 (15) : 40 Cr.L.J. 833, *Mosahab Dome v. Emperor*. (Fact of accused being a registered member of a criminal tribe under the Criminal Tribes Act should not be brought before jury till they have returned their verdict.)]

4. ('39) AIR 1939 Sind 203 (205) : 40 Cr. L. J. 770 : I L R (1939) Kar 677, *Ghous Bakhsh v. Emperor*. (28 Cal 689, Followed.)

Note 4

1. ('90) 1890 All W N 12 (13), *Empress v. Jhinguri*. (Accused prejudiced — Conviction set aside.)

('20) AIR 1920 Pat 351 (353) : 22 Cr. L. J. 219 : 5 Pat L Jour 706, *Teka Ahir v. Emperor*. (Do.)

('27) AIR 1927 Lah 774 (774, 775) : 28 Cri L Jour 667, *Raju v. Emperor*. (Do.)

('01) 2 Weir 393 (393), *In re Chundi Perugadu*. (Do.)

('83) 13 Cal L R 110 (111), *Bepin Behari Shaha v. Empress*. (No prejudice — Conviction not set aside.)

('86) 1886 All W N 47 (47), *Empress v. Sukha*. (Do.)

[See ('39) AIR 1939 Sind 203 (205) : 40 Cri L Jour 770 : I L R (1939) Kar 677, *Ghous Bakhsh v. Emperor*. (Accused held prejudiced and retrial ordered.)]

Section 311
Note 1

previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

This section was added as the last paragraph of S. 310 of the Code of 1882 by Act III of 1891 and took the place of S. 311* of the Code of 1882, which was repealed by Act XII of 1891.

1. Scope. — The guilt of a person accused of an offence is to be established by proof of the *facts* and not by proof of his *character*. A previous conviction may be proved to show the offender's character. But such evidence might create a prejudice but not lead a step towards substantiation of guilt. Hence, S. 310 *delays* the proof of such previous conviction to a stage *after* the conviction, or the delivery of a verdict by the jury, or the recording of opinions of assessors, as the case may be. However, if the fact of the previous conviction is *relevant* under the provisions of the Evidence Act, the present section provides that the evidence of the same need not be delayed but may be given *at the trial* of the subsequent offence, notwithstanding S. 310.

The relevancy of a previous conviction is to be determined by a reference to the sections of the Evidence Act. Such evidence is inadmissible save in a few, well-defined and exceptional circumstances.¹ Under S. 54, Evidence Act, a previous conviction is relevant as evidence of bad character. But a previous conviction is not admissible in evidence against the accused unless evidence of good character be given by him, in which case the fact that the accused has been previously convicted of an offence is admissible as evidence of bad character. A previous conviction may also be relevant under S. 43 (see illustrations (e) and (f)) and S. 8, Evidence Act, as showing motive. It is also relevant under S. 14, Evidence Act, when the existence of any state of mind such as intention, knowledge, etc., or existence of any state of body or bodily feeling is in issue or relevant (see illustration (b)).^{1a} For instance, where a person was charged with the offence of belonging to a gang of persons associated for purpose of *habitually* committing dacoity, it was held that the proof of a previous conviction was

* Code of 1882 : S. 311.

J. — List of jurors for High Court, and summoning jurors for that Court.
(Repealed by Act XII of 1891.)

311. In each Presidency-town, the jurors' book for the year current when this Code comes into force shall be taken as containing a correct list of persons liable to serve as jurors under this Chapter.

Those persons whose names are entered in the jurors' book as being liable to serve on special juries only shall be deemed to be persons privileged and liable to serve only as special jurors under this chapter during the year for which the said list has been prepared.

Codes of 1872 and 1861 — Nil.

Section 311 — Note 1

1. ('34) AIR 1934 Cal 198 (202) : 35 Cri L Jour 722, *Parbati Dasi v. Emperor*. (1864) 2 Bom H CR Cr 125 (126), *Reg v. Timmi*. (It is improper to allow evidence of bad character against the accused when it is not in question.)

1a. ('95) 1895 Pun Re No. 7 Cr, p. 26 (30), *Wasir v. Empress*.

admissible under S.14 of the Evidence Act, having regard to the character of the offence attributed to the accused.²

Section 311
Note 1

*J. — List of Jurors for High Court, and
summoning Jurors for that Court.*

312.* The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list:

Section 312

Provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed.

This section was substituted for the original section by the Criminal law Amendment Act, XII of 1923.

1. High Court. — As to the meaning of the expression "High Court," see section 266.

2. "May prescribe the number." — Under the section, as it stood before the amendment, it was provided that not more than *four hundred* persons should, at any one time, be entered in the special jurors' list. Under the present section, as amended by Act XII of 1923, the High Court is empowered to prescribe the number of special jurors. The proviso is intended to secure a list which should "include all persons qualified, to whatever nationality they may belong."

313.† (1) The Clerk of the Crown shall, before

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* Code of 1898, original S. 312.

Number of special jurors. 312. The names of not more than four hundred persons shall at any one time be entered in the special jurors' list.

1882 : S. 312; 1872 and 1861 — Nil.

† 1882 : S. 313; 1872 and 1861 — Nil.

2. ('97) 1 Cal W N 146 (150), *Empress v. Naba Kumar Patnaik*.
(12) 13 Cr. L. J. 539 (540) : 15 Ind Cas 811 (Bom), *Emperor v. Tukaram Malhari*. (S. 401, Penal Code.)
(23) AIR 1923 Bom 71 (71, 72) : 46 Bom 958 : 24 Cr. L. J. 867, *Emperor v. Haji Sher Mahomed*.
(11) 12 Cri L Jour 97 (98) : 38 Cal 408 : 9 I. C. 555, *Bonai v. Emperor*. (Offence under S. 401, Penal Code.)
(14) AIR 1914 Cal 589 (591) : 15 Cr. L. J. 43, *Baharuddin Mandal v. Emperor*. (Ss. 148, 365, 366, Penal Code.)
(10) 11 Cri L Jour 364 (365) : 6 Ind Cas 492 (Lah), *Walia v. Emperor*.
(14) AIR 1914 Lah 545 (548) : 16 Cri L Jour 300 (302) : 1915 Pun Re No. 3 Cr, *Hidayata v. Emperor*. (Evidence of previous orders under S. 110, Criminal P. C., is also admissible.)
(30) AIR 1930 Oudh 455 (459) : 32 Cri L Jour 162, *Bachchu v. Emperor*. (Where evidence of previous conviction can be considered only as evidence of character it must be excluded but where such evidence is admissible *aliunde*, it should not be excluded.)
(33) AIR 1933 Oudh 355 (358) : 9 Luck 22 : 35 Cri L Jour 273, *Beni Madho v. Emperor*. (Do.)

Section 313
Note 1

Lists of common and special jurors. the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare —

(a) a list of all persons liable to serve as common jurors; and

(b) a list of persons liable to serve as special jurors only.

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

(4) *The Provincial Government may exempt any salaried servant of the Crown from serving as a juror.^a*

(5) The Clerk of the Crown shall, subject to such Discretion of officer preparing lists. rules as aforesaid, have full discretion to prepare the said list as seems to him to be proper, and there shall be no appeal from, or review of, his decision.

a. The present sub-s.(4) was substituted by A. O. for original sub-s.(4).

Local Amendment

BURMA

Add after sub-s.(3) —

“(3A) Members of either Chamber of the Legislature shall be exempt from serving as jurors.”— [Burma Act IV of 1937, 11-9-1937.]

1. Clerk of the Crown. — For the definition, see S. 4 (1) (e).

The preparation of the list of special jurors is entirely in the discretion of the Clerk of the Crown; the Court will not interfere.¹

Section 314

314.* (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the *Official Gazette*^a before the fifteenth day of April next after their preparation.

Publication of lists, preliminary and revised.

* 1882 : S. 314; 1872 and 1861 — Nil.

Section 313 — Note 1

1. ('77) 1 Ind Jur (N S) 106, *In re Shamchand Mitter*.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the *Official Gazette* before the first day of May next after their preparation.

Section 314

(3) Copies of the said lists shall be affixed to some conspicuous part of the court-house.

a. Substituted by A. O. for "Local Official Gazette."

315.* (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each sessions in the town which is the usual place of sitting of each High Court, as many of those who are liable to serve on special or common juries respectively as the Clerk of the Crown considers necessary.

Section 315

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

1. Legislative changes. — The words, "in the town . . . considers necessary" in sub-s.(1) were substituted by Act XVIII of 1923 for the words, "in each presidency-town . . . on common juries."

2. "Shall be summoned." — The procedure for the service of summons to be followed is the one laid down in S.68 and the following sections, and no other mode adopted for such service is justifiable. Thus, the issue of summons by a *registered letter* is illegal and no fine can be imposed for non-attendance in pursuance of such summons.¹ Where the summons was served by affixing a duplicate on the door of

* Code of 1898 : Original S. 315, sub-ss. (2) and (3) were the same as above.

Sub-section (1) was as follows :

315. (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each session in each presidency-town at least twenty-seven of those who are liable to serve on special juries, and fifty-four of those who are liable to serve on common juries.

1882 : S. 315; 1872 and 1861—Nil.

Section 315 — Note 2

1. ('97) 1 Cal W N cxvi (cxvi), *In re Sharat Chandra Ray*.

Section 315
Notes 2-3

the dwelling house of the juror but the latter had no knowledge thereof, as he was living away from his residence, it was held that he was not liable to fine for non-attendance as the law did not contemplate the imposition of any obligation on persons on the jury list, either to notify their change of address, or to make any arrangement for the acceptance of the summons.²

3. Sub-section (3).— Sub-section (3) allows further persons to be summoned during the course of the High Court Sessions when the number summoned is insufficient.¹

The sub-section does not apply to the choosing of a jury in a particular case where a deficiency of one or more members has appeared within the meaning of ss. 276 and 279 (2) and the trial has already begun.²

Section 316

316.* Whenever a High Court has given notice of its intention to hold sittings at any place outside the town which is the usual place of sitting of such High Court for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

By the Code of Criminal Procedure (Amendment) Act, XVIII of 1923, the words "Presidency Towns" were substituted by the words "town which is such High Court."

Section 317

317.† (1) In addition to the persons so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army or Air Force resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required

* 1882 : S. 316; 1872 and 1861 — Nil.

† 1882 : S. 317; 1872 and 1861 — Nil.

2. ('02) 6 Cal W N 887 (888), *Moni Lal Roy v. Emperor*.

Note 3

1. ('39) AIR 1939 Sind 209 (219) : 41 Cri L Jour 28 : I L R (1940) Kar 249, *Shewaram Jethanand v. Emperor*.

2. ('39) AIR 1939 Sind 209 (219, 220) : 41 Cri L Jour 28 : I L R (1940) Kar 249, *Shewaram Jethanand v. Emperor*.

for the trial of persons charged with offences before the High Court as aforesaid.

Section 317
Note 1

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent official duty, or for any other special official reason.

1. **Legislative changes.** — The words, "or Air Force" were inserted in sub-s. (1) and the word, "official" was substituted for "military" in sub-s. (2) by the Repealing and Amending Act X of 1927.

318.* Any person summoned under section 315, section 316 or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid:

Section 318

Failure of jurors to attend.

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

1. **Legislative changes.**

Code of 1898. — The words, "for a term not exceeding six months" and the proviso were newly added.

2. **Failure to attend — Effect of.** — See Note 2 to Section 315.

K. — List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court.

319.† All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held

Section 319

Liability to serve as jurors or assessors.

* 1882 : S. 318; 1872 and 1861 — Nil.

† 1882 : S. 319; 1872 : S. 404; 1861 : S. 333.

Section 319
Notes 1-4

within the district in which they reside, or, if the *Provincial Government*,^a on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

a. Substituted by A. O. for "Local Government."

1. **Legislative changes.**—The last twenty-three words beginning from "or, if the Local Government" were not found in the Code of 1882 but were newly added in the present Code.

2. **"All male persons."** — It is contrary to the usage of the country and eminently undesirable that a gentleman of high position, such as a hereditary Raja, should be placed on the list, or if placed on such list, should be summoned to serve as an assessor unless it were known that he would be willing to act as such.¹

3. **"Liable to serve."** — The mere fact that a person's name is on the list does not render him liable to serve as an assessor unless he is liable under this section. Thus, a man may reside during the year in more than one district and his name might be entered in the jurors' or assessors' list in each of such districts. But he would be subject to serve as a juror or assessor only if he is residing in the district in which the trial is held. A juror or assessor, who is absent for a long time from his ordinary place of residence, will be regarded as non-resident in that place and will be exempt from liability to serve as a juror or assessor under this section.¹

4. **Within the district.** — Where the Sessions Judge of Kanara asked the High Court for special permission to hold his Court at Sirsi instead of at Karwar, the High Court declined to permit it as no assessors were available for the sessions at Sirsi which was outside the area fixed.¹

Section 320

320.* The following persons are exempt from Exemptions. liability to serve as jurors or assessors, namely :—

- (a) officers in civil employ superior in rank to a District Magistrate;
- (aa) members of any Legislature in British India^a;
- (b) salaried Judges;
- (c) Commissioners and Collectors of Revenue or Customs;

* 1882 : S. 320; 1872 : S. 406; 1861 : S. 335.

Section 319 — Note 2

1. ('97) 1897 All W N 167 (167), *In the matter of Bhup Indar Bahadur Singh*.

Note 3

1. ('31) AIR 1931 Pat 160 (160): 32 Cr.L.J. 740, *Md. Ejaz Hussan Khan v. Emperor*.

Note 4

1. ('86) 1886 Rat 304 (304).

- (d) police-officers and persons engaged in the Preventive Service in the Customs Department;
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;
- (f) persons actually officiating as priests or ministers of their respective religions;
- (g) persons in Her Majesty's Army, Navy^b or Air Force, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors;
- (h) surgeons and others who openly and constantly practise the medical profession;
- (i) legal practitioners (as defined by the Legal Practitioners' Act, 1879), in actual practice;
- (j) persons employed in the Post-Office and Telegraph Departments;
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641;^c
- (l) other persons exempted by the *Provincial Government*^d from liability to serve as jurors or assessors.

a. Substituted by A. O. for original clause (aa) which was inserted by the Legislative Members Exemption Act, XXIII of 1925.

b. Inserted by the Amending Act XXXV of 1934.

c. See Code of Civil Procedure V of 1908, Ss. 132 and 133.

d. Substituted by A. O. for "Local Government."

1. Legislative changes.

Code of 1898 —

- (1) The words 'salaried' in clause (b), "Police Officers and" in clause (d) and the whole clause (i) were not found in the Code of 1882, but have been added in this Code.
- (2) The words "or Air Force" were added in clause (g) by the Repealing and Amending Act X of 1927.

2. Scope of the section.—Under this section, cases of *exemption* are dealt with, while S. 278 deals with cases of *disqualification*. Thus, the Code makes a clear distinction between exemption and disqualification. The persons enumerated in this section, though they are *capable*, are not *liable* to serve as jurors or assessors (see S. 321). This right to exemption has, however, to be claimed and established (S. 324). Where the proper number of Europeans and Americans cannot other-

Section 320
Notes 2-3

wise be obtained, even the exempted persons may, under the proviso to S. 326, sub-s.(3), be summoned to try Europeans and Americans.

3. Persons exempted under Civil Procedure Code — Cl. (k).

— Sections 640 and 641 of the Civil Procedure Code of 1882 are now ss. 132 and 133 of the present Civil Procedure Code of 1908. Under the former section women, who, according to the customs and manners of the country, ought not to be compelled to appear in public, are exempt from personal appearance in Court. Under the latter section, the Provincial Government may, by notification in the Official Gazette, exempt from personal appearance in Court any person whose rank entitles him to the privilege of exemption, the names and residences of such persons being forwarded to the High Court.

Section 321**321.*** (1) The Sessions Judge, and the Collector

List of jurors and assessors. of the district or such other officer as the *Provincial Government*^a appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278, clauses (b) to (h), both inclusive.

(2) The list shall contain the name, place of abode and quality or business of every such person ; and, if the person is an European or an American, the list shall mention the race to which he belongs.

a. Substituted by A. O. for "Local Government."

1. Preparation of list of persons liable to serve as jurors or assessors. — It is undesirable that a gentleman of a high position, such as a hereditary Raja should be placed on the list of jurors or assessors.¹

Section 322**322.†** Copies of such list shall be stuck up in

Publication of list. the office of the Collector or other officer as aforesaid, and in the court-houses of the District Magistrate and of the District Court, and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

* 1882 : S. 321; 1872 : S. 400; 1861 : S. 329.

† 1882 : S. 322; 1872 : S. 401; 1861 : S. 330.

Section 321 — Note 1

1. '97) 1897 All W N 167 (167), *In the matter of Bhup Indar Bahadur Singh.*

323.* To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the sessions court-house, and at a time to be mentioned in the notice.

Section 323

324.† (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror, or as an assessor, or who may establish his right to any exemption from service given by section 320 and insert the name of any person omitted from the list whom they deem qualified for such service.

Section 324

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

6

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

Annual revision of list. (6) The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

* 1882 : S. 323; 1872 : S. 401, para. 2; 1861 : S. 330.

† 1882 : Ss. 324, 325; 1872 : Ss. 402, 403; 1861 : Ss. 331, 332.

Section 324
Note 1

1. Annual revision of the list — Sub-section (6). — The list of jurors or assessors can be revised only once a year.¹

Section 325

325.* In the case of any district for which the *Provincial Government*^a has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors: Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of liability to serve as an ordinary juror in cases not tried by special jury.

a. Substituted by A. O. for "Local Government."

Section 326

326.† (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial.

* 1882 : S. 325A; 1872 and 1861 — Nil.

† 1882 : S. 326; 1872 : S. 407; 1861 : S. 336.

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

Section 326
Note 1

(3) Where the accused requires and is entitled to be tried under the provisions of section 275, there shall be chosen by lot, in the manner prescribed by or under section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained :

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under section 320.

(4) Where, under the proviso to sub-section (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under section 316.

Synopsis

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| 1. Legislative changes. | 4. Assessor not summoned if can be chosen by the Sessions Judge to make up deficiency. |
| 2. Scope and object of the section. | 5. Names of persons to be drawn by lot. |
| 3. Letter to be sent only by the Sessions Judge. | |

Other Topics (miscellaneous)

- | | |
|--|---|
| All jurors available for all trials though double the number needed is to be summoned. See Note 2. | Non-compliance—Effect. See Note 2. |
| Form of precept. See Schedule V, Form No. 32. | Normal procedure to summon for first day of sessions. See Note 2. |
| Murder case—Summoning less than 18 —Illegality. See Note 2. | Object of lots. See Note 5. |
| | Section not mandatory. See Note 2. |

1. Legislative changes.

There was no material difference between the corresponding sections of the Codes of 1861 and 1872.

Difference between the Codes of 1872 and 1882—

The words "the Sessions Judge" and "for any such trial" were substituted respectively for the words 'the Court' and "for any

Section 326
Notes 1-2

case about to be tried at such sessions," which occurred in the corresponding section of the Code of 1872.

Changes introduced in the Code of 1898 —

The words 'seven days' were substituted for 'three days' and the words "or the said special list" were added after the words "revised list."

Changes made in 1923 —

The words "and including for the trial" at the end of sub-s. (1) were inserted and sub-ss. (3) and (4) were added by the Criminal Law Amendment Act, XII of 1923.

2. Scope and object of the section. — This section fixes the minimum number of jurors and assessors to be summoned by the Sessions Judge for trials in a session. The normal procedure contemplated is that all jurors or assessors should be summoned on *the first day* on which a criminal session commences, whatever may be the number of *trials* it may be proposed to hold in the course of that session.¹

The total number of jurors or assessors so summoned are intended to be available for all the trials, though, in order to fix a minimum, it has been provided that the Judge is to summon at least double the number of jurors or assessors required for any particular trial to be held in the course of the session.²

The object of the section in summoning a number of jurors or assessors is two-fold : *firstly*, to ensure that there is no reason for suspicion that any of the jurors or assessors sitting on a particular trial has been planted on the Court by any person interested in the success or failure of the prosecution,³ and *secondly*, to leave a margin for those cases where any particular juror or jurors may claim exemption from being empanelled on the ground of ill-health or some other reason.⁴

The section is not, however, *mandatory*.⁵ Although the section deals with the summoning of jurors for a particular session and has really no concern with individual cases at all,⁶ the use of the word 'ordinarily' shows that it is neither illegal nor irregular to summon jurors or assessors only for a *particular trial* and not for the whole

Section 326 — Note 2

1. ('31) AIR 1931 Pat 152 (153, 154) : 10 Pat 107 : 32 Cri L Jour 797, *Behari Mahton v. Emperor*.
- ('33) AIR 1933 All 941 (944, 945) : 56 All 210 : 35 Cr.L.J. 668, *Lala v. Emperor*.
- ('16) AIR 1916 All 54 (55, 56) : 17 Cri L Jour 17 (18), *Chutta v. Emperor*.
2. ('31) AIR 1931 Pat 152 (153) : 10 Pat 107 : 32 Cr. L. J. 797, *Bihari Mahton v. Emperor*.
3. ('16) AIR 1916 All 54 (55, 56) : 17 Cri L Jour 17 (17), *Chutta v. Emperor*.
4. ('31) AIR 1931 Pat 152 (153) : 10 Pat 107 : 32 Cr. L. J. 797, *Behari Mahton v. Emperor*.
5. ('38) AIR 1938 Pat 60 (62) : 39 Cri L Jour 302, *Ram Babu Jadav v. Emperor*.
(One assessor absent on day of trial — Person present in Court and whose name appeared in list summoned and chosen as assessor—Trial is not contrary to law.)
- ('33) AIR 1933 All 941 (944) : 56 All 210 : 35 Cri L Jour 668, *Lala v. Emperor*.
6. ('36) 40 C W N 1411 (1412), *Fakta Bibi v. Emperor*. (Objection to juror during trial—Discharge of jury—Selection of another jury—S. 326 has no application.)

of the session or to summon less than eighteen persons for a murder trial so long as the Judge takes care to have summoned a sufficient number of persons to enable him to choose the requisite number of jurors or assessors from among them in the manner provided by law.⁷ In *Emperor v. Ermanali*,⁸ fourteen persons were summoned to act as jurors in a murder case. Nine of them appeared and were chosen by lot. It was held that the trial was not bad. "It is no part of the intention of the Legislature," said Rankin, C. J., "to have a large area of selection in the persons attending upon summons on the theory that the larger the number of effective names in the ballot, the greater the chance that the persons chosen will make good jurors."

Where, however, in a murder trial, less than eighteen persons are summoned and *less than* nine are chosen out of them, it cannot be said that it was *impracticable* to get the requisite number, namely nine and consequently the jury is not a validly constituted one. See Note 4 to section 274.

3. Letter to be sent only by the Sessions Judge. — The duty of issuing a letter or precept imposed on the *Sessions Judge* by this section cannot legally be performed by a subordinate Judge in temporary charge of the current duties of the Court of Session.¹

4. Assessor not summoned if can be chosen by the Sessions Judge to make up deficiency. — In the case of deficiency of *jurors* summoned, or where a juror is objected to and the objection is allowed, the deficiency can be made up by choosing from persons present in Court (see S. 276, second proviso and S. 279). There is no such provision applicable to the case of assessors. The Sessions Judge has, therefore, no power to select any one to act as an assessor who has not been summoned under this section.¹ Thus, where the Sessions Judge had requested the District Magistrate to summon five persons to attend as assessors but only one of these persons was present, whereupon the Nazir of the Court was directed by the Judge to act as an assessor, it was held that as the Nazir was neither a person on the list of assessors nor summoned to act as an assessor, the trial was illegal.² But, where out of the assessors summoned only three were present at the date of the trial and the Sessions Judge caused a summons to be served on a gentleman who was present in the Court

Section 326
Notes 2-4

7. ('31) AIR 1931 Pat 152 (154) : 10 Pat 107 : 32 Cr.L.J. 797, *Behari Mahton v. Emperor*.

8. ('30) AIR 1930 Cal 212 (213, 214, 215, 216) : 57 Cal 1228 : 31 Cri L Jour 536 (FB). (Overruling 31 Cri L Jour 426.)

Note 3

1. ('80) 1880 Rat 148 (148).

Note 4

1. ('94) 1894 All W N 207 (207), *Empress v. Badri*.

[See however ('38) AIR 1938 Pat 352 (357) : 39 Cr. L. J. 725, *Emperor v. Ramsidh Rai*. (Omission to follow the provisions strictly is only an irregularity — Held, in the particular case no prejudice to accused was caused as the assessor who was not summoned, gave his opinion in favour of the accused.)]

See also S. 284 Note 5.

2. ('10) 11 Cr. L. J. 724 (724, 725) : 13 Oudh Cas 337 : 8 I. C. 874, *Khubsingh v. Emperor*.

Section 326
Notes 4-5

and whose name was in the list of persons qualified to serve as assessors and chose him as an assessor, it was held that the trial was not illegal.³

5. Names of persons to be drawn by lot.—An accused person has a right to claim to be tried, whether by a jury or with the aid of assessors, chosen with strict regard to all the safeguards provided in the Code to secure perfect impartiality,¹ the object in view being to secure an impartial trial by rendering impossible any intentional selection of jurors or assessors to try a particular case.² Thus, in the interests alike of the jury or the assessors and the prisoner, it is desirable that the persons, who are in fact to serve as jurors or assessors, should not be selected by the conscious choice of any one, whether it be the District Magistrate, the Judge or any other person.³

Section 327

327.* The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive or whenever for other reasons such direction is found to be necessary.

Powers to summon another set of jurors or assessors.

Section 328

328.† Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

Form and contents of summons.

* 1882 : S. 327; 1872 : S. 410; 1861 : S. 338.

† 1882 : S. 328; 1872 : S. 409, para. 1; 1861 : S. 337.

3. ('38) AIR 1938 Pat 60 (62) : 39 Cr. L. J. 302, *Ram Babu Jadav v. Emperor*. ('38) AIR 1938 Pat 352 (354) : 39 Cr. L. J. 725, *Emperor v. Ramsidh Rai*. (Requisite number of assessors summoned but only three present — Person included in list of assessors and jurors but not summoned for any case on that date, asked to serve — Trial is not illegal—Requisitioning services of gentleman whose name is in the assessors list amounts to summoning him. A I R 1938 Pat 60, Followed.)

Note 5

1. ('02) 7 Cal W N 188 (192), *Brojendra Lal Sirkar v. Emperor*. ('27) AIR 1927 Cal 593 (595) : 28 Cr. L. J. 615 : 54 Cal 1026, *Rahamat Sheikh v. Emperor*.

2. ('02) 7 Cal W N 188 (192), *Brojendra Lal Sirkar v. Emperor*. ('27) AIR 1927 Cal 787 (790) : 28 Cr. L. J. 889, *Rosonali v. Emperor*. ('28) AIR 1928 Cal 83 (85) : 55 Cal 371 : 29 Cr. L. J. 437 (FB), *Kedarnath Mahito v. Emperor*.

('33) AIR 1933 All 941 (944) : 56 All 210 : 35 Cr. L. J. 668, *Lala v. Emperor*. See also S. 276 Note 2 and S. 279 Note 2.

3. ('30) AIR 1930 Cal 212 (215) : 57 Cal 1228 : 31 Cr. L. J. 536 (FB), *Emperor v. Ermanali*.

('94) 1894 All W N 207 (207), *Empress v. Badri*.

1. Summons to juror or assessor.—Forms of summons given in Schedule V, Nos. 32 and 33, are to be used under this section. Service of summons is to be effected in the manner provided by s. 63 and the sections following it.

Section 328
Note 1

329.* When any person summoned to serve as a juror or assessor is in the service of the *Crown*^a or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

Section 329

a. Substituted by A. O. for "Government."

330.† (1) The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session.

Section 330

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

Sub-section (2) corresponds with section 330A of the Code of 1882, which was added to it by Act XIII of 1896.

331.‡ (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

Section 331

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section. ...

* 1882 : S. 329; 1872 : S. 411; 1861 : S. 339.

† 1882 : S. 330; 1872 : S. 412; 1861 : S. 340.

‡ 1882 : S. 331; 1872 : S. 413; 1861 : S. 341.

Section 332

332.* (1) Any person summoned to attend as a juror or as an assessor who without lawful excuse, fails to attend as required by summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

1. Legislative changes (omitted)

2. Failure to attend — Effect of. — See Note 2 to section 315.

If an assessor has been absent for a long time from district A and has gone to reside in district B, so that he may be said to have almost ceased to be a resident of district A, he is not liable to serve as an assessor in that district under S. 319. Consequently, he cannot be fined under this section for non-attendance as an assessor in obedience to a summons served in district A, of which he had no notice.¹

3. "Shall be liable . . . to a fine." — The order of a Sessions Judge fining an assessor is not open to appeal.¹

4. "For good cause shown." — The fact that an assessor was ill on the day on which he was summoned to act as such and that he had produced a medical certificate to that effect would be a good cause under this section.¹

* 1882 : S. 332; 1872 : S. 414; 1861 : S. 354.

Section 332 — Note 2

1. ('31) AIR 1931 Pat 160 (160): 32 Cr.L.J. 740, *Id. Ejaz Hussain Khan v. Emperor*.

Note 3

1. ('67) 8 Suth W R Cr 83 (83), *In re Gour Surun Dass*.

Note 4

1. See ('67) 8 Suth W R Cr 83 (83), *In re Gour Surun Dass*.

L.—Special Provisions for High Courts.

333.* At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate-General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

Section 333

Power of Advocate-General to stay prosecution.

1. Scope of the section. — The power given to the Advocate-General under this section is the power of entering a *nolle prosequi*, which is an entry on the record, of a statement that the prosecutor will proceed no further in his action. The power does not depend on the consent of the Court, which a Public Prosecutor has to obtain when acting under section 494. Entering a *nolle prosequi* is one of the rights and privileges, which an Advocate-General has by virtue of his appointment.¹

2. The Advocate-General may not further prosecute. — A *nolle prosequi* is entered where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence, or where it is clear that an indictment is not sustainable against the defendant,¹ or questions of difficulty arise as to the jurisdiction of the Court.^{1a} Thus, where, after a trial had commenced before R and a jury, R retired under s. 556 of the Code and was succeeded by S, and it was objected that S and the jury had no jurisdiction, the Advocate-General was allowed to enter a *nolle prosequi*.² Similarly, where the jury gave a verdict in a case, before the case for the defence was heard, the Advocate-General entered a *nolle prosequi* and the accused was discharged.³

3. An order of discharge is no bar to fresh proceedings. — An order of discharge under this section is no bar to fresh proceedings being taken before a competent Magistrate upon complaint, or upon a police-report, or under S.190 (1) (c).¹ The same proceeding, however, in

* 1882 : S. 333; 1872 and 1861 — Nil.

Section 333 — Note 1

1. ('32) AIR 1932 Cal 699 (703) : 60 Cal 233 : 34 Cr. L. J. 433, *Giribala Dasi v. Mader Gazi*. (Per Mukerji, J.)

Note 2

1. ('31) AIR 1931 Cal 607 (612) : 59 Cal 275 : 33 Cr. L. J. 3, *Sher Singh v. Jitendranath*.
- 1a. ('04) 8 Cal W N xlvi (xlvi), *Emperor v. Jotindranath Gui*.
2. ('98) 2 Cal W N 481 (481, 482, 483), *Empress v. Khagendranath Banerjee*.
3. ('03) 7 Cal W N xxxi (xxx), *Emperor v. Olu Mahamed*.

Note 3

1. ('12) 13 Cr. L. J. 488 (488) : 40 Cal 71 : 15 I. C. 488, *Emperor v. Sheikh Idoo*.

Section 333
Note 3

which *nolle prosequi* was entered, cannot be *renewed*. Thus, where A and B were indicted before the Court, B being at that time an absconder, and A was discharged under this section on the Advocate-General entering *nolle prosequi* against him, and subsequently when B was apprehended, the same proceeding was sought to be continued against both A and B, it was held that this could not be done.²

Section 334

334.* For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

Section 335

335.† (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the *Provincial Government*,^a may direct.

(2) But it may, from time to time,^b with the consent of the *Provincial Government*,^c hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice beforehand in the *Official Gazette*,^d of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

- a. Substituted by A. O. for "Governor-General in Council in the case of the High Court at Fort William or the Local Government in the case of the other High Courts."
- b. The words "in the case of the High Court at Fort William with the consent of the Governor-General in Council, and in all other cases" were repealed by the A. O.
- c. Substituted by A. O. for "Local Government."
- d. Substituted by A. O. for "Local Official Gazette."

* 1882 : S. 334; 1872 and 1861 — Nil.

† 1882 : S. 335; 1872 and 1861 — Nil.

2. ('25) AIR 1925 Cal 902 (908) : 52 Cal 590 : 26 Cri L Jour 1397, *Emperor v. Jitendranath Bose*, (40 Cal 71 not referred to.)

336.* (Place of trial of European British subjects.) *Repealed by section 20 of the Criminal Law Amendment Act, XII of 1923.* Section 336.

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

337.† (1) In the case of any offence triable Section 337.
Tender of pardon to accomplice. exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, namely, sections 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly

* Code of 1898, repealed S. 336.

336. The High Court may direct that all European British subjects and persons liable to be tried by it under S. 214, who have been committed for trial by it within certain specified districts or during certain specified periods of the year, shall be tried at the ordinary place of sitting of the Court, or direct that they shall be tried at a particular place named.

1882 : S. 336; 1872 and 1861 — Nil.

† Code of 1898, original S. 337.

337. (1) In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the offence, or, with the sanction of the District Magistrate, any other Magistrate, may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) Every person accepting a tender under this section shall be examined as a witness in the case.

(3) Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.

(4) Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this section, shall record his reasons for so doing; and when any Magistrate has made such tender and examined the person to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.

1882 : S. 337; 1872 : S. 347; 1861 : S. 209.

Section 337 or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof:

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record:

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.

(4) *Repealed by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.*

Sub-sections (1) and (1A) were substituted for the original sub-s.(1); sub-s.(2A) was inserted and sub-s.(4) was omitted; the words "the Court of the Magistrate

taking cognizance of the offence and in the subsequent trial, if any" in sub-s.(2) were substituted for the words "the case"; the words "unless he is already on bail" in sub-s.(3) were substituted for the words "if not on bail," and the words "by the Court of Session or High Court as the case may be" at the end of sub-s.(3) were omitted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Section 337

Synopsis

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and object of the section. 3. Who can tender a pardon. 4. Power of Provincial Government to tender conditional pardon. 5. Offences in respect of which pardon may be tendered. 6. Effect of tendering pardon in other cases. 7. Stage at which pardon can be tendered. 8. "Supposed to have been directly or indirectly concerned in, or privy to, the offence." 9. Condition of pardon. 10. Procedure in tendering pardon. | <ol style="list-style-type: none"> 11. Recording reasons for tendering pardon. 12. Accepting pardon. 13. Disclosure, whether should be recorded at the time of the tender of pardon. 14. Effect of pardon. 15. Forfeiture of pardon. See S. 339. 16. Examination of approver as witness — Sub-section (2). 17. Evidence of an accomplice — Credibility of. 18. Commitment of accused. 19. Detention of approver in custody — Sub-section (3). |
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Other Topics (miscellaneous)

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| <p>Accessories after the fact. See Note 17.
 Accomplice and spy. See Note 8.
 Accused's conduct as corroboration. See Note 17.
 Addition of other offences—Immaterial. See Note 5.
 Bail by superior Courts. See Note 19.
 Blood in accused's house and his nails — Corroboration. See Note 17.
 Circumstantial evidence. See Note 17.
 Confession of accused is corroboration. See Note 17.
 Confessions of co-accused. See Note 17.
 Corroboration by evidence of others taken prior to pardon. See Note 17.
 Corroboration of accomplice's evidence. See Note 17.
 Custody — Judicial and not police. See Note 19.
 Delegation not permissible. See Note 3.
 District Magistrate pardoning — Competent to try. See Note 18.
 Effect of invalid pardon. See Notes 3 and 6.
 Entry of <i>nolle prosequi</i> and subsequent evidence. See Note 2.
 Examination after forfeiture of pardon. See Note 16.
 Explicable circumstances — No corroboration. See Note 17.
 Evidence of a spy. See Note 17.
 Evidence of tutored son of accomplice not corroborated. See Note 17.
 Hearsay evidence inadmissible even for corroboration. See Note 17.
 Illegal conditions of pardon. See Note 9.</p> | <p>Informal statements at tender of pardon. See Notes 10 and 13.
 Motive or animosities — Not corroboration. See Note 17.
 No pardon to principal offender. See Note 2.
 Non-explanation of suspicious circumstances — Not corroboration. See Note 17.
 Omission to record reasons for pardon. See Note 11.
 Oral sanction — Only irregularity. See Note 3.
 Pardon accepted or refused—Procedure. See Note 10.
 Persons bribing for release of wrongfully confined persons — Not accomplices. See Note 17.
 Person helping disposal of murdered body — No accomplice. See Note 17.
 Presence of accused before occurrence — No corroboration. See Note 17.
 Prior statements of accomplice. See Note 17.
 Production of stolen property from place not in accused's possession—No corroboration. See Note 17.
 Section no bar to trial under Ordinances — Commitment not needed. See Note 18.
 Statements of other accomplices. See Notes 17 and 8.
 Strict compliance with section. See Note 2.
 Suspicion — No corroboration. See Note 17.
 Witnesses and not partakers — Not accomplices. See Note 17.</p> |
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Section 337
Notes 1-2

1. Legislative changes.

Changes introduced by Act XVIII of 1923 —

1. In sub-section (1) —
 - (a) The words “or any offence and 477A” are new. See Note 5.
 - (b) The words “at any stage of the investigation or inquiry into, or trial of, the offence” are new. See Note 7.
 - (c) For the words “with the sanction of the District Magistrate, any other Magistrate,” the proviso to sub-s.(1) has been substituted. See Note 3.
2. The words “and shall, on application made by the accused, furnish him with a copy of such record, “in sub-s.(1A) and the proviso to sub-s.(1A), are new.
3. In sub-s.(2), the words “in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any” have been substituted for the words “in the case.” See Note 16.
4. Sub-section (4) has been omitted and sub-s.(2A) is new. See Note 18.

2. Scope and object of the section. — This section empowers a Magistrate to tender pardon to a person who is supposed to have been directly or indirectly concerned in, or privy to, an offence under investigation or inquiry, on condition that he makes a full and true disclosure of all the circumstances within his knowledge in relation to the accused and to the offence. The object of tendering such conditional pardon to an accomplice in the crime is to secure the evidence of such a person; and also to encourage him to give the fullest details in respect of the matter, so that points may be found in his evidence which may be capable of corroboration, especially in cases where it is otherwise impossible to establish the guilt of the accused from other evidence.¹ In the exercise, therefore, of the power to tender a pardon, the Magistrate should exercise a sound judicial discretion,² and proceed with great caution and on ample grounds; and with a clear recognition of the risk which it necessarily involves of allowing an offender to escape just punishment at the expense of possibly innocent men.³ It is thus a wrong exercise of discretion on the part of the Magistrate to tender pardon to a person who is the *principal* offender in order to obtain evidence against the other accused.⁴

The provisions of this section do not imply that the only method of obtaining the evidence of an accused person against his co-accused is by tendering a pardon to such person with all the conditions and

Section 337 — Note 2

1. ('88) 11 All 79 (90) : 1888 All W N 289, *Queen-Empress v. Ganga Charan*.
[See ('15) AIR 1915 Nag 92 (93) : 11 Nag L R 59 : 16 Cri L Jour 417, *Local Government v. Mulu*.
(‘22) AIR 1922 Bom 177 (177) : 46 Bom 120 : 22 Cri L Jour 620, *In re Dagdu Bapu*.]
2. See ('72-92) 1872-1892 L. B. R. 246 (248, 250), *In the matter of Nga Po Aung*.
3. ('03) 1903 Pun Re No.4 Cr,p.11(14):1903 PLR No. 52, *Ghulam Md. v. Crown*.
(‘66) 5 Suth W R Cr 80 (85) : Beng L R Sup Vol 459 (F B), *In re Elahee Buksh*.
4. ('21) AIR 1921 Pat 499 (501), *Sheobhajan Ahir v. Emperor*.

safeguards mentioned in the section.⁵ It is the right of the Crown at any stage to enter *nolle prosequi* (Ss. 393 and 494) and thereafter call such person as a witness for the Crown.⁶ (See Note 16 and S. 342.) Similarly, there is nothing in the section to compel the police to produce an accused person who is intended to be examined as a witness in the case for the tender of a pardon. The police can refrain from prosecuting such person although there is adequate evidence to justify his prosecution and if they do so, he will be a competent witness in the trial of the other accused. But such a course is to be highly deprecated and the evidence of such a witness will be entitled to little weight.⁷

As special powers are conferred upon the Magistrate by the section, he should exercise such powers in strict accordance with the provisions of the section.⁸

Where action has been taken under this section and a conditional pardon has been tendered and accepted, it is not thereafter open to the prosecution to ignore the provisions of this section and proceed under S. 494. Thus, in such a case, the prosecution against the person who has accepted the pardon cannot be withdrawn under S. 494 and the provisions of sub-s.(2A) of this section which require the case to be tried by a High Court or Sessions Court avoided. In determining whether action has been taken under this section, if the manner in which the tender of pardon is made follows in substance the method prescribed in this section, the section must be held to apply and minor and immaterial irregularities or variations cannot be taken to affect the operation of the section.⁹

3. Who can tender a pardon. — A District Magistrate has power to tender a pardon at any stage of the investigation, inquiry or trial even though he himself may not be holding such inquiry or trial.¹ A Magistrate of the first class, not being a District Magistrate,

5. ('37) AIR 1937 Nag 17 (21) : 38 Cr.L.J. 237 & 251 : ILR (1937) Nag 315 (FB), *Amdumiyar v. Emperor*. (Provision is enabling and obligatory.)

6. ('29) AIR 1929 Cal 319 (320, 321) : 56 Cal 1023 : 31 Cr. L. J. 315, *Raman v. Emperor*.

('23) AIR 1923 All 91 (107) : 45 All 226 : 25 Cr.L.J.497, *Emperor v. Har Prasad Bhargava*.

(1900) 25 Bom 422 (428,429) : 2 Bom L R 1095, *Queen-Empress v. Hussein Haji*.

('35) AIR 1935 Bom 186 (188) : 59 Bom 355 : 36 Cr. L. J. 937, *Keshav Vasudev v. Emperor*.

[But see ('35) AIR 1935 Cal 473 (474) : 36 Cri L Jour 1248, *Abdul Majid v. Emperor*. (Section 494 is not intended to be used by prosecution to get evidence of accomplice.)]

7. ('37) AIR 1937 Nag 17 (20, 21) : 38 Cr. L.J. 237 & 251 : I L R (1937) Nag 315 (FB), *Amdumiyar v. Emperor*.

('35) AIR 1935 Bom 186 (188) : 59 Bom 355 : 36 Cr. L. J. 937, *Keshav Vasudeo v. Emperor*.

8. ('72-92) 1872-1892 Low Bur Rul 246 (248,250), *In the matter of Nga Po Aung*. ('08) 3 Cr. L. J. 445 (450) : 5 A L J 691, *Sultan Khan v. Emperor*. (Provisions of this section are very salutary, the neglect of which may easily lead to great difficulties.)

9. ('38) AIR 1938 P C 266 (269) : I L R (1938) Lah 628 : 65 I A 388 : 32 S L R 937 : 40 Cr.L.J. 360 (P C), *Faqir Singh v. Emperor*.

Note 3

1. See ('12) 13 Cr. L. J. 35 (34) : 5 Sind L R 174 : 13 I. C. 273, *Emperor v. Andal*.

Section 337
Notes 3-4

can tender a pardon only —

(a) in case the offence is under investigation, if he has jurisdiction in the place where the offence might be inquired into and tried, *and* the sanction of the District Magistrate has been obtained therefor, or

(b) in case the offence is under inquiry or trial, if the case is pending inquiry or trial before him.

The words "District Magistrate" in this section will include an Additional District Magistrate on whom all the powers of a District Magistrate have been conferred under section 10 (2).²

The mere absence of a *written* sanction of the District Magistrate, where it appears that in fact an oral sanction was given, is only an irregularity which, under S. 529, is not sufficient to vitiate the proceedings if it was obtained in good faith.³

The tender of pardon being a judicial function⁴ the Magistrate empowered to exercise such function cannot delegate it to a police-officer or to a subordinate Magistrate.⁵ Where a Magistrate, not empowered by law to tender a pardon, erroneously in good faith tenders such pardon under this section, the proceedings cannot be set aside merely on the ground of his not being so empowered [S. 529, clause (g)]. But if a Magistrate, who has no *jurisdiction* in respect of such offence, tenders a pardon, such pardon is illegal and the defect cannot be cured under S. 529.⁶ The person to whom such illegal pardon is tendered continues to be an accused person and can be tried and convicted along with the other accused.⁷ He cannot be examined as a witness (section 342), and if he has been examined, his evidence is inadmissible.⁸

A special Magistrate appointed under S. 24 of the Bengal Suppression of Terrorist Outrages Act (XII of 1932) has power to tender a pardon under this section.⁹

4. Power of Provincial Government to tender conditional pardon.—There is no provision in the Code conferring upon the Provincial Government a power to tender, to an accused person, a

2. ('38) AIR 1938 Lah 796 (798) : I L R (1939) Lah 38 : 40 Cr. L. J. 543, *Emperor v. Amar* (Pardon tendered by such Additional District Magistrate without sanction of District Magistrate is not invalid—Dissenting from AIR 1936 Lah 353.)

3. ('08) 8 Cr. L. J. 445 (450, 451) : 5 A L J 691, *Sultan Khan v. Emperor*.

4. ('38) AIR 1938 P C 266 (270) : I L R (1938) Lah 628 : 65 Ind App 388 : 32 Sind L R 937 : 40 Cr. L. J. 360 (PC), *Faqir Singh v. Emperor*. (Pardon under this section is tendered as a judicial act.)

5. ('72-92) 1872-92 Low Bur Rul 246 (248, 250), *In the matter of Nga Po Aung*. ('66) 6 Suth W R Cr L 5 (5).

See also Note 10.

6. ('97) 20 All 40 (41, 42) : 1897 All W N 173, *Queen-Empress v. Chidda*.

See also S. 529 Note 1.

7. ('97) 20 All 40 (41, 42) : 1897 All W N 173, *Queen-Empress v. Chidda*.

8. ('72-92) 1872-92 Low Bur Rul 246 (248, 250), *In the matter of Nga Po Aung*.

9. ('36) AIR 1936 Cal 356 (361, 363, 364) : 37 Cr. L. J. 758 : I L R (1937) 1 Cal 711 (FB), *Harihar Sinha v. Emperor*. (Per Full Bench—Mukerji, J., *contra* — But the Special Magistrate must try the accused himself instead of committing him to the sessions.)

('35) AIR 1935 Cal 281 (282) : 36 Cr. L. J. 884, *Md. Saleuddin v. Emperor*.

conditional pardon. Such pardon can be tendered only by the Magistrate and the Courts specified in ss. 337 and 338.¹ But the fact that the Magistrate in tendering the pardon did so after consulting the Provincial Government and with its authority is an internal matter of administration which cannot affect the position of the accused or the approver.² The Provincial Government has, however, power under S. 401 to remit or suspend sentences passed against the accused.

As to the exercise of the Royal Prerogative of mercy, see S. 401.

5. Offences in respect of which pardon may be tendered.—The jurisdiction to tender a pardon to an accomplice is strictly limited to such offences as are specifically mentioned in the section itself.¹ It is determined with reference to the offence in respect of which the investigation is being made or the inquiry or trial is held, and is not affected in any manner by a subsequent alteration of the charge or offence or by the ultimate result of the investigation, inquiry or trial,² or by the fact that there are also other offences alleged or charged against the accused.^{2a} All that is necessary is that there should be an investigation or inquiry in progress relating to an offence referred to in the section.³ The words “triable exclusively by the High Court or a Court of Session” mean “shown in the second schedule as so triable.”⁴ Before the amendment of 1923, conditional pardon could be granted only in cases of offences triable by a Court of Session or High Court.⁵

Note 4

1. ('06) 4 Cr.L.J. 145 (146): 33 Cal 1353: 10 CWN 962, *Banu Singh v. Emperor*. ('06) 4 Cr. L. J. 44 (45): 10 CWN 847, *Paban Singh v. Emperor*. (Evidence of accused taken under conditional pardon so offered is wholly inadmissible.)
2. ('38) AIR 1938 PC 266 (269): ILR (1938) Lah 628 : 65 I.A. 388 : 32 S. L. R. 937: 40 Cr. L. J. 360 (PC), *Faqir Singh v. Emperor*. (Overruling AIR 1936 Lah 353.)

Note 5

1. ('38) AIR 1938 P C 266 (268) : ILR (1938) Lah 628 : 65 I. A. 388 : 32 S. L. R. 937 : 40 Cr. L. J. 360 (PC), *Faqir Singh v. Emperor*.
- ('36) AIR 1936 Cal 356 (366) : 37 Cri L Jour 758 : ILR (1937) 1 Cal 711 (FB), *Harihar Sinha v. Emperor*.
- (1900-02) 1 L. B. R. 62 (62), *Empress v. Nga Po Sin*. (Magistrate has no power under S. 337 to examine an accused person charged under the Gambling Act.)
2. ('39) AIR 1939 All 567 (571, 572) : ILR (1939) All 736 : 40 Cri L Jour 856, *Bhola Nath v. Emperor*.
- ('21) 22 Cri L Jour 676 (677) : 63 Ind Cas 612 (613) (Lah), *Sardara v. Emperor*.
- ('25) AIR 1925 Sind 105 (108): 19 S.L.R. 183: 25 Cr.L.J. 1057, *Faizulla v. Emperor*.
- ('33) AIR 1933 Pesh 3 (4): 34 Cr.L.J. 212, *Public Prosecutor, Peshawar v. Muqarrab*. [See also ('26) AIR 1926 All 590 (591) : 27 Cri L Jour 1103, *Bhawani Prasad v. Emperor*. (It is doubtful whether the validity of a pardon given to accused charged with an offence specified in that section would be affected by the fact that the co-accused was ultimately convicted of a minor offence.)]
- 2a. ('15) AIR 1915 Lah 16 (21) : 1915 Pun Re No. 17 Cr : 16 Cri L Jour 354, *Balmokand v. Crown*.
- ('15) AIR 1915 Sind 43 (45): 9 S. L. R. 43: 16 Cr.L.J. 632, *Harumal v. Emperor*.
3. ('25) AIR 1925 Nag 337 (338) : 26 Cri L Jour 1115, *Ismail Panju v. Emperor*.
4. ('97) 1897 Pun Re No. 3 Cr, p. 4 (6), *Bhallu Singh v. Empress*.
5. ('84) 10 Cal 936 (937), *Queen-Empress v. Sadhee Kasal*.
- ('82) 1882 All W N 240 (240), *Empress v. Gopal*.
- ('20) AIR 1920 Lah 215 (216) : 1 Lah 102 : 21 Cr.L.J. 599, *Mahandu v. Emperor*.
- ('12) 13 Cri L Jour 33 (34) : 5 Sind L R 174 : 13 I. C. 273, *Emperor v. Andal*. [See ('02) 1902 Pun Re No. 12 Cr, p. 33 : 1902 Pun L R No. 100, *Nabi Bakhsh v. Emperor*.
- ('73) 1873 Pun Re No. 7 Cr, p. 7, *In re a Reference from Commissioner, Rawalpindi*.
- ('93-1900) 1893-1900 Low Bur Rul 51 (51), *Nga Tha Hla v. Queen-Empress*.

Section 337 Notes 4-5

Section 337
Notes 5-7

The amended section provides specifically for tender of pardon in respect of several other offences enumerated in the section.⁶

6. Effect of tendering pardon in other cases.— Where a pardon is granted in respect of an offence *not specified* in the section and the person to whom pardon is granted is examined as a witness, such evidence is inadmissible. The reason is that as the pardon is unauthorized, the person continues to be an accused person and no oath can be administered to him.¹ See S. 342. Nor can such person be prosecuted for giving false evidence.²

7. Stage at which pardon can be tendered.— Before the amendment of 1923, the Magistrate could tender a pardon only in respect of the "offence under inquiry" and there was a conflict of decisions as to whether the word "inquiry" included also the stage of the investigation by the police.¹ The amended section has definitely set the conflict at rest by specifically providing that the pardon may be granted even at the stage of the investigation by the police.² The Magistrate has power to tender a pardon at *any* stage, *i. e.*, until he commits the accused under sub-s. (2A) or discharges the accused.³ The mere fact that the case is adjourned on application under S. 526 does

(193-1900) 1893-1900 Low Bur Rul 642 (644), *Pat Tha U. v. Queen-Empress*. (1864) 3 Mad H C R App ii (ii). (S. 209 of the Code of 1861 did not contain the words "exclusively triable by Court of Session" and therefore a Magistrate was held competent to tender pardon in a case triable by Magistrate concurrently with Court of Session.)

(1866) 3 Mad H C R App iv (iv). (The power given to a Magistrate by S. 209 of the Code of 1861 could not be properly exercised except with a view to commit the case to a Court of Session.)

[But see ('72-92) 1872-1892 L B R 586 (587, 588), *Tha Dung v. Empress*.]

See also S. 338 Note 2.

6. ('37) AIR 1937 Nag 17 (20) : 38 Cr. L. J. 237 & 251 : I L R (1937) Nag 315 (FB), *Amdumiyar v. Emperor*. (Amendment also amplifies the power to tender a pardon even during the course of the investigation.)

Note 6

1. ('79) 2 All 260 (262), *Empress of India v. Asgher Ali*.

[See however ('26) AIR 1926 All 590 (591) : 27 Cri L Jour 1103, *Bhawani Prasad v. Emperor*. (Even if the pardon is invalid it would not prevent the approver being examined in the Sessions Court as a witness if he is not committed for trial along with the accused.)]

2. ('85) 10 Bom 190 (192), *Queen-Empress v. Dala Jiva*.

(193-1900) 1893-1900 Low Bur Rul 51 (51), *Nga Tha Hla v. Queen-Empress*.

Note 7

1. ('22) AIR 1922 Bom 138 (139) : 46 Bom 61 : 22 Cri L Jour 728, *Emperor v. Moti Lal Hira Lal*. (Inquiry does not include investigation by police.)

('12) 13 Cri L Jour 33 (34) : 13 Ind Cas 273 : 5 Sind L R 174, *Emperor v. Andal*. (Inquiry includes investigation by police.)

('23) AIR 1923 Lah 270 (271) : 3 Lah 431 : 24 Cri L Jour 941, *Sher Muhammad v. Emperor*. (Inquiry means everything done by a Magistrate whether the case is challaned or not.)

('97) 1897 Pun Re No. 3 Cr, p. 4 (6), *Bhallu Singh v. Empress*. (Do.)

2. ('37) AIR 1937 Nag 17 (20) : 38 Cri L Jour 237 & 251 : I L R (1937) Nag 315 (FB), *Amdumiyar v. Emperor*.

3. ('32) AIR 1932 Sind 40 (41) : 33 Cri L Jour 906, *Ali Muhammad v. Emperor*. ('21) 22 Cri L Jour 255 (256) : 60 Ind Cas 607 (608) (Lah), *Mangu v. Emperor*. (Magistrate could tender pardon even after framing the charge — In this case, the trial and conviction were by a Magistrate empowered under S. 30 — After the amendment of S. 337 in 1923 the case must be committed to Sessions and cannot be disposed of by the Magistrate himself. See Note 18.)

not deprive the Magistrate of his power of tendering a pardon.⁴

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Notes 7-9

8. "Supposed to have been directly or indirectly concerned in, or privy to, the offence." — The expression "any person supposed to have been directly or indirectly concerned in, or privy to, the offence," is a wide one and is not necessarily confined to a person who has been charged with the offence or who has been sent up by the police for trial, as an accused person.¹ It is not necessary that he should exactly know what crime is being committed in all its details.² All that is requisite is that there should be the intention of assisting in the commission of the crime³ and that the Magistrate should be *satisfied* that he himself took part in the crime to the extent that he admits and that he is in a position to give a true account as to what occurred.⁴

An accomplice is different from a "spy." An accomplice is a person who concurs fully in the criminal designs of his co-conspirators for a time and joins in the execution of those designs; while a spy or informer does not concur in those designs but enters into the conspiracy as agent for the prosecution for the sole purpose of detecting and disclosing it and of bringing the offenders to justice.⁵

The word "supposed" does not exclude a person who confesses the guilt and pleads guilty to the charge, but is yet unconvicted; it merely excludes the person who has been *already convicted* of the offence.⁶

9. Condition of pardon. — It has been already seen in Note 2 that the object of tendering a pardon is to encourage the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The law, therefore, requires, not a cramped and constrained statement by the approver, but a

4. ('27) AIR 1927 All 90 (90) : 49 All 181 : 27 Cr. L. J. 1369, *Bal Chand v. Emperor*.

Note 8

1. ('12) 13 Cr. L. J. 33 (34) : 13 L. C. 273 : 5 Sind L. R. 174, *Emperor v. Andal*. ('23) AIR 1923 Nag 248 (249) : 24 Cri L Jour 566, *Kashiram v. Emperor*.

2. ('20) AIR 1920 Cal 980 (983) : 21 Cri L Jour 802, *Surya Kanta v. Emperor*. (1913) 9 Cr App Rep 232, *Charles Cratchely*. (Per Lord Chief Justice Isaacs.)

3. ('20) AIR 1920 Cal 980 (983) : 21 Cr. L. J. 802, *Surya Kanta v. Emperor*. (Per Shamsul-Huda, J.)

4. ('23) AIR 1923 Nag 248 (250, 251) : 24 Cri L Jour 566, *Kashiram v. Emperor*. [See ('33) AIR 1933 Rang 199 (200) : 34 Cri L Jour 1255, *Yacoob v. Emperor*. (Accomplices are those who are in some way or other connected with the offence in question.)

('24) AIR 1924 Oudh 188 (188) : 24 Cri L Jour 799, *Sant Ram v. Emperor*. (The statement of an alleged approver who is not proved to have participated in the offence is not admissible against the accused.)

('09) 10 Cr. L. J. 530 (532) : 4 Ind Cas 268 (269) (Bom), *Emperor v. Percy Henry Burn*.]

5. ('28) AIR 1928 Lah 193 (194, 195) : 9 Lah 550 : 29 Cr. L. J. 577, *Karim Bakhsh v. Emperor*.

('95) 19 Bom 363 (370), *Queen-Empress v. Javecharam*.

('10) 11 Cri L Jour 560 (564) : 38 Cal 96 : 8 I. C. 119, *Emperor v. Chaturbhuj*.

('12) 13 Cri L Jour 609 (663) : 16 Ind Cas 257 (Cal), *Pulin Behari Das v. Emperor*.

('28) AIR 1928 Lah 647 (649) : 29 Cri L Jour 740, *Mangat Rai v. Emperor*.

6. ('84) 7 All 160 (163) : 1884 A W N 314, *Queen-Empress v. Kallu*.

('95) 1895 Rat 750 (752), *Queen-Empress v. Bhagya*.

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thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gives evidence.¹

It should, however, be borne in mind that the temptation to the accomplice to strain the truth should be as slight as possible and it is illegal to tender a pardon on condition that the prisoner should profess to have been present at the murder and to have personal knowledge of the circumstances under which the offence took place as alleged by the prosecution.² As to the effect of a breach of the conditions of pardon, see section 339.

10. Procedure in tendering pardon. — The tender of pardon should be made by the Magistrate directly and should not be made through any police-officer.¹ The Magistrate should, at the time, explain to the person to whom it is made all the conditions accompanying such tender of pardon and should also record his reasons for tendering the pardon (sub-s.(1A)). If the person does not accept the conditions, the inquiry or trial will proceed as if no tender of pardon was made. If such person should accept the conditions, it is the duty of the Magistrate to examine him as a witness under the rules applicable for the examination of witnesses.² As to whether the Magistrate should record informal statements from the person at the time of tendering the pardon, see Note 13.

11. Recording reasons for tendering pardon. — It has been seen already in Note 2 that the Magistrate should tender a pardon to an accomplice only on ample grounds and in exceptional cases and that he should exercise a sound judicial discretion before taking such a step. Sub-section (1A) provides that it is his duty to record his reasons for so doing and that the accused is entitled to a copy thereof.¹ Where, however, the circumstances which preceded the grant of pardon provide by themselves sufficient grounds for the Magistrate's action and such circumstances appear on record, it is not necessary for the Magistrate to formally set out such circumstances in writing.² Similarly, where the Magistrate states in his order that in order to connect the accused with the offence of a certain murder, it is essential to make an approver in the case, there is sufficient compliance with

Note 9

1. ('88) 11 All 79 (87) : 1888 A W N 289, *Queen-Empress v. Ganga Charan*. ('26) AIR 1926 Pat 279 (281, 286): 5 Pat 171: 27 Cr.L.J. 957, *Nilmadhab v. Emperor*.
2. ('92) 1892 Rat 612 (613, 614), *Queen-Empress v. Yakub*.

Note 10

1. ('66) 6 Suth W R Cr Letters 5.
See also Note 3.
2. ('70) 12 Suth W R Cr 80 (81) : 6 Beng L R App 50, *Queen v. Gaganu Magalu*. (1900) 13 C P L R Cr 7 (8), *Empress v. Bodhan*.

Note 11

1. ('97-01) 1 Upp Bur Rul 81 (81), *Queen-Empress v. Nga Tun Baw*.
2. ('09) 10 Cr. L J. 32 (34): 36 Cal 629: 2 I. C. 497, *Emperor v. Annada Charan Thakur*. (Omission to state reasons in such a case is neither illegality nor irregularity which vitiates the proceedings.) ('07) 5 Cr.L.J. 142(144): 5 C.L J. 224, *Deputy Legal Remembrancer v. Banu Singh*. (Do.)

the provisions of sub-s.(1A) of this section.³ The recording of reasons is merely a matter relating to procedure and is not a condition precedent to the tender of pardon.⁴ Thus, an omission to record the reasons amounts only to an irregularity⁵ and will not vitiate the trial, unless it is shown that it has, in fact, occasioned a failure of justice.⁶ See section 537.

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12. Accepting pardon. — A person can be said to accept a pardon tendered to him only when he *actively assents* to the conditions of the pardon and volunteers to make a statement with reference to the offence. Where he expresses complete ignorance and states that he is indifferent as to whether a pardon is granted or not, he cannot be said to accept a tender of pardon.¹ But it is not necessary that the acceptance of the pardon should be in writing or that it should be expressed in any other manner. It can be gathered from the circumstances. Thus, the fact that he appears before the Magistrate in the capacity of a witness and not in the capacity of an accused person, is a clear indication of the fact that he has accepted the pardon tendered to him.²

13. Disclosure, whether should be recorded at the time of the tender of pardon. — The section does not contemplate the recording of any statement by the proposed approver before the pardon is granted to him.¹

There is a conflict of decisions as to whether, after the pardon has been granted, the approver can be examined on oath before the preliminary inquiry in the committing Magistrate's Court. One view is that such an examination is permissible under S. 164² and the other view is that it is not.³ As there does not seem to be any reason why

3. ('38) AIR 1938 Lah 796 (798); I L R (1939) Lah 38: 40 Cr. L. J. 543, *Emperor v. Amar Singh*.

4. ('12) 13 Cri L Jour 588 (590); 15 I. C. 1004 (All), *Emperor v. Shama Charan*.

5. ('38) AIR 1938 P C 266 (269); I L R (1938) Lah 628: 65 I A 388: 32 S L R 937: 40 Cri L Jour 360, *Faqir Singh v. Emperor*. (Right of accused or approver is not affected because of Magistrate's failure to record reasons, a requirement imposed for the benefit of the accused.)

6. ('29) AIR 1929 All 321 (322): 30 Cri L Jour 1157, *Emperor v. Dukhu*. ('08) 8 Cri L Jour 445 (450, 451): 5 All L Jour 691: 1908 All W N 259, *Sultan Khan v. Emperor*.

('24) AIR 1924 Lah 90 (90): 25 Cri L Jour 174, *Emperor v. Waryam Singh*.

('66) 1866 Pun Re No. 113 Cr, p. 109, *Crown v. Mana Singh*.

Note 12

1. ('24) AIR 1924 All 564 (564): 26 Cri L Jour 336, *Palati Rai v. Emperor*.

2. ('38) AIR 1938 Lah 796 (798, 799): I L R (1939) Lah 38: 40 Cri L Jour 543, *Emperor v. Amar Singh*.

Note 13

1. ('40) AIR 1940 Nag 218 (219): 187 I. C. 203 (205): 41 Cr. L. J. 433 (437), *Horilal Mohanlal v. Emperor*.

2. ('33) AIR 1933 Lah 321 (322): 14 Lah 507: 34 Cri L Jour 469, *Emperor v. Parmanand*.

('33) AIR 1933 Lah 868 (869): 35 Cri L Jour 111, *Emperor v. Hussaina*.

('38) AIR 1938 Lah 796 (799): I L R (1939) Lah 38: 40 Cr. L. J. 543, *Emperor v. Amar Singh*.

('40) AIR 1940 Nag 218 (221): 41 Cr. L. J. 433 (437), *Horilal Mohanlal v. Emperor*.

3. ('25) AIR 1925 Rang 286 (286): 3 Rang 224: 26 Cri L Jour 1396, *Emperor v. Nga Bo Gyi*.

('22) AIR 1922 Bom 138 (141): 46 Bom 61: 22 Cr. L. J. 728, *Motilal v. Emperor*. (1900) 13 C P T. R Cr 7 (8) *Emperor v. Radhan*

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s. 164 should not apply to such cases, it is submitted that the former view is correct.

14. Effect of pardon. — Where a pardon is tendered and accepted under this section, the accused person ceases to be such from the moment the pardon is accepted and is to be treated as a witness thereafter. It is not necessary that the prosecution should be *withdrawn* in such cases.¹

A pardon tendered under this section refers not only to the offence in respect of which it is tendered, but extends to all such offences also in connection with the same matter, as the approver has *necessarily* to disclose, in making a full and true disclosure of all the circumstances relating to such offence.² In *Queen-Empress v. Ganga Charan*,³ Straight, J., observed as follows :

“While, on the one hand, the condition is ‘a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence,’ on the other, a non-compliance with it leaves him open to trial for the offence in respect of which the pardon was tendered, or any *other offence in connection with the same matter*. It must be borne in mind that, in countenancing these pardons to accomplices, the law does not invite a cramped and constrained statement by the approver; on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence, or offences, as to which he gives evidence, and when he has given his evidence, I do not think that the question of how far it is to protect him, and what portion of it should not protect him, ought to be treated in a narrow spirit.”

Where, however, the statement of the person to whom a pardon was tendered disclosed a *distinct* offence of dacoity which was committed one month prior to the offence in respect of which the pardon was tendered, it was held that the tender of pardon did not extend to such an offence.⁴ See also section 339 Note 6.

15. Forfeiture of pardon. — See Section 339.

16. Examination of approver as witness — Sub-section (2). — Sub-section (2), as it stood before the amendment of 1923, provided that the person accepting a tender of pardon should be examined as a witness “in the case,” and it was held in the undermentioned cases¹ that the words “in the case” referred both to the magisterial inquiry

Note 14

1. ('36) AIR 1936 Lah 353 (354) : 16 Lah 594 : 37 Cr. L. J. 515, *Faqir Singh v. Emperor*.
2. ('88) 11 All 79 (87), *Queen-Empress v. Ganga Charan*.
- ('21) AIR 1921 All 234 (234) : 22 Cri L Jour 699, *Shiam Sunder v. Emperor*.
3. ('88) 11 All 79 (87).
4. ('24) AIR 1924 All 220 (222) : 46 All 236 : 25 Cr.L.J.956(FB), *Sardara v. Emperor*.
[See also ('37) 38 Cri L Jour 84 (86) : 165 I. C. 795, *Jagat Singh v. Emperor*.
(Trial for such distinct offence — Accused's statement as approver and witness in prior trial is admissible.)]

Note 16

1. ('94) 1894 Pun Re No. 14 Cr, p. 44, *Mamun v. Queen-Empress*.
- ('90) 2 Weir 394 (394), *In re Kumaramdy*.
- (1900) 27 Cal 137 (139), *Queen-Empress v. Natu*.
- ('91) 1891 All W N 182 (183), *Queen-Empress v. Piary*.
- [See also ('01) 25 Bom 675 (679) : 3 Bom L R 271, *King-Emperor v. Bala* (Quere)].

and to the sessions trial and that therefore the approver ought to be examined in the sessions trial notwithstanding he did not fulfil the conditions of pardon in the magisterial inquiry. It was, however, held in other cases that if the approver should show an inclination to resile from his evidence before the committing Magistrate, the prosecution was not bound to examine him as a witness in the sessions trial as his examination before the committing Magistrate is a sufficient compliance with the provisions of sub-s.(2).² The amended section now specifically provides that such person should be examined as a witness in the Magistrate's Court *and in the subsequent trial*, if any.³ There is still a conflict of decisions whether the section makes it obligatory on the prosecution to examine the approver in the Sessions Court where in the committing Magistrate's Court he has resiled from his former position and broken the condition of his pardon. The Lahore High Court⁴ and the Sind Judicial Commissioner's Court⁵ have held that the approver must be examined in the Sessions Court even in such cases, while the opposite view has been expressed by the Calcutta High Court.⁶

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Notes 16-17

17. Evidence of an accomplice — Credibility of. — In dealing with the question as to the weight to be attached to the evidence of an accomplice, it is necessary to consider the provisions of S. 133 of the Evidence Act, as also illustration (b) to S. 114 of that Act. Section 133 of that Act provides as follows:

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (b) to section 114 runs as follows: "The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars."¹ The reasons underlying the

2. ('15) AIR 1915 Cal 667 (668, 672, 673) : 42 Cal 856 : 16 Cri L Jour 65, *Sashi Rajbanshi v. Emperor*.

('01) 24 Mad 321 (324) : 2 Weir 396, *Queen-Empress v. Ramasamy*.

[See also ('08) 8 Cri L Jour 153 (153) : 31 Mad 272, *In re Arunachellam*.]

3. ('28) AIR 1928 Lah 320 (323) : 29 Cr. L. J. 413 : 9 Lah 608, *Ram Nath v. Emperor*.

('27) AIR 1927 Cal 680 (681) : 54 Cal 539 : 28 Cri L Jour 689, *Ayub Mandal v. Emperor*. (Fact that by mistake his name is not removed from list of accused persons at the time of commitment does not disqualify him to be a witness in the Sessions Court.)

4. ('31) AIR 1931 Lah 102 (102) : 32 Cr. L. J. 1126, *Chet Singh v. Emperor*. (Even where the pardon has been withdrawn and the approver has been committed separately for trial.)

('30) AIR 1930 Lah 95 (96) : 11 Lah 230 : 31 Cri L Jour 111, *Mahla v. Emperor*. (Approver examined in the trial of some of the accused — Sessions Judge coming to the conclusion that he was untrustworthy and he not being examined in the inquiry or trial relating to the other accused — Held this was illegal.)

5. ('40) AIR 1940 Sind 114 (116, 117) : 41 Cr. L. J. 747, *Emperor v. Shahdino*. (Pardon cannot be withdrawn before approver is examined in Sessions Court.)

6. ('34) AIR 1934 Cal 636 (638, 639) : 61 Cal 399 : 35 Cr. L. J. 1479, *Nayeb Shahana v. Emperor*. (Pardon withdrawn on the approver giving evidence in the committing Magistrate's Court — Approver need not be examined in the Sessions Court.)

Note 17

1. The following cases deal with the testimony of an accomplice :

('36) AIR 1936 Pat 531 (532) : 38 Cri L Jour 72, *Hanuman Sahay v. Emperor*. (The Court, though it may presume the evidence of accomplices to be unworthy of credit is not compelled to do so.)

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- (136) 37 Cri L Jour 840 (844) : 163 Ind Cas 566 (Cal), *Bimal Krishna v. Emperor*.
 (186) 8 All 120 (138) : 1886 All W N 7, *Queen-Empress v. Imdad Khan*.
 (113) 14 Cr. L. J. 577 (586) : 36 Mad 501 : 40 Ind App 193 : 21 Ind Cas 369 (P C), *Vaithinatha Pillai v. Emperor*.
 (26) 27 Cri L Jour 918 (920) : 96 Ind Cas 262 (Lah), *Jang Singh v. Emperor*.
 (26) AIR 1926 All 705 (706) : 27 Cri L Jour 879, *Partab Singh v. Emperor*.
 (30) AIR 1930 All 740 (741) : 32 Cri L Jour 141, *Paras Ram v. Emperor*.
 (96) 1896 Rat 844 (846), *Queen-Empress v. Shidlingappa*.
 (85) 10 Bom 319 (326), *Queen-Empress v. Krishna Bhat*.
 (12) 13 Cr. L. J. 542 (543) : 15 Ind Cas 814 (Bom), *Emperor v. Chotalal*. (Degree of corroboration required depends upon facts of each case.)
 (73) 19 Suth W R Cr 43 (43), *Queen v. Luchmee Pershad*.
 (73) 20 Suth W R Cr 19 (20), *Queen v. Ramsodoy*.
 (11) 12 Cri L Jour 150 (155) : 9 Ind Cas 897 (Mad), *In re P. V. Vyasa Rao*.
 (1900) 27 Cal 925 (927) : 4 C W N 755, *Akhoy Kumar v. Jagat Chunder*. (Persons bribing for obtaining release of wrongfully confined persons are not accomplices and therefore their evidence may be accepted without corroboration.)
 (18) AIR 1918 Cal 72 (73) : 19 Cri L Jour 959, *Emperor v. Kabili Katoni*.
 (20) AIR 1920 Cal 663 (666) : 32 Cal L Jour 204 (209) : 22 Cr. L. J. 225, *Emperor v. Anant Kumar*.
 (32) AIR 1932 Cal 377 (380) : 33 Cr. L. J. 357, *Surendranath Goswami v. Emperor*.
 (66) 5 Suth W R Cr 59 (59, 60), *Queen v. Chutter Dhareesingh*.
The following cases deal with the testimony of an approver :
 (36) 37 Cri L Jour 1096 (1097) : 165 Ind Cas 144 (Oudh), *Bhabhuti v. Emperor*. (Conviction upon uncorroborated testimony of an approver cannot be sustained.)
 (12) 13 Cri L Jour 571 (572, 574) : 15 I. C. 987 (Cal), *Lalan Malik v. Emperor*. (Confession made to private person repeated before Magistrate but retracted four months later—Another accused turning approver—Held confession was sufficient to corroborate approver.)
 (67) 8 Suth W R Cr 57 (58), *Queen v. Ram Sagor*.
 (19) AIR 1919 All 327 (328) : 20 Cri L Jour 561, *Allauddin v. Emperor*. (Statement by approver not corroborated — His statement though not reliable casts doubt and accused is entitled to benefit.)
 (68) 9 Suth W R Cr 28 (28, 29), *Queen v. Nunhoo*.
 (69) 12 Suth W R Cr 5 (5, 7), *Queen v. Chirag Ali*.
 (11) 12 Cri L Jour 5 (5) : 9 Ind Cas 39 (Lah), *Hira v. Emperor*.
 (11) 12 Cri L Jour 35 (37) : 9 Ind Cas 232 (Lah), *Manna v. Emperor*.
 (12) 13 Cri L Jour 182 (182) : 13 Ind Cas 998 (Lah), *Ladkhan v. Emperor*.
 (16) AIR 1916 Lah 390 (393) : 17 Cri L Jour 107, *Waryam Singh v. Emperor*. (There should be direct and material corroboration of statement of approver who is of very bad character.)
 (16) AIR 1916 Lah 339 (340) : 17 Cri L Jour 220, *Ghulam Rasul v. Emperor*.
 (24) AIR 1924 Lah 235 (235) : 24 Cri L Jour 696, *Chaprolia v. Emperor*.
 (24) AIR 1924 Lah 481 (482) : 25 Cr. L. J. 979, *Khushi Muhammad v. Emperor*.
 (25) AIR 1925 Lah 253 (254), *Nur Muhammad v. Emperor*.
 (25) AIR 1925 Lah 397 (399) : 26 Cri L Jour 1335, *Nawab v. Crown*.
 (26) AIR 1926 Lah 439 (439) : 27 Cri L Jour 600, *Munshi v. Emperor*.
 (27) AIR 1927 Lah 581 (589) : 28 Cri L Jour 625, *Barkati v. Emperor*.
 (32) AIR 1932 Lah 557 (558) : 33 Cri L Jour 935, *Sangara Ram v. Emperor*.
 (33) AIR 1933 Lah 838 (839) : 34 Cri L Jour 1129, *Shub Dhan v. Emperor*.
 (33) AIR 1933 Lah 987 (996) : 35 Cri L Jour 654, *Amrit Lal v. Emperor*.
 (34) AIR 1934 Lah 21 (23) : 36 Cri L Jour 671, *Gujar Singh v. Emperor*. (Unconvincing and uncorroborated statement of approver is not sufficient for conviction.)
 (34) AIR 1934 Lah 346 (347) : 35 Cri L Jour 1046, *Mangal Singh v. Emperor*.
 (34) AIR 1934 Lah 583 (585) : 35 Cri L Jour 752, *Bimal Pershad v. Emperor*.
 (89) 12 Mad 196 (197) : 2 Weir 519, *Queen-Empress v. Arumuga*. (Judge should caution jury not to accept evidence of approver unless it is corroborated; omission to do so amounts to misdirection.)
 (109) 10 Cr. L. J. 567 (568) : 4 I. C. 391 (Mad), *In re Muthan Papayya*. (Corroboration must be by material facts tending to point accused as guilty person.)
 (11) 12 Cri L Jour 240 (240) : 10 Ind Cas 284 (Mad), *Nanzigadu v. Emperor*.
 (14) AIR 1914 Mad 323 (326) : 15 Cr. L. J. 417, *Narayana Ayyar v. Emperor*.
 (12) 13 Cr. L. J. 305 (313) : 35 Mad 247 : 14 I. C. 849 (SB), *Emperor v. Nilakanta*.
 (25) AIR 1925 Oudh 158 (162) : 25 Cri L Jour 1162, *Surat Bahadur v. Emperor*. (Evidence given by a spy who encourages a person to commit a crime is of no better value than that of an accomplice and cannot be accepted without corroboration.)

presumption are —

- (i) that an accomplice is likely to swear falsely in order to shift the blame on to others ;
- (ii) that he being necessarily a man of bad character, his evidence is open to suspicion ; and
- (iii) that the evidence given by an approver in the hope of pardon would necessarily be biased in favour of the prosecution.²

The utmost caution is, therefore, necessary in considering the weight to be attached to such evidence^{2a} and the presumption that an accomplice is unworthy of credit, unless corroborated in material particulars, has, therefore, become a rule of practice of almost universal application.³ It is, however, possible in *exceptional* cases and under

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- ('25) AIR 1925 Oudh 374 (375) : 27 Oudh Cas 385 : 26 Cri L Jour 1412, *Murli Brahman v. Emperor*. (Acquittal of some accused for want of corroboration of approver's evidence—Weight of evidence is not affected.)
- ('31) AIR 1931 Oudh 172 (176) : 32 Cri L Jour 860 : 6 Luck 668, *Bhuneshwari Pershad v. Emperor*. (But evidence of spies associating with accused to entrap him does not require corroboration.)
- ('34) AIR 1934 Pesh 11 (12) : 35 Cri L Jour 719, *Nizam Din v. Emperor*.
- ('09) 10 Cri L Jour 355 (356, 357) : 3 Ind Cas 681 : 5 Low Bur Rul 72 (FB), *Emperor v. Nga Po*.
- ('17) AIR 1917 Low Bur 5 (7) : 19 Cri L Jour*42, *Pan Gang v. Emperor*.
[See also ('36) AIR 1936 Cal 356 (360) : 37 Cri L Jour 753 : ILR (1937) 1 Cal 711 (FB), *Harihar Sinha v. Emperor*. (The evidence of an accomplice whether dealt with under S. 337 or discharged under S. 494 (a), or acquitted under S. 494 (b), is the evidence of an approver, and as such, open to suspicion.)]
2. ('32) AIR 1932 Oudh 11 (15) : 33 Cr. L. J. 287, *Jai Singh v. Emperor*.
- ('01) 28 Cal 339 (343) : 5 C W N 517, *Kamala Prasad v. Sital Prasad*.
- ('89) 14 Bom 115 (120), *Queen-Empress v. Maganlal*.
- ('11) 12 Cri L Jour 150 (159) : 9 Ind Cas 897 (Mad), *In re Vyasa Rao*.
- ('16) AIR 1916 Lah 32 (36) : 1917 Pun Re No. 2 Cr : 18 Cr. L. J. 29, *Barkat Ali v. Emperor*.
- ('89) 4 C P L R Cr 1 (7), *Empress v. Tantia Bhil*.
- ('66) 5 Suth W R Cr 80 (85) : Beng L R Sup Vol, 459 (FB), *In re Ellahce Buksh*.
- ('31) AIR 1931 Lah 406 (407) : 32 Cr. L. J. 1049, *Amar Nath v. Emperor*.
[See ('24) AIR 1924 Cal 701 (702) : 51 Cal 160 : 25 Cr. L. J. 1000, *Emperor v. Jamaldi Fakir*.
- ('12) 13 Cr. L. J. 305 (314) : 14 I.C.849 : 35 Mad 247, *Emperor v. Nilkanta*.
- ('27) AIR 1927 Lah 78 (79) : 28 Cr. L. J. 193, *Charan Singh v. Emperor*.]
- 2a. ('39) AIR 1939 Rang 361 (362, 363) : 41 Cr. L. J. 44, *Nga Thein Pe v. The King*.
- ('21) AIR 1921 Nag 39 (41) : 17 Nag L R 113 : 23 Cri L Jour 673, *Govinda v. Emperor*. (The Judge must nevertheless act on this evidence if he believes it.)
- ('06) 4 Cri L Jour 145 (151) : 10 Cal W N 962 : 33 Cal 1353, *Banu Singh v. Emperor*. (Evidentiary value of such evidence depends considerably upon circumstances under which it is given.)
- ('66) 6 Suth W R Cr 77 (77), *Queen v. Reaz Ali*.
- ('84) 7 All 160 (163) : 1884 All W N 314, *Queen-Empress v. Kallu*.
- ('34) AIR 1934 Oudh 90 (92) : 9 Luck 355 : 35 Cr. L. J. 397, *Mahadeo v. Emperor*.
- ('29) AIR 1929 P C 15 (18) (PC), *Macdonald v. Fred Latimer*.
- ('35) AIR 1935 Cal 473 (475) : 36 Cri L Jour 1248, *Abdul Majid v. Emperor*.
- ('33) AIR 1933 Oudh 265 (268) : 34 Cri L J 1009, *Ghirrao v. Emperor*.
- ('28) AIR 1928 Pat 630 (631) : 8 Pat 235 : 30 Cr. L. J. 137, *Rattan Dhanuk v. Emperor*.
3. ('39) AIR 1939 All 567 (571) : 40 Cr. L. J. 856 : ILR (1939) All 736, *Bhola Nath v. Emperor*.
- ('38) AIR 1938 Rang 177 (178) : 39 Cri L Jour 581 : 1938 Rang L R 190 (FB), *King v. Nga Myo*. (In cases where the evidence of an accomplice is tendered the Court should not call for proof of the presumption that he is unworthy of credit unless corroborated in material particulars.)
- ('37) AIR 1937 Cal 433 (444) : 38 Cr. L. J. 852 (SB), *Nitai Chandra v. Emperor*.
- ('37) AIR 1937 Rang 209 (210) : 38 Cri L Jour 785 : 1937 Rang L R 110, *Nga Aung Pe v. Emperor*. (The rule of practice contained in S. 114, III. (b), Evidence Act, is not a rule of law.)

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special circumstances that the Court could, notwithstanding the above rule of prudence and caution, give credit to the accomplice's testimony against the accused, even without corroboration, and in such cases S. 133 of the Evidence Act provides that a conviction is not illegal merely because it proceeds upon such uncorroborated testimony of an accomplice.⁴ But, except in such special cases, it is the duty of the

- (‘36) AIR 1936 P C 242 (246) : 37 Cri L Jour 914 (PC), *Mahadeo v. The King*.
 (‘36) 37 Cri L Jour 999 (1002) : 164 Ind Cas 779 (FB) (Cal), *Moti Lal v. Emperor*.
 (‘36) 37 Cr. L. J. 840 (843) : 62 Cal 819 : 163 I. C. 566 (Cal), *Bimal v. Emperor*.
 (‘34) AIR 1934 Cal 114 (116) : 35 Cri L Jour 551, *Shibadas Daw v. Emperor*.
 (‘32) AIR 1932 Oudh 11 (15) : 33 Cri L Jour 287, *Jai Singh v. Emperor*.
 (‘25) AIR 1925 Oudh 715 (716) : 26 Cr. L. J. 1317, *Sheo Narain Singh v. Emperor*.
 (‘27) AIR 1927 Lah 581 (589) : 28 Cri L Jour 625, *Barkati v. Emperor*.
 (‘23) 24 Cri L Jour 723 (730) : 73 Ind Cas 963 (970) (Pat), *Madan v. Emperor*.
 (Failure to raise presumption is error of law.)
 (‘14) AIR 1914 Mad 323 (326) : 15 Cri L Jour 417, *Narayana Ayyar v. Emperor*.
 (‘84) 7 All 160 (162) : 1884 All W N 314, *Queen-Empress v. Kallu*.
 (‘12) 13 Cr. L. J. 767 (768) : 17 Ind Cas 79 : 6 Sind L R 106, *Emperor v. Isardas*.
 (‘24) AIR 1924 Lah 357 (358), *Tota Singh v. Emperor*.
 (‘15) AIR 1915 Cal 73 (74) : 15 Cri L Jour 438 (438), *Munassar Ahir v. Emperor*.
 (‘25) AIR 1925 Oudh 1 (3) : 27 O. C. 40 : 25 Cr. L. J. 49, *Manna Lal v. Emperor*.
 (Impossibility of corroborative evidence does not dispense with necessity thereof.)
 (‘34) AIR 1934 Oudh 90 (92) : 9 Luck 355 : 35 Cr. L. J. 397, *Mahadeo v. Emperor*.
 (‘31) AIR 1931 Pat 105 (109, 110) : 32 Cri L Jour 383, *Kailas Missir v. Emperor*.
 (‘14) AIR 1914 Oudh 176 (181) : 15 Cr. L. J. 440, *Rustam Singh v. Emperor*.
 (‘28) AIR 1928 Pat 630 (631) : 8 Pat 235 : 30 Cr. L. J. 137, *Rattan v. Emperor*.
 (‘90) 14 Bom 331 (336), *Queen-Empress v. Chagan Dayaram*. (Omission to follow this rule of practice is not error of law.)
 (‘35) AIR 1935 All 132 (133, 134) : 36 Cr. L. J. 617, *Abdul Salam v. Emperor*.
 (‘35) AIR 1935 Cal 513 (517) : 62 Cal 238 : 36 Cri L Jour 1115 (SB), *Emperor v. Nirmal Jiban Ghose*. (Rule requiring corroboration though one of prudence has become equivalent to rule of law.)
 (‘35) 36 Cri L Jour 1202 (1203) : 157 I. C. 626 (628) (Lah), *Ata Md. v. Emperor*.
 (The rule which is one of prudence has acquired the sanctity of a rule of law.)
 (‘25) AIR 1925 Lah 268 (269) : 26 Cr. L. J. 769, *Feroze Khan v. Emperor*.
 [See (1863) 2 Weir 796 (797), *In re Palarasam*. (Though this is the general rule, conviction on basis of uncorroborated testimony of accomplice need not necessarily be set aside.)]
 4. (‘39) AIR 1939 All 567 (571) : 40 Cri L Jour 856 : ILR (1939) All 736, *Bhola Nath v. Emperor*. (The question as to whether or not the statement of the approver should be taken into consideration or should be totally rejected is one which will depend upon the circumstances of each case — No hard and fast rule can be enunciated which will govern all cases.)
 (‘38) AIR 1938 Rang 177 (178) : 39 Cri L Jour 581 : 1938 Rang L R 190 (FB), *King v. Nga Myo*. (The presumption is not a hard and fast presumption but can be displaced in the circumstances of a particular case.)
 (‘37) AIR 1937 Rang 209 (210) : 38 Cri L Jour 785 : 1937 Rang L R 110, *Nga Aung Pe v. Emperor*.
 (‘36) AIR 1936 Pat 531 (532) : 38 Cri L Jour 72, *Hanuman Sahay v. Emperor*.
 (Though the Court may presume the evidence of accomplices to be unworthy of credit, it is not compelled to do so.)
 (‘25) AIR 1925 Oudh 715 (716) : 26 Cr. L. J. 1317, *Sheo Narain Singh v. Emperor*.
 (‘87) 9 All 528 (554) : 1887 All W N 156, *Queen-Empress v. Gobardhan*.
 (‘66) 5 Suth W R Cr 80 (83, 91, 92) : Beng LR Sup Vol 459, *In re Ellahee Buksh*.
 (‘89) 14 Bom 115 (120, 121), *Queen-Empress v. Maganlal*. (Per Scott, J.)
 (‘04) 1 Cri L Jour 211 (214, 215) : 1 All L J 110, *Abdul Karim v. Emperor*.
 (‘27) AIR 1927 All 90 (91) : 49 All 181 : 27 Cr. L. J. 1369, *Balchand v. Emperor*.
 (‘25) AIR 1925 All 223 (226) : 47 All 39 : 27 Cr. L. J. 836, *Abdul Wahab v. Emperor*.
 (‘98) 1898 All W N 28 (28), *Queen-Empress v. Tipru*.
 (‘10) 11 Cri L Jour 441 (441) : 7 I. C. 185 (All), *Balkaran v. Emperor*. (Evidence must be so far above suspicion that a Court has no alternative but to accept and act upon it.)
 (‘16) AIR 1916 Bom 229 (233) : 17 Cri L Jour 256, *Govind v. Emperor*.
 (‘09) 10 Cr. L. J. 433 (434) : 3 I. C. 963 (Bom), *Emperor v. Lallubhai Pranubhai*.

Court to require corroboration of the evidence in material particulars before basing a conviction thereon,⁵ and it is also the duty of the Judge to warn the jury of the danger of convicting an accused person merely on the strength of the accomplice's evidence.⁶

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- (06) 3 Cr.L.J. 452 (455) : 33 Cal 649 : 10 C W N 669, *Deonandan v. Emperor*.
 ('29) AIR 1929 Cal 822 (824) : 31 Cr. L. J. 809, *Emperor v. Mathews*.
 ('73) 19 Suth W R Cr 48 (48), *Queen v. Koa*.
 ('71) 15 Suth W R Cr 37 (38) : 6 Beng LR App 108, *Queen v. Mahima Chandra Das*.
 ('70) 13 Suth W R Cr 24 (25), *In the matter of Rojoni Kant Bhoomick*. (Approver not open to same charge as accused—Uncorroborated testimony of the former can be accepted.)
 ('66) 6 Suth W R Cr 91 (91), *Queen v. Ashruff Sheik*.
 ('66) 5 Suth W R Cr 11 (12), *Queen v. Godai Raout*.
 ('31) AIR 1931 Lah 178 (179) : 32 Cr. L. J. 684, *Sher Jang v. Emperor*.
 ('17) AIR 1917 Lah 323(327):1917 P.R.No.9Cr:18 Cr.L.J.536, *Ghulam v. Emperor*.
 ('11) 12 Cr. L. J. 170 (174) : 9 I. C. 978 (Mad), *In re Talari Narayanaswami*.
 ('11) 12 Cr. L. J. 150 (159) : 9 I. C. 897 (Mad), *In re Vyasa Rao*.
 ('04) 1 Cr. L. J. 641 (656) : 27 Mad 271 : 2 Weir 203 : 14 M L J 226, *Ramaswamy Goundan v. Emperor*.
 ('78) 1 Mad 394 (395) : 2 Weir 799, *Reg. v. Ramasamy Padayachi*.
 ('11) 12 Cri L Jour 132 (137) : 6 Low Bur Rul 4 : 9 Ind Cas 778, *Nga Po Chit v. Emperor*. (No general rule can be laid down as to when an accomplice's uncorroborated evidence should be accepted.)
 ('21) AIR 1921 Nag 39(41):17 N L R 113:23 Cr. L. J. 673, *Govinda v. Emperor*. (Uncorroborated testimony of an accomplice must be acted upon if believed in.)
 ('32) AIR 1932 Oudh 11 (15) : 33 Cr. L. J. 287, *Jaisingh v. Emperor*.
 ('31) AIR 1931 Pat 105 (109, 110) : 32 Cr. L. J. 383, *Kailash Missir v. Emperor*.
 ('33) AIR 1933 Pat 500 (502, 503), *Emperor v. Wajid Sheikh*.
 ('15) AIR 1915 Lah 16 (21, 50) : 16 Cr. L. J. 354 : 1915 Pun Re No. 17 Cr, *Balmokand v. Emperor*.
 [See also ('07) 29 All 434 (440) : 5 Cri L Jour 360 : 4 A L J 310: 1907 A W N 140, *Emperor v. Kecheri*.
 ('16) AIR 1916 Lah 32 (35) : 18 Cri L Jour 29 : 1917 Pun Re No. 2 Cr, *Barkat Ali v. Emperor*. (S. 133, Evidence Act, contains the rule of law and S. 114, Illus. (b) of the same Act is merely a rule of guidance to assist Courts.)
 ('30) 1930 Mad W N 169 (171, 172), *Kuppuswamy Iyer v. Emperor*.]
 5. ('35) AIR 1935 Oudh 1 (3) : 10 Luck 281 : 36 Cr. L. J. 166, *Turab v. Emperor*. (The evidence of an accessory after murder is virtually that of an accomplice.)
 ('32) AIR 1932 Cal 295 (296) : 33 Cri L Jour 477, *Golam Asphia v. Emperor*. (An accomplice includes one who poses himself as an accomplice and his evidence requires corroboration.)
 ('32) AIR 1932 Oudh 317 (319) : 7 Luck 511 : 33 Cr L. J. 920, *Emperor v. Maqbool Ahmad Khan*.
 ('19) AIR 1919 Bom 164 (166) : 43 Bom 739 : 20 Cr. L. J. 497, *Emperor v. Sabit Khan*. (Case of a confession of co-accused.)
 ('98) 2 C W N 749 (750), *Manki Tewari v. Amir Hossein*. (Confession of co-accused if proved, is evidence of the very weakest kind and if uncorroborated is not sufficient to warrant a conviction.)
 ('12) 13 Cri L Jour 305 (315) : 14 I C 849 : 35 Mad 247, *Emperor v. Nilakanta*.
 ('29) AIR 1929 Oudh 321 (326) : 30 Cri L Jour 922, *Lale v. Emperor*.
 ('31) AIR 1931 Cal 697 (702) : 33 Cri L Jour 19 (SB), *Ambica Charan v. Emperor*. (The Court's duty is not merely to record a conviction that is not illegal — The conviction should be properly based.)
 ('31) AIR 1931 Lah 408 (410) : 32 Cri L Jour 818, *Indar Datt v. Emperor*.
 ('29) AIR 1929 Nag 233 (234) : 30 Cri L Jour 333, *Musa v. Emperor*.
 ('27) AIR 1927 Oudh 369 (378):2 Luck 631:29 Cr.L.J. 129, *Ram Parsad v. Emperor*.
 ('24) AIR 1924 Rang 173 (174):1 Rang 609:25 Cr.L.J. 381, *Maung Lay v. Emperor*.
 ('25) AIR 1925 Sind 105 (108):19 SLR 183 : 25 Cr.L.J. 1057, *Faizulla v. Emperor*.
 6. ('36) 37 Cr.L.J.999(1002,1003) : 164 I.C. 779 (FB)(Cal), *Moti Lal v. Emperor*.
 ('34) AIR 1934 Cal 114 (116) : 35 Cr.L.J. 551, *Shibadas Daw v. Emperor*. (Evidence of accomplice—Judge sitting without jury must treat himself as jury and apply same rules as in trials with jury.)
 ('32) AIR 1932 Cal 295 (296) : 33 Cr L Jour 477, *Golam Asphia v. Emperor*.
 (1925) 133 L T 736 (738): 89 J P 175 : 41 T L R 635: 28 Cox C C 47, *Rex v. Beebe*.
 ('12) 13 Cri L Jour 305 (314) : 14 I. C. 849 : 35 Mad 247, *Emperor v. Nilakanta*.

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It is not necessary, however, that an accomplice should be corroborated as regards every portion of his statement and in all its details.⁷ In determining the weight to be attached to such evidence and the amount of corroboration required in each particular case, the Court must exercise careful discrimination and consider all the surrounding circumstances including the character and antecedents of the accomplice, the extent of his complicity in the crime and the circumstances under which his evidence is tendered.⁸ The evidence in

- (189) 1889 Rat 466 (466) *Queen-Empress v. Rama*.
 (196) 1896 Rat 848 (848, 849), *Queen-Empress v. Dhondi*.
 (168) 10 Suth W R Cr 17 (17), *Queen v. Bykunt Nath*.
 (24) AIR 1924 Cal 701 (702) : 51 Cal 160 : 25 Cr.L.J. 1000, *Emperor v. Jamaldi*.
 (86) 2 Weir 742 (744), *In re Alagappan Bali*.
 (168) 4 Mad H C R App vii (vii, viii).
 (28) AIR 1928 Oudh 207 (208) : 29 Cr. L. J. 311, *Mani Ram v. Emperor*.
 (28) AIR 1928 Pat 630 (631) : 8 Pat 235 : 30 Cr.L.J. 137, *Rattan v. Emperor*.
 7. (39) AIR 1939 All 567 (571) : 40 Cr.L.J. 856:ILR(1939)All 736, *Bhola Nath v. Emperor*. (Mere fact that an approver makes a wrong statement on a particular point will not justify the total rejection of his evidence when in other respects his evidence is trustworthy and fully corroborated.)
 (1884) 15 Cox C C 291 (318), *Reg. v. Thomas Ghatalghar*.
 (13) 14 Cri L Jour 225 (229) : 19 Ind Cas 321 (Bom), *Emperor v. Kuberappa*.
 (25) AIR 1925 Cal 872 (874):52 Cal 595 : 26 Cr.L.J.1037, *Ledu Molla v. Emperor*.
 (69) 11 Suth W R Cr 21 (21), *Queen v. Kalla Chand*.
 (12) 13 Cri L Jour 305 (315) : 14 I. C. 849 : 35 Mad 247, *Emperor v. Nilakanta*.
 (92-96) 1 Upp Bur Rul 148 (152), *Saya Kye v. Queen-Empress*.
 (86) 1886 All W N 65 (66), *Empress v. Kure*.
 8. (29) AIR 1929 Cal 822 (824) : 31 Cri L Jour 809, *Emperor v. Mathews*.
 (29) AIR 1929 Lah 850 (854) : 31 Cri L Jour 517, *Hakam Singh v. Emperor*.
 (33) AIR 1932 Pat 96 (99) : 34 Cri L Jour 421, *Raghunath Panday v. Emperor*.
 (87) 9 All 528 (554) : 1887 A W N 156, *Queen-Empress v. Gobardhan*.
 (01) 26 Bom 193 (197) : 3 Bom L R 694, *Emperor v. Malhar Martand*.
 (33) AIR 1933 Bom 24 (25) : 34 Cri L Jour 136, *Allisab Rajesab v. Emperor*. (A person who has been convicted and sentenced on his own plea continues to be an accomplice and his evidence should be corroborated.)
 (13) 14 Cri L Jour 225 (227) : 19 Ind Cas 321 (Bom), *Emperor v. Kuberappa*.
 (29) AIR 1929 Bom 296 (302) : 53 Bom 479 : 31 Cri L Jour 65, *Emperor v. C. E. Ring*. (The testimony of accomplices, who are victimised by police-officer into offering them illegal gratification or have not willingly done so, requires a much slighter degree of corroboration.)
 (79) 4 Cal 483 (490, 496) : 3 C L R 270 (FB), *Empress v. Ashootosh Chukerbuttery*.
 (1900) 27 Cal 144 (155), *Queen-Empress v. Deodhar Singh*.
 (06) 3 Cri L Jour 452 (455) : 33 Cal 649 : 10 C W N 669, *Deonandan v. Emperor*.
 (33) AIR 1933 Cal 148 (149) : 34 Cr. L. J. 675, *Sudan Chandra Bag v. Emperor*. (Co-accused against whom charge is withdrawn unconditionally is more reliable witness than accomplice under conditional pardon.)
 (22) AIR 1922 Lah 1 (22) : 3 Lah 144 : 23 Cr. L. J. 513, *Mahant Narain v. Emperor*.
 (23) AIR 1923 Lah 345 (346) : 24 Cri L Jour 618, *Jehana v. Emperor*. (One who deposes that he only helped the accused in disposing of the body of the deceased after he was killed by the accused is no accomplice.)
 (16) AIR 1916 Lah 380 (383) : 17 Cri L Jour 97, *Bachinta v. Emperor*. (Question of value to be attached to accomplice's statement must be decided upon particular circumstances of each case.)
 (23) AIR 1923 Lah 391 (392) : 25 Cr. L. J. 264, *Nawab v. Crown*. (When a person sees a murder committed but gives no information thereof, his evidence must be considered as no better than that of an accomplice.)
 (21) AIR 1921 Lah 267 (269) : 21 Cri L Jour 507, *Sunder Singh v. Emperor*. (Un corroborated statement of approver taken at the end of trial is valueless.)
 (25) AIR 1925 Lah 432 (434) : 6 Lah 183 : 26 Cri L Jour 1238, *Bahawala v. The Crown*. (Witness accused's paramour and assisting him to put murdered man on bed and covering him with chadar—Other circumstances—Corroboration of evidence was held essential.)
 (94) 1894 Pun Re No. 14 Cr, p. 42 (45), *Maman v. Queen-Empress*.

corroboration should be satisfactory and reliable and should be derived from independent and unimpeachable sources or circumstances.⁹ It

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- { '28 } AIR 1928 Lah 30 (32) : 28 Cr L Jour 564, *Wazir Chand v. Emperor*. (It is very difficult to vary standard of corroborative proof required in case of various approvers. Tender age is no ground for applying lenient standard.)
- { '29 } AIR 1929 Lah 540 (542) : 31 Cr L Jour 50, *Hayatu v. Emperor*. (Witnesses who are accessories after the fact are in the same position as accomplices and their evidence requires corroboration.)
- { '31 } AIR 1931 Lah 178 (179) : 32 Cr. L. J. 684, *Sher Jang v. Emperor*. (Extent of corroboration varies with circumstances of each case.)
- { '32 } AIR 1932 Lah 73 (75, 80) : 32 Cr.L.J. 1036, *Nanak Chand v. Emperor*. (Do.)
- { '33 } AIR 1933 Lah 871 (875) : 35 Cr L Jour 137, *Emperor v. Rai Singh Narain Singh*. (Where approver's evidence is false as against one accused it should not be accepted against other accused.)
- { '03 } 26 Mad 1 (8) : 2 Weir 521, *Emperor v. Edward William Smither*. (Witnesses who took no part in the transaction but merely witnessed it are not 'accomplices'.)
- { '12 } 13 Cr. L. J. 305 (314, 315) : 35 Mad 247 : 14 I. C. 849, *Emperor v. Nilakanta*. (Oral testimony of independent witnesses is not necessary to corroborate accomplice's evidence.)
- { '13 } 14 Cr. L. J. 207 (207) : 19 Ind Cas 207 (Mad), *Killikyattra Bomma v. Emperor*.
- { '29 } AIR 1929 Nag 215 (217) : 30 Cr.L.J. 311, *Muhammad Usuf Khan v. Emperor*.
- { '30 } AIR 1930 Nag 97 (104) : 31 Cr L Jour 153, *Daulat v. Emperor*.
- { '32 } AIR 1932 Oudh 11 (15, 16) : 33 Cr.L.J. 287, *Jai Singh v. Emperor*. (Evidence of the accomplice after the fact requires corroboration.)
- { '26 } AIR 1926 Pat 232 (235) : 5 Pat 63 : 27 Cr.L.J. 484, *Jagwa Dhanuk v. Emperor*. (Accomplice should be corroborated in material points as to the part played by his accomplices.)
- { '28 } AIR 1928 Pat 630 (631) : 8 Pat 235 : 30 Cr L Jour 137, *Rattan Dhanuk v. Emperor*. (Corroboration is required with respect to each individual accused.)
- { '97-1901 } 1 Upp Bur Rul 173 (174), *Queen-Empress v. Nga Tun Baw*.
- { '24 } AIR 1924 Rang 173 (174) : 1 Rang 609 : 25 Cr.L.J. 381, *Maung Lay v. Emperor*.
- { '31 } AIR 1931 Rang 235 (242) : 9 Rang 404 : 33 Cr L Jour 205 (SB), *Aung Hla v. Emperor*.
- { '13 } 14 Cr. L. J. 262 (265) : 6 Sind L R 195 : 19 I. C. 534, *Ramchand v. Emperor*.
- { '14 } AIR 1914 Sind 117 (118) : 8 S L R 203 : 16 Cr.L.J. 233, *Punkhu v. Emperor*.
- { '25 } AIR 1925 Sind 295 (295) : 19 S L R 111 : 26 Cr.L.J. 1028, *Emperor v. Sunderdas*.
- { '28 } 29 Cr L Jour 209 (210) : 107 Ind Cas 97 (Lah), *Naraina v. Emperor*.
- { '78 } 4 Cal 483 (490) : 3 Cal L R 270 (FB), *In re Ashutosh Chuckerbutty*. (Confession of co-accused—Extent of corroboration required depends on the circumstances of each particular case.)
- [See also ('96) 23 Cal 361 (366), *Alimuddin v. Queen-Empress*.
- { '75 } 24 Suth W R Cr 55 (56), *Queen v. Chando Chandalinnee*. (Evidence of accomplices after the fact requires corroboration.)
- { '94 } 21 Cal 328 (336), *Ishan Chandra v. Queen-Empress*. (Do.)
- { '12 } 13 Cr L Jour 571 (574) : 15 I. C. 987 (Cal), *Lalan Malik v. Emperor*. (In all cases depending on evidence of an informer, the degree of support that the evidence requires must depend on the amount of credit in each particular case to be attached to informer.))
9. { '36 } AIR 1936 Lah 400 (401) : 17 Lah 518 : 37 Cr. L. J. 597, *Kartar Singh v. Emperor*. (Motive is not corroborative evidence.)
- { '04 } 1 Cr. L. J. 568 (571) : 6 Bom L R 481, *Empress v. Baji Krishna*.
- { '73 } 19 Suth W R Cr 16 (21) : 10 Beng L R App 455n, *Queen v. Mohesh Biswas*.
- { '10 } 11 Cr. L. J. 554 (555) : 13 Oudh Cas 243 : 7 I. C. 1012, *Hira Lal v. Emperor*.
- { '07 } 5 Cr. L. J. 437 (437) (Lah), *Kaloo v. Crown*.
- { '11 } 13 Cr.L.J. 424 (425, 426) : 14 Ind Cas 968 : 1 Upp Bur Rul 3rd Qr. 96, *Ah Tat v. Emperor*. (Hearsay evidence is inadmissible even to corroborate evidence of accomplice.)
- { '23 } AIR 1923 Lah 683 (683) : 25 Cr. L. J. 495, *Saudagar Singh v. Emperor*.
- { '78 } 4 Cal 483 (490, 494) : 3 C L R 270 (FB), *Empress v. Ashutosh Chuckerbutty*. (Such evidence should if believed be sufficient to base a conviction.)
- { '12 } 13 Cr. L. J. 283 (284) : 14 Ind Cas 667 (Cal), *Tufani Sheikh v. Emperor*. (Evidence of motive can never by itself be sufficient to corroborate any statement requiring corroboration.)
- { '25 } AIR 1925 Lah 605 (608) : 6 Lah 415 : 27 Cr. L. J. 514, *Pratab Singh v. Emperor*. (But confession of accused himself is corroboration.)

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has generally been held that evidence in corroboration must not merely consist of statements or evidence of other accomplices¹⁰ or confessions of co-accused.¹¹ But it would appear that this is only a general rule

(‘29) AIR 1929 Lah 587 (588): 31 Cr. L. J. 91, *Mehr Singh v. Emperor*. (Evidence of the son of the accomplice who repeated what he had been tutored to say is no corroboration.)

(‘32) AIR 1932 Lah 298 (300): 33 Cri L Jour 251, *Surjan Singh v. Emperor*. (Approver’s evidence may be corroborated by accused’s own confession.)

(‘25) AIR 1925 Lah 526 (527): 26 Cr. L. J. 875, *Jit Singh v. Emperor*. (Motive is not corroborative evidence.)

(‘25) AIR 1925 Oudh 295 (298): 25 Cr. L. J. 391, *Sheo Ambar v. Emperor*. (Do.)

(‘32) AIR 1932 Sind 100 (103): 33 Cr. L. J. 324, *Khairatiram v. Emperor*.

(‘26) AIR 1926 Cal 374 (376): 26 Cr. L. J. 1146, *In re Ibrahim*. (The evidence of a witness who supports approver is a corroboration even if the evidence was known to the police before the approver was examined by them.)

(‘31) AIR 1931 Pat 105 (119): 32 Cr. L. J. 383, *Kailash Missir v. Emperor*. (Suspicion however grave never amounts to legal corroboration.)

(‘21) AIR 1921 Pat 406 (407), *Dhannu Beldar v. Emperor*. (Motive or animosity is no corroborative evidence.)

(‘34) AIR 1934 Lah 23 (24): 35 Cr. L. J. 352, *Jiwan Singh v. Emperor*. (Motive is no corroborative evidence.)

[See also (‘12) 13 Cri L Jour 571 (574): 15 Ind Cas 987 (Cal), *Lalan Mallik v. Emperor*. (In cases depending on evidence of an informer, degree of support that the evidence requires must depend on amount of credit to be attached to informer.)]

10. (‘37) AIR 1937 Cal 433 (445): 38 Cr. L. J. 852 (SB), *Nitai Chandra v. Emperor*.

(‘36) 37 Cri L Jour 1096 (1098): 165 I C 144 (Oudh), *Bhabhuti v. Emperor*.

(‘36) 37 Cri L Jour 840 (843): 163 I. C. 566 (Cal), *Bimal Krishna v. Emperor*.

(‘36) AIR 1936 P C 242 (246): 37 Cri L Jour 914 (PC), *Mahadeo v. The King*.

(‘85) 8 All 306 (312): 1885 A W N 311, *Queen-Empress v. Ram Saran*.

(‘76) 25 Suth W R Cr 43 (43), *Queen v. Baijoo Chowdhry*.

(‘33) AIR 1933 Cal 6 (8): 34 Cri L Jour 23, *Kashem Ali v. Emperor*.

(‘28) AIR 1928 Cal 745 (747): 30 Cri L Jour 586, *Latafat Hossain v. Emperor*.

(‘34) AIR 1934 Cal 678 (680): 35 Cri L Jour 1357 (SB), *Hafizuddin v. Emperor*.

(‘04) 1 Cri L Jour 211 (214, 215): 1 All L Jour 110, *Abdul Karim v. Emperor*.

(‘19) AIR 1919 Lah 168 (169): 1919 Pun Re No. 20 Cr: 20 Cri L Jour 191, *Shahra v. Emperor*.

(‘29) AIR 1929 Lah 850 (853): 31 Cri L Jour 517, *Hakam Singh v. Emperor*.

(‘33) AIR 1933 Lah 946 (946): 35 Cri L Jour 79, *Parbhu v. Emperor*. (Approvers having ample opportunity to consult each other before becoming approvers—They should not be considered as corroborating each other.)

(‘34) AIR 1934 Lah 171 (172, 173): 36 Cr. L. J. 491, *Ali Muhammad v. Emperor*.

(‘29) AIR 1929 Nag 215 (218, 219): 30 Cr. L. J. 311, *Ma. Usuf Khan v. Emperor*.

(‘97-01) 1 Upp Bur Rul 224 (226), *Queen-Empress v. Nga Ya Po*. (Though evidence of approver may in certain circumstances be sufficient to corroborate evidence of another approver, still it must be regarded with suspicion.)

[See also (‘33) AIR 1933 Rang 116 (117): 34 Cr. L. J. 929, *Nga Aung Pa v. Emperor*.]

[But see (‘35) AIR 1935 Rang 491 (494): 37 Cri L Jour 280, *Maung Tha Ka Do v. Emperor*. (Evidence of the accomplice can be used for the purpose of corroborating the evidence of the approvers.)]

11. (‘33) AIR 1933 All 31 (36): 55 All 91: 34 Cr. L. J. 489, *Nazir v. Emperor*.

(‘13) 14 Cr. L. J. 112 (113): 18 I.C. 672 (All), *Debi Dayal v. Emperor*. (Retracted confessions do not constitute corroboration of high value though they may be taken into consideration against co-accused.)

(‘95) 1895 Rat 750 (752), *Queen-Empress v. Bhagya*.

(‘76) 1 Bom 475 (476), *Reg. v. Budhu Nanku*.

(‘84) 10 Cal 970 (974), *Queen-Empress v. Bepin Biswas*.

(‘74) 21 Suth W R Cr 69 (71), *Queen v. Sadhu Mundul*.

(‘73) 19 Suth W R Cr 68 (69), *Queen v. Uddhan Bind*.

(‘18) AIR 1918 Lah 358 (359): 19 Cri L Jour 439, *Gurdit Singh v. Emperor*.

(‘21) AIR 1921 Lah 215 (215, 216): 23 Cri L Jour 158, *Lala v. Emperor*.

(‘22) AIR 1922 Lah 1 (23): 3 Lah 144: 23 Cr. L. J. 513, *Narain v. Emperor*.

(‘23) AIR 1923 Lah 76 (78): 23 Cri L Jour 597, *Ahmad Nur v. Emperor*.

(‘31) AIR 1931 Lah 408 (414): 32 Cri L Jour 818, *Indar Datt v. Emperor*.

(‘32) AIR 1932 Lah 298 (300): 33 Cri L Jour 251, *Surjan Singh v. Emperor*.

and it cannot be affirmed that in no circumstances can the evidence of one accomplice be used to corroborate that of another.¹² In this connexion, the following observations of a Full Bench of the Rangoon High Court^{12a} may be quoted :

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"From a consideration of all the matters to be dealt with it is apparent : First : Provided it has been established by extraneous evidence or matters appearing on the record that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the *prima facie* presumption of the individual unworthiness of credit of their statements, and, if this be the case, a conviction may legitimately be recorded upon their statements alone, if the Court is convinced of their truth. The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused where the presumption of their unreliability has, in the special circumstances, been rebutted. Secondly : That evidence from a source which is not *prima facie* unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy of credit. Thirdly : That corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate. But it may consist of extraneous proof of a fact relating to that very person's prior conduct."

It is not enough if the corroborative evidence is of a vague or general nature and relates merely to the circumstances of the occurrence or to the details of the crime.¹³ It should refer and relate distinctly to the complicity of the accused in such offence and also to the identity of each of the accused.¹⁴

(186) 2 Weir 742 (744), *In re Alagappan*.

(1902) 25 Mad 143 (148) : 2 Weir 800, *King-Emperor v. Mohiuddin Saheb*.

(1925) AIR 1925 Nag 78 (80) : 25 Cri L Jour 1067, *Sheroo v. Emperor*.

(1924) AIR 1924 Oudh 369 (371) : 25 Cri L Jour 1207, *Parmeshwar v. Emperor*.

(1933) AIR 1933 Oudh 355(360) : 9 Luck 22 : 35 Cr.L.J. 273, *Beni Madho v. Emperor*.

(1914) AIR 1914 Bom 305(311) : 14 Cr.L.J. 625 : 38 Bom 156, *Gangappa v. Emperor*.

[See however (1907) 5 Cr. L. J. 360 (375) : 1907 All W N 140 : 29 All 434 : 4 A L J 310, *Kehri v. Emperor*. (Conviction of accused even on unsupported evidence of confession of co-accused would not be illegal.)]

[But see (1937) AIR 1937 Rang 116 (116) : 38 Cri L Jour 705, *Nga Tun Shwe v. Emperor*. (Approver can be corroborated by the confession of a co-accused jointly tried with the accused for the same offence even where both the approver and the confessor retract their statements — See also AIR 1938 Rang 177 (SB).)]

12. (1923) AIR 1923 Lah 666 (667) : 25 Cri L Jour 520, *Darya Singh v. Emperor*.

(1933) AIR 1933 Rang 57 (58) : 11 Rang 4 : 34 Cri L Jour 286, *Nga Nyein v. Emperor*. (Only the care to be exercised in such cases should be great.)

(197-01) 1 Upp Bur Rul 173 (174), *Queen-Empress v. Nga Tun Baw*.

(1935) AIR 1935 Cal 513 (517) : 62 Cal 238 : 36 Cri L Jour 1115 (SB), *Emperor v. Nirmal Jiban Ghose*.

12a. (1938) AIR 1938 Rang 177 (179) : 39 Cri L Jour 581 : 1938 Rang LR 190(FB), *King v. Nga Myo*. (Overruling dicta to the contrary in AIR 1931 Rang 235 and AIR 1937 Rang 209.)

13. See (1927) AIR 1927 Lah 581 (590) : 28 Cri L Jour 625, *Barkati v. Emperor*. (1917) AIR 1917 Lah 317 (319) : 18 Cri L Jour 696, *Nand Singh v. Emperor*.

14. (1939) AIR 1939 Mad 469 (469, 470) : 40 Cri L Jour 801, *In re Subbanna*.

(1937) AIR 1937 Cal 433 (437, 445) : 38 Cr.L.J. 852(SB), *Nitai Chandra v. Emperor*.

(1936) AIR 1936 P C 242 (246) : 37 Cri L Jour 914 (PC), *Mahadeo v. The King*. ((1916) 2 K B 658, *Rex v. Baskerville*, followed.)

(1936) AIR 1936 Lah 400 (401) : 17 Lah 518 : 37 Cr. L. J. 597, *Kartar v. Emperor*.

(1936) 37 Cri L Jour 840 (843) : 163 I. C. 566 (Cal), *Bimal Krishna v. Emperor*.

(1934) AIR 1934 Cal 114 (115) : 35 Cri L Jour 551, *Shibadas Daw v. Emperor*.

(1925) AIR 1925 Oudh 715 (716) : 26 Cr.L.J. 1317, *Sheo Narain Singh v. Emperor*.

(1966) 5 Suth W R Cr 80 (84) : Beng L R Sup Vol 459, *In re Elahee Buksh*.

(1916) 2 K B 658 (665) : 86 L J K B 28 : 115 L T 453 : 80 J P 446 : 25 Cox C C 524 : 60 S J 696, *Rex v. Baskerville*. (Referred to in AIR 1931 Mad 689.)

(1849) 3 Cox C C 526 (531), *Reg. v. Mullins*. (Referred to in 8 All 509.)

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- ('33) AIR 1933 All 31, (35, 36) : 55 All 91 : 34 Cri L Jour 489, *Nazir v. Emperor*.
 ('85) 8 All 306 (310, 313) : 1885 All W N 311, *Queen-Empress v. Ram Saran*.
 ((1834) 6 C & P 595, *R. v. Webb*, Relied on.)
 ('35) AIR 1935 All 162 (167) : 36 Cri L Jour 684, *Bacha Babu v. Emperor*.
 ('76) 1876 Rat 102 (105), *Reg. v. Chatur*. (There must be corroborative evidence as to *corpus delicti* also.)
 ('96) 1896 Rat 840 (840), *Queen-Empress v. Dhondi Raoji*.
 ('76) 1 Bom 475 (476), *Reg. v. Budhu Nanku*.
 ('85) 10 Bom 319 (327), *Queen-Empress v. Krishnabhat*.
 ('04) 1 Cri L Jour 568 (572, 575) : 6 Bom L R 481, *Emperor v. Baji Krishna*.
 ('06) 3 Cri L Jour 33 (38) : 7 Bom L R 969, *Emperor v. Srinivas*.
 ('32) AIR 1932 Bom 286 (288) : 56 Bom 172 : 33 Cr. L. J. 396, *Ganu v. Emperor*.
 (1865) 3 Suth W R Cr 8 (8), *Queen v. Issen Mundle*.
 ('66) 5 Suth W R Cr 18 (18), *Queen v. Dwarka*.
 ('67) 8 Suth W R Cr 19 (23), *Queen v. Nawab Jan*.
 ('68) 10 Suth W R Cr 17 (17, 18), *Queen v. Bykunt Nath Banerjee*.
 ('73) 19 Suth W R Cr 16 (21) : 10 Beng L R 455n, *Queen v. Mohesh Biswas*.
 ('74) 21 Suth W R Cr 69 (71), *Queen v. Sadhu Mundle*.
 ('02) 29 Cal 782 (787) : 6 C W N 553, *Jamiruddi Masalli v. Emperor*.
 ('11) 12 Cri L Jour 286 (289) : 38 Cal 559 : 10 I. C. 582, *Emperor v. Noni Gopal*.
 ('21) 22 Cri L Jour 676 (677) : 63 Ind Cas 612 (613) (Lah), *Sardara v. Emperor*.
 ('30) AIR 1930 Cal 430 (432) : 31 Cri L Jour 1115, *Monohar Mandal v. Emperor*.
 ('31) AIR 1931 Cal 697 (702) : 33 Cr. L. J. 19 (SB), *Ambica Charan Roy v. Emperor*.
 ('02) 1902 Pun Re No. 5 Cr, p. 14 (16) : 1902 Pun L R No. 57, *Wazir Khan v. Emperor*.
 ('16) AIR 1916 Lah 297 (297) : 17 Cri L Jour 156, *Nikka v. Crown*.
 ('17) AIR 1917 Lah 317 (319) : 18 Cri L Jour 696, *Nand Singh v. Emperor*.
 ('20) AIR 1920 Lah 487 (488) : 23 Cri L Jour 476, *Fatta v. Emperor*.
 ('23) AIR 1923 Lah 385 (386) : 25 Cri L Jour 252, *Suleman v. Emperor*.
 ('24) AIR 1924 Lah 727 (728) : 25 Cri L Jour 1347, *Hazara Singh v. Emperor*.
 ('27) AIR 1927 Lah 10 (10) : 27 Cri L Jour 1294, *Kattu v. Emperor*.
 ('27) AIR 1927 Lah 581 (585, 590) : 28 Cri L Jour 625, *Barkati v. Emperor*.
 ('29) AIR 1929 Lah 680 (682, 684) : 30 Cri L Jour 292, *Nathu v. Emperor*.
 ('29) AIR 1929 Lah 850 (854) : 31 Cri L Jour 517, *Hakam Singh v. Emperor*.
 ('31) AIR 1931 Lah 406 (407) : 32 Cri L Jour 1049, *Amar Nath v. Emperor*.
 ('32) AIR 1932 Lah 73 (75, 80) : 32 Cri L Jour 1036, *Nanakchand v. Emperor*.
 ('32) AIR 1932 Lah 180 (181) : 33 Cri L Jour 414, *Gehna v. Emperor*.
 ('32) AIR 1932 Lah 204 (207) : 33 Cri L Jour 242, *Randir Singh v. Emperor*.
 ('33) AIR 1933 Lah 294 (296) : 35 Cri L Jour 641, *Dalip Singh v. Emperor*.
 ('35) AIR 1935 All 132 (133) : 36 Cri L Jour 617, *Abdul Salam v. Emperor*.
 ('17) AIR 1917 Lah 311 (317) : 18 Cri L Jour 852, *Sahai Singh v. Emperor*.
 (Accused found in company of approver shortly after commission of crime is strong indication of fellowship in crime.)
 ('12) 13 Cri L Jour 305 (346) : 35 Mad 247 : 14 I. C. 849, *Emperor v. Nilkanta*.
 ('29) 1929 Mad W N 698 (706, 707), *Abboi Naidu v. Emperor*.
 ('29) 1929 Mad W N 794 (795), *Sundaram v. Emperor*.
 ('31) AIR 1931 Mad 689 (691, 694, 696) : 54 Mad 931 : 33 Cri L Jour 51, *Venkatasubba Reddi v. Emperor*.
 ('29) AIR 1929 Nag 222 (223, 224) : 30 Cri L Jour 331, *Lodya Mahar v. Emperor*.
 ('30) AIR 1930 Nag 97 (99, 100) : 31 Cri L Jour 153, *Daulat v. Emperor*.
 ('10) 11 Cri L Jour 71 (75) : 4 I. C. 884 : 12 Oudh Cas 418, *Hubba v. Emperor*.
 ('11) 12 Cri L Jour 537 (539) : 12 Ind Cas 513 (Oudh), *Makbul Ahmad v. Emperor*.
 ('29) AIR 1929 Oudh 321 (326) : 30 Cri L Jour 922, *Lale v. Emperor*.
 ('30) AIR 1930 Oudh 455 (459) : 32 Cri L Jour 162, *Bachchu v. Emperor*.
 ('32) AIR 1932 Oudh 11 (16) : 33 Cri L Jour 287, *Jai Singh v. Emperor*.
 ('32) AIR 1932 Oudh 317 (321) : 7 Luck 511 : 33 Cri L Jour 920, *Emperor v. Maqbool Ahmad Khan*.
 ('28) AIR 1928 Pat 630 (631) : 8 Pat 235 : 30 Cr. L. J. 137, *Rattan Dhanuk v. Emperor*.
 ('30) AIR 1930 Pat 164 (166) : 32 Cri L Jour 5, *Sheo Barhi v. Emperor*.
 ('33) AIR 1933 Pat 96 (99) : 34 Cri L Jour 421, *Raghunath Pandey v. Emperor*.
 ('33) AIR 1933 Pat 112 (113) : 34 Cri L Jour 476, *Dhaju Mandal v. Emperor*.
 ('72-92) 1872-1892 Low Bur Rul 322 (322), *Nga Shwe v. Queen-Empress*.
 ('28) 30 Cr. L. J. 57 (61) : 113 I. C. 73 (Cal), *Kailash Chandra Rishi v. Emperor*.
 ('25) AIR 1925 Lah 600 (601, 602) : 26 Cri L Jour 1141, *Emperor v. Ram Karan*.
 (Mere presence of accused before murder was committed does not connect accused with the crime.)
 ('08) 7 Cri L Jour 227 (229) (Lah), *Chet Singh v. Emperor*. (Mere fact that accused

It is not strictly necessary, however, that the corroboration should be afforded only by *direct* evidence—it may in certain cases be provided by circumstantial evidence.¹⁵ But the circumstantial evidence should be such as would unmistakably lead to the inference of guilt and be reasonably inconsistent with the theory about the innocence of the accused.¹⁶

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was seen with dacoits does not corroborate participation in crime.)

[See also ('16) AIR 1916 Lah 433 (437): 1916 Pun Re No. 7 Cr: 17 Cr. L. J. 273, *Ram Singh v. Emperor*.

('34) AIR 1934 Lah 873 (874): 15 Lah 491: 36 Cri L Jour 383, *Kanshi Ram v. Emperor*. (Witness failing to identify accused in Court — There is no sufficient corroboration of approver's testimony.)

('11) 12 Cri L Jour 562 (563): 12 I. C. 650 (Mad), *Venkata Reddi v. Nagi Reddi*.

('15) AIR 1915 Lah 244 (246): 16 Cri L Jour 634 (636), *Uda v. Emperor*. (An approver's testimony is not sufficiently corroborated by the production by accused of stolen property from a place not in possession of accused, as such evidence is easy to fabricate.)]

15. ('35) AIR 1935 All 132 (133, 134): 36 Cr.L.J. 617, *Abdul Salam v. Emperor*.

('23) AIR 1923 Lah 153 (155): 26 Cri L Jour 343, *Hakim v. Emperor*.

('23) AIR 1923 Lah 335 (335): 25 Cri L Jour 234, *Khushal Singh v. Emperor*. (Production of stolen property by accused is corroboration.)

('33) AIR 1933 Lah 294 (296): 35 Cri L Jour 641, *Dalip Singh v. Emperor*.

('22) AIR 1922 Nag 172 (173): 23 Cri L Jour 391, *Kisan v. Emperor*.

('24) AIR 1924 Oudh 314 (315): 27 Oudh Cas 29: 25 Cri L Jour 785, *Emperor v. Ram Charan*. (Identification by three persons and recovery of stolen property with accused constitute very satisfactory corroboration.)

('29) AIR 1929 Oudh 321 (326): 30 Cri L Jour 922, *Lale v. Emperor*.

('30) AIR 1930 Oudh 455 (459): 32 Cri L Jour 162, *Bachchu v. Emperor*.

('28) 29 Cri L Jour 863 (864): 111 Ind Cas 447 (Lah), *Muhammad v. Emperor*. (Production of stolen property by accused from place not in possession of accused is corroboration.)

('33) AIR 1933 Bom 482 (483): 58 Bom 40: 35 Cri L Jour 317, *Shanker Shet v. Emperor*. (A circumstance cannot furnish corroboration of the story of the approver if it is by itself susceptible of innocent explanation.)

('35) AIR 1935 All 132 (133, 134): 36 Cri L Jour 617, *Abdul Salam v. Emperor*.

16. ('32) AIR 1932 Oudh 251 (253): 32 Cr.L.J. 1184 (1185): 6 Luck 658, *Gaya Prasad v. Emperor*.

See the following cases illustrating the proposition :

('31) AIR 1931 Cal 697 (702): 33 Cr. L. J. 19 (SB), *Ambica Charan v. Emperor*.

('23) AIR 1923 Lah 389 (390): 25 Cri L Jour 259, *Wadhawa Singh v. Emperor*.

('25) AIR 1925 Lah 426 (426): 26 Cr. L. J. 693, *Maula Dad v. Emperor*. (Stolen property being found in possession of accused is sufficient corroboration.)

('32) AIR 1932 Lah 621 (622, 623): 33 Cr. L. J. 916: 14 Lah 411, *Sher Singh v. Emperor*. (Fact that accused produced certain articles belonging to deceased is sufficient to justify conviction of accused on charge of murder when there is general corroboration of approver's story.)

('31) AIR 1931 Mad 689 (691, 694, 696): 54 Mad 931: 33 Cr. L. J. 51, *Venkatasubba Reddi v. Emperor*. (Mere strong suspicion is not enough — Benefit of doubt must be given to accused.)

('30) AIR 1930 Oudh 353 (356): 31 Cr. L. J. 1210, *Hazari v. Emperor*. (Person found in possession of stolen articles must be presumed to be either thief or receiver of stolen property.)

('15) AIR 1915 Lah 244 (245, 246): 16 Cr. L. J. 634, *Uda v. Emperor*. (Production of stolen property from a place not in the possession of accused is no corroboration.)

('28) AIR 1928 Lah 681 (685): 10 Lah 265: 29 Cr L J 851, *Chatru v. Emperor*. (Accused's conduct may be considered in corroboration of approver's testimony.)

(1919) 1 K B 431 (434): 88 L J KB 551: 120 L T 572: 83 J P 123: 14 Cr App R 1: 26 Cox C C 387, *Reg v. Marks Feigenbaum*. (Do.)

('03) 2 Weir 809n (809n), *Narayanswami v. Emperor*. (Corroboration by conduct of accused.)

('21) AIR 1921 Lah 392 (394), *Ghulam Hassan v. Emperor*. (Discovery of blood in convict's house and on his nails and suspicious conduct corroborate accomplice.)

himself instead of committing him for trial to the Court of Session or the High Court.⁵

The fact that the Magistrate in tendering the pardon did so after consulting the Provincial Government and with its authority will not affect the position of the accused or the approver, and once pardon has been tendered, the trial must not be by another Magistrate, even though he is vested under S. 30 to try such an offence, but by the High Court or the Sessions Court.⁶

19. Detention of approver in custody — Sub-section (3). —

If the person to whom a pardon is tendered is *not already on bail*, he has to be detained in judicial custody until the termination of the trial; he cannot be released on bail under the provisions of Ss. 497 and 498.¹ The custody contemplated is judicial custody and is not the custody of the police.² The approver should be detained in such custody until the proceedings are terminated by a magisterial order of discharge or until after the termination of the sessions trial.³

There is no jurisdiction to order the detention of the approver till the expiration of the period of limitation for filing an appeal from the decision in the case. His detention can only be ordered till the termination of the trial.⁴

338.* At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly

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Section 338

* 1882 : S. 338; 1872 : S. 348; 1861 : S. 219.

5. ('36) AIR 1936 Cal 356 (361, 362) : 37 Cri L Jour 758 : 1 L R (1937) 1 Cal 711 (FB), *Harihar Sinha v. Emperor*. (Per Full Bench — Mukerji, J., contra.)
(35) AIR 1935 Cal 281 (282) : 36 Cr. L. J. 884, *Md. Saleuddin v. Emperor*. (In so far as the provisions of S. 337 are inconsistent with the Act, the Act will prevail.)
6. ('38) AIR 1938 P C 266 (269, 270) : ILR (1938) Lah 628 : 65 IA 388 : 32 SLR 937 : 40 Cr. L. J. 360 (PC), *Faqir Singh v. Emperor*. (Overruling AIR 1936 Lah 353.)

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- (1900) 13 C P L R Cr 7 (8), *Empress v. Bodhan*.
(32) AIR 1932 Sind 40 (41) : 33 Cri L Jour 906, *Ali Muhammad v. Emperor*.
(27) AIR 1927 Sind 173 (173, 174) : 28 Cr. L. J. 439, *Muhammad Abdul Majid v. Emperor*. (Rupchand Bilaram, A. J. C., observed however that the restriction in S. 337, sub-section (3), does not deprive the power of the Sessions Court or the High Court to grant bail to the approver.)
[But see (1865) 3 Suth W R Cr L 17 (17). (Decided under Code of 1861.)]
See also S. 498 Note 2.
- (32) AIR 1932 Sind 40 (42) : 33 Cri L Jour 906, *Ali Muhammad v. Emperor*.
(31) AIR 1931 Lah 476 (478, 479) : 12 Lah 635 : 32 Cr. L. J. 913, *In the matter of Khairati Ram*.
(31) AIR 1931 Lah 480 (480) : 33 Cri L Jour 162, *Emperor v. Ranbir Singh*.
(31) AIR 1931 Lah 473 (473) : 12 Lah 623 : 32 Cr. L. J. 909, *Kundan Lal v. Emperor*.
(31) AIR 1931 Lah 353 (356, 359) : 12 Lah 604 : 32 Cr. L. J. 785, *Kundan Lal v. Emperor*.
See also S. 167 Note 12.
- (12) 13 Cr. L. J. 842 (843, 844) : 17 I. C. 714 : 37 Bom 146, *Emperor v. Intiya Salabat Khan*.
- (35) AIR 1935 Cal 545 (545, 546) : 62 Cal 430 : 36 Cr. L. J. 1308, *Sultan v. Emperor*.

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or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

1. Scope of the section.—Section 337 provides for tender of pardon to an accomplice during the stage of investigation or of inquiry into the offence by a Magistrate. This section enables the Sessions Judge to tender, or direct the Magistrate or District Magistrate to tender, a pardon after the commitment of the case.¹ He has power to tender a pardon or to direct the tender of pardon at *any* time before judgment is pronounced;² but he should not exercise such power after the evidence for the prosecution and of the defence has been taken and the opinion of the assessors has also been given.³ Where the tender of pardon made by the Magistrate is bound to be invalid, the Sessions Judge may make a valid tender of pardon under this section.⁴

2. Offences in respect of which pardon may be tendered.—A pardon may be tendered, under this section, in respect of any of the offences mentioned in S. 337, after the case has been committed by the Magistrate under sub-s. (2A) of that section. See section 337 Note 5.

3. “Any person supposed to have been directly or indirectly concerned in, or privy to, any such offence.” — See S. 337 Note 8.

Section 339

339.* (1) Where a pardon has been tendered under section 337 or section 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not

* Code of 1898, original S. 339.

339. (1) Where a pardon has been tendered under S. 337 or S. 338, and any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connexion with the same matter.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been forfeited under this section.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

1882 : S. 339; 1872 : S. 349; 1861 : S. 211.

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1. ('38) AIR 1938 P C 266 (268): I L R (1938) Lah 628: 32 S L R 937: 40 Cr.L.J. 360 (PC), *Faqir Singh v. Emperor*.
2. ('67) 7 Suth W R Cr 78(78), *In the matter of Nistarinee Debia*. (Under the Code of 1861 it was held that Sessions Judge could not tender a pardon before a trial.)
3. ('84) 1884 All W N 147 (148), *Empress v. Hullia*.
4. ('82) 1882 All W N 241 (241), *Empress v. Kashia*.

complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connexion with the same matter:

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Synopsis

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| 1. Legislative changes. | 6. Effect of pardon. |
| 2. The certificate of the Public Prosecutor. | 7. Procedure at the trial — Joint trial. |
| 3. "Any person who has accepted such tender." | 8. Plea of pardon in bar. See S. 339A. |
| 4. Non-compliance with the conditions. | 9. Use of statements made by the approver — Sub-section (2). |
| 5. "Wilfully concealing anything essential." | 10. Prosecution for perjury — Sanction of the High Court. |

Other Topics (miscellaneous)

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| Application for sanction and not letter of reference. See Note 10. | No duty of disclosure as to other offences. See Note 5. |
| Approver's absconding. See Note 5. | No prosecution of approver for other offences disclosed. See Note 6. |
| Approver's statements — Evidence in civil suit. See Note 9. | Onus on prosecution to prove forfeiture. See Note 4. |
| Approver's statement — Evidence in prosecution for perjury. See Note 9. | Pardon accepted but resiled from subsequently. See Note 3. |
| Approver's statements — Non-applicability of S. 24, Evidence Act. See Note 9. | Proof and explanation of approver's statements. See Note 9. |
| Certificate and sanction. See Note 10. | Re-arrest of approver. See Note 7. |
| Certificate of Public Prosecutor not needed in cases already pending. See Note 2. | Retracted statements — Corroboration needed. See Note 9. |
| Committal without certificate. See Note 2. | Sanction before prosecution. See Note 10. |
| Discharge of approver after termination of trial. See Note 7. | Sanction of High Court — Discretion. See Note 10. |
| Examination of approver not needed. See Notes 9 and 10. | Sanction of High Court when granted. See Note 10. |
| Facts insufficient for forfeiture of pardon. See Note 4. | Sanction of High Court when refused. See Note 10. |
| Facts sufficient for forfeiture. See Note 4. | Strictest faith with approver. See Note 6. |
| Forfeiture of pardon — Which Court to decide. See Note 2. | Sub-section (3) — Supplementary to Ss. 195 and 476. See Note 10. |
| | Want of sanction of High Court — Incurable. See Note 10. |
| | Withdrawal of pardon. See Note 4. |

Section 339
Notes 1-2

1. Legislative changes.

Changes introduced by the Code of 1898 —

In sub-section (2) the word "forfeited" has been substituted for the word "withdrawn." See Note 4.

Changes introduced by Act XVIII of 1923 —

- (1) In sub-s.(1), the words "and the Public Prosecutor certifies that in his opinion" are new. See Note 2.
- (2) The proviso to sub-s.(1) is new. See Note 7.
- (3) The words "such person may be" after the words "was made" in sub-s.(1) were substituted for the words "he may be."
- (4) The words "at such trial" at the end of sub-s.(2) were substituted for the words "when the pardon has been forfeited under this section."

2. The certificate of the Public Prosecutor. — Prior to the amendment of 1923, if the approver did not comply with the conditions of pardon, the Court before which his evidence was given, could only record its opinion to the effect that he had not complied with the conditions of the pardon and leave it to the District Magistrate to prosecute him, if he thought fit to do so; it could not itself *direct a prosecution*.¹ It was, however, held in the undermentioned cases² that a Sessions Judge, before whom the evidence of the approver was given, could himself order the approver to be committed to trial, if he found that he did not comply with the conditions of the pardon. See also the undermentioned cases,³ decided before the amendment of 1923. These cases are no longer of any importance in view of the amendment of 1923, making the certificate of the Public Prosecutor, the sole basis for the prosecution of the approver for the original offence.⁴ The Sessions Judge has, thus, no power to order the prosecution of the approver *suo motu*.⁵ Where, however, proceedings had already been instituted against the approver under this section before the date on which the

Section 339 — Note 2

1. ('15) AIR 1915 All 245(246): 37 All 331: 16 Cr. L. J. 483, *Emperor v. Gangua*. ('17) AIR 1917 L B 143 (145): 8 Low Bur Rul 447: 17 Cr. L. J. 337, *Emperor v. Nya Po Ket*.
2. ('20) AIR 1920 Lah 222 (223): 22 Cr. L. J. 128, *Daulat v. Emperor*. ('24) AIR 1924 Lah 568 (569): 25 Cr. L. J. 121, *Dil Bahadur v. Emperor*. (AIR 1915 Cal 667 and 1 Cr L J 1082, *Rel. on.*) ('20) AIR 1920 Lah 376(376): 1 Lah 218: 21 Cr.L.J. 518, *Chanan Singh v. Emperor*.
3. ('97) 24 Cal 492 (493), *Queen-Empress v. Manick Chandra*. (Only the authority which granted pardon has the right to withdraw it.) (1900) 24 Mad 321 (325): 2 Weir 396, *Queen-Empress v. Ramasami*. (Do.) ('01) 1901 Pun Re No. 19 Cr, p. 49 (50), *Crown v. Manna Singh*. (Do.) ('98) 1898 Pun Re No. 1 Cr, p. 1 (2, 3), *Mt. Taban v. Empress*. (Do.) ('01) 1901 Pun L R No. 149 p. 566 (567), *Emperor v. Abdu Shah*. (District Judge trying the case is competent to withdraw pardon granted to the accused by Additional Magistrate during the course of enquiry.) ('95) 1895 All W N 163 (164), *Queen-Empress v. Bholat*. (After trial, District Magistrate has no power to revoke the pardon and institute proceedings.)
4. ('25) AIR 1925 Bom 135 (136, 137): 26 Cr.L.J. 469, *Emperor v. Maria Basappa*. ('25) AIR 1925 Lah 15 (15): 5 Lah 379: 26 Cr. L. J. 237, *Ali v. Emperor*. (Held that even where approver was declared by the District Magistrate to have forfeited his pardon before amendment of 1923, certificate of Public Prosecutor was essential, if proceedings were instituted after amendment.) ('26) 27 Cri L Jour 940 (941): 96 Ind Cas 396 (Lah), *Lal Shah v. Emperor*. (Do.)
5. ('25) AIR 1925 Bom 135 (136, 137): 26 Cr.L.J. 469, *Emperor v. Maria Basappa*.

amendment took effect, it was held that the certificate of the Public Prosecutor was not necessary.⁶

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Notes 2-3

The certificate, which is required as a condition precedent to the trial of an approver, has to be filed before his *trial* commences in the *Court of Session*. It is not absolutely essential to file it in the *committing* Court and even if it is so, the absence of it is not fatal and the commitment can, in view of S. 532, be accepted by the Court of Session.⁷

This section does not require that the particulars in regard to which the pardon is alleged to have been forfeited should be given in the certificate, and a certificate cannot be said to be defective if it does not mention such particulars.⁸

It has been held that the person who is authorized to grant a certificate under this section is the Public Prosecutor who conducted the case in which the pardon was granted and that he need not necessarily occupy the position of Public Prosecutor on the date on which he grants the certificate.⁹ But where a case was conducted by an Assistant Public Prosecutor in the Sessions Court and he expressed his intention not to take action against the approver, but subsequently the Public Prosecutor issued a certificate under this section, it was held that the certificate was not without jurisdiction.¹⁰

3. "Any person who has accepted such tender." — In a proceeding against the approver under this section, it should first be proved that the approver accepted the conditions of the pardon;¹ that is, that the conditions were fully explained to him, that he was free to accept or refuse the conditions and that he accepted the tender of pardon on a full understanding of such conditions.² It is also open to a person, who has accepted a pardon in the first instance, to resile from such acceptance and say that he may be tried in respect of the original offence in order that his character may be cleared. In such

6. ('25) AIR 1925 Nag 172 (173) : 25 Cri L Jour 1355, *Gangaram v. Emperor*.

7. ('35) AIR 1935 Oudh 116 (116, 117) : 10 Luck 537 : 36 Cr.L.J. 377, *Emperor v. Sadanand*.

('25) AIR 1925 Rang 219 (220, 221) : 3 Rang 55 : 27 Cr.L.J. 254, *Nga Wa Gyi v. Emperor*.

See also S. 532 Note 2.

8. ('36) AIR 1936 Lah 409 (411) : 37 Cri L Jour 732, *Indar Pal v. Emperor*.

9. ('36) AIR 1936 Lah 409 (410) : 37 Cri L Jour 732, *Indar Pal v. Emperor*.

10. ('40) AIR 1940 Sind 114 (116) : 41 Cr.L. J. 747, *Emperor v. Shahdino*. (The general powers of control which the District Magistrate and the Public Prosecutor exercise are sufficiently wide to justify a prosecution being taken out of the hands of a particular Assistant Public Prosecutor at any stage of the proceedings and there is nothing in the Criminal Procedure Code which requires that when a Public Prosecutor has once appeared in a case all further proceedings must be conducted by him.)

Note 3

1. ('69) 12 Suth W R Cr 80 (81) : 6 Beng L R App 50, *Queen v. Gagalu Magalu*. ('24) AIR 1924 All 564 (564) : 26 Cr.L.J. 336, *Palati Rai v. Emperor*. (A person to whom pardon is tendered and who expresses a complete ignorance and states that he is indifferent whether a pardon is granted or not, is not a person accepting pardon.)

2. ('93-1900) 1893-1900 Low Bur Rul 7 (8), *Nga Thin Nu v. Queen-Empress*.

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Notes 3-4

cases, the provisions of this section do not apply and he may be tried jointly with the other accused.³ See also S. 337.

4. Non-compliance with the conditions. — Prior to the Code of 1898, the Magistrate or the Sessions Judge had to *withdraw* the pardon tendered to an approver under S. 337 or S. 338, before the approver could be tried for the offence, in respect of which the pardon was tendered.¹ Under the present Code, however, no such order is necessary and the only question, which the Court has to consider, before trying the approver for the original offence, is whether he has, by some act or omission on his part, failed to comply with the conditions of pardon.² It is the duty of the prosecution to establish that the approver has failed to comply with the conditions of the pardon,^{2a} either —

(a) by wilfully concealing anything essential, or

(b) by wilfully giving false evidence.³

The mere fact that his alleged associates in crime, against whom he had given evidence, have been acquitted,⁴ or that the Sessions Judge or the Magistrate is of opinion that he was not telling the truth,⁵ or that the facts stated by him are not probable,⁶ or the mere fact that some discrepancies have been elicited from him in cross-examination,⁷

3. ('24) AIR 1924 Mad 391 (391, 392): 25 Cri L Jour 210, *Basireddy v. Emperor*.

Note 4

1. See ('19) AIR 1919 Lah 449 (450): 1918 P. R. No. 24 Cr: 19 Cri L Jour 926, *Suraj Bhan v. Emperor*.

2. ('01) 25 Bom 675 (679, 680) 3 Bom L R 271, *King-Emperor v. Bala*.

('22) AIR 1922 Sind 31 (32): 16 Sind L R 131: 23 Cr.L.J. 611, *Emperor v. Haji Jiand*.

('19) AIR 1919 Lah 449 (450): 1918 Pun Re No. 24 Cr: 19 Cri L Jour 926, *Suraj Bhan v. Emperor*.

('17) AIR 1917 All 316 (317): 39 All 305: 18 Cr. L. J. 444, *Khiali v. Emperor*.

2a. ('40) AIR 1940 Nag 77 (77): 40 Cri L Jour 956, *Horital v. Emperor*.

('35) AIR 1935 Lah 799 (800): 37 Cri L Jour 79, *Dip Chand v. Emperor*. (Onus of proving forfeiture is on prosecution.)

('30) 1930 Mad W N 773 (775), *Soliyan v. Emperor*.

See also S. 339A Note 3.

3. ('09) 9 Cri L Jour 571 (575): 32 Mad 173: 2 I. C. 343, *Kullan v. Emperor*.

('13) 14 Cr.L.J. 401 (403): 20 I.C. 225: 7 Low Bur Rul 1, *Nga To Gale v. Emperor*.

('15) AIR 1915 Cal 397 (398): 42 Cal 756: 16 Cr.L.J. 120, *Emperor v. Saber Akunji*.

('15) AIR 1915 Cal 667 (673): 42 Cal 856: 16 Cr.L.J. 65, *Sashi Rajbanshi v. Emperor*.

('02) 1902 Pun Re No. 34 Cr, p. 88 (93): 1902 Pun L R No. 126, *Kanwar Singh v. Emperor*.

('04) 1 Cr.L.J. 1082 (1087): 1905 Pun L R No. 176: 1904 Pun Re No. 31 Cr, *King-Emperor v. Kadu*.

('06) 3 Cri L Jour 342 (343): 1905 Pun Re No. 59 Cr, *Bahadur v. Emperor*.

('89) 1889 Pun Re No. 6 Cr, p. 40 (42), *Empress v. Mt. Muriama*.

(1900) 3 Oudh Cas 245 (246), *Queen-Empress v. Debi*.

('30) 1930 Mad W N 773 (775), *Soliyan v. Emperor*.

('02) 1902 Pun Re No. 24 Cr, p. 69 (72): 1902 Pun L R No. 136, *Hargalal v. Emperor*.

('95) 1895 Pun Re No. 15 Cr, p. 47 (50), *Habibulla v. Empress*. (Mere suspicion that approver has given false evidence is insufficient.)

('26) 27 Cri L Jour 77 (78): 91 Ind Cas 253 (Lah), *Ahmed v. Emperor*.

See also Note 5.

4. ('95) 1895 Pun Re No. 15 Cr, p. 47 (49), *Habibulla v. Empress*.

5. ('70) 14 Suth W R Cr 10 (10), *Queen v. Petumber Dhoobee*.

6. ('01) 3 Bom L R 489 (502, 503), *King-Emperor v. Trimbaka Dewji*.

7. ('02) 1902 Pun Re No. 34 Cr, p. 88 (93): 1902 Pun L R No. 126, *Kunwar Singh v. Emperor*.

('26) 27 Cri L Jour 768 (768): 95 Ind Cas 288 (Oudh), *Emperor v. Jagannath*.

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Notes 4-5

or that there are certain inconsistencies in his evidence on immaterial points,⁸ is not sufficient to show that the condition of the pardon has not been complied with. Where, however, the approver wilfully introduces discrepancies into his deposition, in order that the Court may hold that he is not a reliable witness, he forfeits his pardon.⁹

The Lahore High Court has held that it is not strictly necessary that the prosecution should have actually examined the approver as a witness, both before the Magistrate's Court and the Sessions Court, before proceedings are instituted against him for non-compliance with the conditions of pardon, and that it is enough, if he is shown to have made a statement absolutely inconsistent with the statement that he made at the time the pardon was tendered to him.¹⁰ But the Sind Judicial Commissioner's Court has taken a different view.¹¹ Where the evidence given by an approver in the sessions trial is not a compliance with the conditions of the pardon, the fact that he gave evidence in accordance with the conditions before the committing Magistrate does not save him from being proceeded against under this section.¹² But when the evidence given by the approver in the Sessions Court was in accordance with the conditions of his pardon and was evidence upon which, in the circumstances subsequently disclosed, reliance might have been placed, then the fact that in the committing Magistrate's Court the approver gave false evidence should not necessarily be taken to be non-compliance with the conditions of pardon.¹³

5. "Wilfully concealing anything essential." — The prosecution has to establish that certain essential facts were within the knowledge of the approver, and that he had wilfully concealed such facts.¹ The mere fact that the approver absconded at the time does not amount to a wilful concealment of anything essential within the meaning of the section.²

As has been seen in Note 9 to S. 337, it is the duty of the approver to make a thorough and complete disclosure of all facts within his knowledge bearing upon the offence or offences in respect of which he is giving evidence. Thus, he is not bound, in fulfilment of the conditions of pardon, to make any disclosure relative to any offence, which was not being inquired into at the time.³

8. ('80) 12 Cal L Rep 226 (229), *Srinop v. Empress*.

('35) AIR 1935 Lah 799 (800) : 37 Cri L Jour 79, *Dipchand v. Emperor*.

9. ('26) 27 Cri L Jour 77 (78, 79) : 91 Ind Cas 253 (Lah), *Ahmed v. Emperor*.

10. (28) AIR 1928 Lah 320 (323) : 9 Lah 608 : 29 Cr.L.J. 413, *Ramnath v. Emperor*.

11. ('40) AIR 1940 Sind 114 (116) : 41 Cri L Jour 747, *Emperor v. Shahdino*.
(Pardon cannot be forfeited before approver's examination in sessions trial.)

12. ('15) AIR 1915 Nag 92 (93,94) : 11 Nag L R 59 : 16 Cri L Jour 417, *Local Government v. Mulu*.

('10) 11 Cr.L.J. 254 (254,255) : 33 Mad 514 : 5 I. C. 831, *In re Aligirisamy Naicken*.

13. ('40) AIR 1940 Sind 114 (117) : 41 Cri L Jour 747, *Emperor v. Shahdino*.

Note 5

1. ('01) 3 Dom L R 489 (502), *King-Emperor v. Trimbaka Dewji*.

See also cases cited in Note 4.

2. ('16) AIR 1916 Low Bur 111 (112) : 8 Low Bur Rul 357 : 17 Cri L Jour 391, *Maung Po Hla v. Emperor*.

3. ('19) AIR 1919 Lah 449 (450) : 1918 Pun Re No. 24 Cr : 19 Cr.L.J. 926, *Suraj Bhan v. Emperor*.

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Notes 6-7

6. Effect of pardon. — Where pardon is tendered to a person, on condition that he should make a true and full disclosure of the *whole* of the circumstances within his knowledge relative to the offence, it is a matter of utmost importance that the strictest faith should be kept with him.¹ Thus, where a person is granted a pardon, and being under the impression that he has freed himself from the consequences of his incriminating statements, he makes a disclosure of his complicity in offences, other than those in respect of which he was granted a pardon, it would be improper to institute proceedings against him in respect of such other offences.² See also section 337 Note 14.

7. Procedure at the trial — Joint trial. — Prior to the amendment of 1923, there was a conflict of opinions as to whether an approver, who had broken the conditions of pardon, could be tried for the offence for which he was tendered a pardon, along with the other accused, or whether his trial ought to be in a separate proceeding altogether. It was held in one set of cases that there was no provision in the Code prohibiting a joint trial, and if an approver had been committed in time, it was not illegal to try him *jointly* with the other accused for the original offence.¹ It was, however, held in another set of cases that the trial of the approver on the original charge ought to be in a separate proceeding altogether, which should commence *de novo* after the case, in which he had given evidence, had been fully heard and determined;² and that he should not be put into the dock,

Note 6

1. ('02) 1902 Pun Re No. 34 Cr, p. 88 (93) : 1902 Pun L R No. 126, *Kunwar Singh v. Emperor*.
- ('30) 1930 Mad W N 773 (775), *Soliyan v. Emperor*. (When a conditional pardon has been tendered and accepted there must be good faith on both sides.)
2. ('26) AIR 1926 Pat 279 (281, 286) : 5 Pat 171 : 27 Cri L Jour 957, *Nilmadhab Chowdhury v. Emperor*.

Note 7

1. ('98) 20 All 529 (532) : 1898 A W N 152, *Queen-Empress v. Brij Narain Man*.
- ('99) 1899 Pun Re No. 5 Cr, p. 13 (16), *Queen-Empress v. Mihan Singh*.
- ('06) 4 Cr. L. J. 142 (143) : 29 All 24 : 3 A L J 615 : 1906 A W N 258, *Emperor v. Budhan*.
- ('08) 8 Cri L Jour 445 (449, 450) : 1908 All W N 259 (261) : 5 A L J 691, *Sultan Khan v. Emperor*.
- [See also ('01) 25 Bom 675 (679) : 3 Bom L R 271, *King-Emperor v. Bala*.
- ('20) AIR 1920 Lah 222 (223) : 22 Cri L Jour 128, *Daulat v. Emperor*.]
2. ('08) 8 Cr. L. J. 153 (153) : 31 Mad 272 (275), *In re Arunachallam*.
- ('98) 23 Bom 493 (494), *Queen-Empress v. Bhaw*.
- ('01) 24 Mad 321 (324) : 2 Weir 396, *Queen-Empress v. Ramasamy*.
- ('92) 14 All 502 (507) : 1892 All W N 95, *Queen-Empress v. Mulua*.
- ('24) AIR 1924 Mad 391 (392) : 25 Cr.L.J. 210, *Bassireddi Narappa v. Emperor*.
- ('92) 15 Mad 352 (354) : 2 Weir 394, *Queen-Empress v. Rama Thevan*.
- ('92) 14 All 336 (338, 339) : 1892 All W N 21, *Queen-Empress v. Sudra*.
- ('70) 14 Suth W R Cr 10 (10), *Queen v. Petumber Dhoobee*.
- ('02) 4 Bom L R 826 (827), *Emperor v. Revappa*.
- ('03) 1903 Pun Re No. 4 Cr, p. 11 (13, 14):1903 Pun L R No. 52, *Ghulam Moham-mad v. Crown*.
- (1900) 13 C P L R Cr 123 (123), *Empress v. Pawan*.
- ('81) 7 Cal L R 66 (67), *In the matter of Joyudee Paramanick*.
- ('22) AIR 1922 Sind 31 (32):16 SLR 131:23 Cr.L.J. 611, *Emperor v. Haji Jiand*.
- (1900) 27 Cal 137 (139), *Queen-Empress v. Natu*.
- [See ('01) 3 Bom L R 489 (502, 503) *King-Emperor v. Trimbaka Dewji*. (The approver was convicted on his own plea — But sentence was only postponed till after the trial of co-accused—Held procedure illegal.)]

after his evidence is given, to be tried *jointly* along with the other accused.^{2a} The proviso to sub-section (1) has been introduced by the amendment of 1923, which specifically provides that the approver should not be tried jointly with the other accused.³

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Notes 7-9

Until the termination of the trial, in which the approver has given evidence, he has to be in judicial custody unless he had already been admitted to bail (see sub-s.(3) to S. 337). At the termination of the trial, however, he should be discharged by the Court which tries the case. But the Crown may re-arrest him and proceed against him for the offence in respect of which he was granted a conditional pardon, if so advised;⁴ that is, as has been seen in Note 2 already, if the Public Prosecutor certifies that the approver had failed to comply with the conditions of the pardon. In such proceedings, the approver is entitled to plead the tender of pardon and the compliance of the conditions thereof, in bar of the trial for the original offence, and the Court has to decide and give its finding as to that plea. See S. 339A, and the undermentioned cases.⁵

8. Plea of pardon in bar. — See Section 339A.

9. Use of statements made by the approver — Sub-s. (2). —

Sub-section (2) provides that any statement made by a person who has accepted a tender of pardon, may be used in evidence against

- 2a. ('05) 31 Mad 272 (275) : 8 Cr. L. J. 153 : 3 M L T 407, *In re Arunachellam*.
 ('92) 14 All 502 (507) : 1892 All W N 95, *Queen-Empress v. Mulua*.
 ('08) 7 Cr. L. J. 245 (249):1907-09 U B R Cr. P. C. 7, *Nga Po Huan v. Emperor*.
 ('82) 1882 All W N 31 (31), *Empress v. Samcharan*.
 ('92) 15 Mad 352 (354) : 2 Weir 394, *Empress v. Ram Thevan*. (Approver should be duly committed before a Sessions Judge can take cognizance of the case.)
 ('91) 1891 All W N 182 (183), *Empress v. Piari*. (The committing Magistrate cannot withdraw pardon and commit the approver along with the other accused.)
 ('03) 6 Oudh Cas 236 (237), *Chokhe v. King-Emperor*.
 ('94) 22 Cal 50 (69, 70, 71), *Queen-Empress v. Jagat Chandra*.
 ('73) 19 Suth W R Cr 43 (43, 44), *Queen v. Bipro Doss*. (A formal order of committal is necessary before a Sessions Judge can take cognizance of a case.)
 ('77) 1877 Rat 119 (119), *Queen-Empress v. Kushya*. (Do.)
 (1865) 4 Suth W R Cr L 4 (4), *In re Doda Aheer*. (Do.)
 ('93-1900) 1893-1900 Low Bur Rul 536 (537), *Nga Aung Burin v. Queen-Empress*. (The Court of Session cannot take cognizance of a case unless the approver had been duly committed by a Magistrate.)
 3. ('37) 1937 M W N 879 (880), *Ramchandrayya v. Emperor*. (Joint committal of approver along with other accused is illegal.)
 ('31) AIR 1931 Oudh 113 (114, 115) : 32 Cr. L. J. 91 : 6 Luck 386, *Ram Lautan v. Emperor*. (Do.)
 ('35) AIR 1935 Oudh 226 (228) : 35 Cri L Jour 889, *Chauhan v. Emperor*.
 4. ('06) 4 Cri L Jour 346 (354):30 Bom 611:8 Bom L R 740, *Emperor v. Kothia*.
 ('10) 11 Cr. L. J. 702 (703, 704) : 8 Ind Cas 721 : 37 Cal 845, *Emperor v. Abani*.
 ('22) AIR 1922 Sind 31 (32):16 Sind L R 131:23 Cr.L.J. 611, *Emperor v. Haji Jiand*.
 ('99) 23 Bom 493 (494), *Queen-Empress v. Bhaw*.
 ('09) 10 Cri L Jour 418 (419) : 3 I. C. 922 : 5 Nag L R 134, *Emperor v. Mohan*.
 5. ('06) 4 Cr. L. J. 346 (354) : 30 Bom 611 : 8 Bom L R 740, *Emperor v. Kothia*. (Notwithstanding the withdrawal of the pardon or declaration of its forfeiture by a Magistrate or Judge — Decided before amendment of 1923.)
 ('15) AIR 1915 Cal 397 (398):42 Cal 756:16 Cr.L.J. 120, *Emperor v. Saber Akunji*.
 ('22) AIR 1922 Bom 177 (177) : 46 Bom 120 : 22 Cr.L.J. 620, *In re Dagdoo Bapu*.
 ('58) 11 All 79 (85, 91) : 1888 A W N 289, *Queen-Empress v. Ganga Charan*.
 ('15) AIR 1915 All 245 (246, 247) : 37 All 331 : 16 Cr.L.J. 463, *Emperor v. Gangua*.
 ('20) AIR 1920 Lah 376 (376):1 Lah 218:21 Cr.L.J. 518, *Chanan Singh v. Emperor*.
 ('11) 12 Cr. L. J. 326 (326) : 10 Ind Cas 622 : 7 Nag L R 65, *Emperor v. Kachri*.

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Note 9

him, in case he is proceeded against under this section on account of his non-compliance with the conditions of the pardon. Thus, the admissibility of such a statement is not affected by S. 24 of the Evidence Act.¹ But it has been held in the undermentioned decisions² that S. 339 (2) operates as an exception to S. 24 of the Evidence Act only in respect of statements which have been induced by a promise of pardon and that statements obtained by threats or violence are still within the mischief of S. 24 of the Evidence Act. Before a statement of the approver is used in the trial against him, it is necessary that it should be properly proved that it should be put to him and that he should be asked, if he desires to offer any explanations thereon.³

Sub-section (2) applies not only to statements by the approver in the committing Magistrate's Court or in the Sessions Court but also to statements made by him *before* the inquiry in the committing Magistrate's Court,⁴ provided they were made after the offer and acceptance of pardon by the approver.⁵

It is not absolutely necessary that the approver should have been examined as a witness as provided under S. 337, sub-s.(2) before any statements made by him are used in evidence against him.⁶ Though the statement or deposition of the approver is not strictly a confession, it is in the nature of a confession, and the Court should, in case it is

Note 9

1. ('82) 8 Cal 560 (568) : 10 C L R 369, *Empress v. Nobin Chundra*.
('08) 8 Cr.L.J. 445 (451) : 5 A L J 691 : 1908 All W N 259, *Sultan Khan v. Emperor*.
('15) AIR 1915 Nag 92 (95) : 16 Cr. L. J. 417 (420) : 11 Nag L R 59, *Local Government v. Mulu*.
('20) AIR 1920 Bom 270 (279, 280) : 22 Cr. L. J. 68 (FB), *Emperor v. Chunna*.
(Per Hayward, J., Shah, J., contra.)
- ('33) AIR 1933 Lah 910 (912) : 35 Cri L Jour 168, *Anup Singh v. Emperor*.
('97) 1897 Pun Re No. 3 Cr, p. 4 (6, 7), *Bhallu v. Empress*.
('71) 8 Bom H C R Cr 103 (107, 108), *Reg v. Alibhai Mitha*.
[But see ('67) 8 Suth W R Cr 53 (54), *Queen v. Radanath Dosadh*. (Decided under Code of 1861 which contained no provision corresponding to sub-s. (2).)
('67) 8 Suth W R Cr L 14 (14), *In re Pudunth Dossad*. (Do.)]
2. ('28) AIR 1928 Lah 320 (322) : 29 Cr.L.J. 413 : 9 Lah 608, *Ram Nath v. Emperor*.
('36) AIR 1936 Lah 409 (415) : 37 Cr. L. J. 732, *Indar Pal v. Emperor*. (Where in spite of being in police custody an approver is neither subjected nor threatened to be subjected to any ill-treatment, the statement made by him will not become inadmissible under S. 24, Evidence Act.)
3. ('25) AIR 1925 Nag 172 (173) : 25 Cri L Jour 1355, *Gangaram v. Emperor*.
4. ('40) AIR 1940 Nag 218 (221) : 41 Cr.L.J. 433 (436, 437), *Horilal v. Emperor*.
('25) AIR 1925 Nag 172 (173) : 25 Cri L Jour 1355, *Gangaram v. Emperor*. (Sub-s. (2) is wide enough to cover statement made not before committing Magistrate but before pardoning Magistrate.)
- ('28) AIR 1928 Lah 320 (322) : 9 Lah 608 : 29 Cr.L.J. 413, *Ram Nath v. Emperor*.
[But see ('22) AIR 1922 Bom 138 (141) : 46 Bom 61 : 22 Cri L Jour 728, *Motilal Hirilal v. Emperor*. (Per Shah, J.—Statement referred to in S. 339 (2) is the statement made by the approver as a witness at the inquiry under Chap. 18 or at the trial and no other.)]
- '5. ('40) AIR 1940 Nag 218 (221) : 41 Cr.L.J. 433 (436, 437), *Horilal v. Emperor*.
(Confession to Magistrate before offer and acceptance of pardon — Confession not recorded as required by Ss. 164 and 364 is not admissible.)
6. ('06) 3 Cr.L.J. 55 (67, 68, 69) : 1905 Pun Re No. 41 Cr (F B), *Suba v. Emperor*.
(Per Chatterjee and Johnstone, JJ.; Kensington and Reid, JJ., dissenting.)
('63) 7 Cr.L.J. 245 (249) : 1907-09 Upp Bur Rul Cr. P. C. 7, *Nga Po Huan v. Emperor*.
[But see ('08) 8 Cr.L.J. 153 (153) : 31 Mad 272 : 3 M L T 407, *In re Arunachellam*.]

retracted, require that the facts contained therein should be corroborated by extrinsic evidence before convicting the approver thereon.⁷

Sub-section (2) does not bar the use of the statements made by the approver, in an inquiry into the offence of perjury against the approver,⁸ or in a civil suit for damages brought against him by the complainant.⁹

10. Prosecution for perjury—Sanction of the High Court.—Under sub-s. (3) it is essential that the prosecution should obtain the sanction of the High Court before proceeding against the approver for giving *false evidence*, and if such sanction is not obtained before the institution of the proceedings, the defect affects the jurisdiction of the Court and cannot be cured under S. 537.¹ The application for sanction to prosecute the approver should be made on behalf of the Crown by a regular application to the High Court, and a letter of *reference* by the Sessions Judge is not sufficient.²

The High Court is not bound to accord sanction in every case that is brought to its notice under sub-s. (3) of this section^{2a} but has a discretion in the matter. The discretion vested in the High Court to sanction the prosecution of the approver for perjury should be exercised with extreme caution.³ The necessity for obtaining the previous sanction of the High Court shows that the mere fact that the approver makes two inconsistent statements cannot be a justification for directing his prosecution.⁴ The

7. ('84) AIR 1934 Pesh 46 (46, 47) : 35 Cri L Jour 1242, *Faqir Shah v. Emperor*.

('15) AIR 1915 Lah 307 (307, 308) : 16 Cri L Jour 815, *Khushi v. Emperor*.

('80) AIR 1930 Nag 259 (260) : 31 Cri L Jour 661, *Shafi v. Emperor*.

[See ('37) AIR 1937 Lah 689 (691) : 39 Cr.L.J. 16, *Mt. Aziz Begum v. Emperor*. (Approver's statement corroborated in general aspect and found to be true—Such statement is sufficient evidence for his conviction on forfeiture of pardon.)]

[But see ('38) AIR 1938 Lah 135 (135) : 39 Cri L Jour 335, *Puran v. Emperor*. (Approver resiling from his statement in committing Magistrate's Court—Statement amounts to confession and conviction can be based on such confession without corroboration.)]

8. ('12) 13 Cri L Jour 33 (35) : 13 I. C. 273 : 5 Sind L R 174, *Emperor v. Andal*.

9. ('09) 4 Ind Cas 523 (526) (Cal), *Keshab Nath v. Maniruddin Sarkar*.

Note 10

1. ('84) 1884 Pun Re No. 42 Cr, p. 92 (96), *Mt. Sharina v. Empress*.

('04) 1 Cri L Jour 1021 (1021, 1022) : 2 Low Bur Rul 302, *Emperor v. Htuktalwe*.

('1900) 27 Cal 137 (139), *Queen-Empress v. Nathu*.

('86) 10 Bom 190 (193) : 1886 Rat 224, *Queen-Empress v. Dala Jiva*. (The sanction under sub-s. (3) to prosecute for false evidence, must be obtained before and not after the commencement of the prosecution.)

See also S. 537 Note 7.

2. ('08) 9 Cr. L. J. 283 (284) : 32 Mad 47 : 1 I. C. 207, *Emperor v. Madiga Nallavadu*.

('93) 1893 All W N 13 (13, 14), *In re the application of the Magistrate of Basti*.

('97) 24 Cal 492 (493), *Queen-Empress v. Manick Chandra Sarkar*.

('04) 1 Cri L Jour 793 (793) : 1904 Pun Re No. 10 Cr, *Emperor v. Bulaka Singh*.

('12) 13 Cri L Jour 451 (451) : 15 Ind Cas 83 (Lah), *Emperor v. Raja*.

('29) AIR 1929 Oudh 527 (527) : 5 Luck 452 : 31 Cr. L. J. 204, *Emperor v. Ghasitey*.

(Held sanction could be granted only if a certificate from Public Prosecutor is produced—It is submitted that such a condition is not imposed by the section itself.)

2a. ('37) AIR 1937 Lah 551 (551) : 38 Cri L Jour 1079, *Emperor v. Prabhu*.

3. ('37) AIR 1937 Lah 551 (552) : 38 Cri L Jour 1079, *Emperor v. Prabhu*.

('34) AIR 1934 All 43 (45) : 56 All 288 : 35 Cr. L. J. 444, *Emperor v. Mathura*.

4. ('37) AIR 1937 Lah 551 (552) : 38 Cri L Jour 1079, *Emperor v. Prabhu*.

('34) AIR 1934 All 43 (45) : 56 All 288 : 35 Cri L Jour 444, *Emperor v. Mathura*.

('14) 15 Cri L Jour 76 (77) : 22 Ind Cas 428 (All), *Emperor v. Bodha*.

('25) AIR 1925 Rang 286 (286) : 3 Rang 224 : 26 Cr. L. J. 1396, *Emperor v. Nga Bo Gyi*. (Sanction for prosecution for perjury should not be granted, when material has only been provided by an unnecessary examination on oath.)

Section 339
Note 10

High Court, before granting a sanction, should carefully consider all the circumstances in the case and decide the cardinal question, whether the *previous* statement or confession was true and voluntary.⁵ If it is of opinion that such *previous* statement is true on the facts before it, then his subsequent statement ought to be false, and in such cases it is not only desirable but also expedient to sanction the prosecution.⁶ If, however, the first statement or confession is not true, but that his later statement is the true one, then the inference may be drawn that the first statement or confession was obtained by threat or inducement and in such cases it would be undesirable to sanction the prosecution.⁷ The High Court has also a discretion in cases where the approver is induced to make certain statements in connexion with a capital charge to allow him every possible *locus poenitentiae* in respect of such a statement.⁸ Where the approver is proceeded against for the original offence itself, in respect of which he was tendered a pardon, it is not proper to sanction his prosecution for perjury.⁹ Such sanction should be granted only in case it appears to the High Court that a conviction for the original offence is unlikely for any reason, or that even on a conviction on the original charge the sentence that could be passed would be too light in the circumstances of the case.¹⁰

Sub-section (3) merely imposes an additional condition to the institution of a prosecution for perjury and does not have the effect of overriding the provisions of S. 476. Thus, even where the sanction of the High Court is obtained, the prosecution could be instituted only in accordance with the provisions of Ss. 195 and 476.¹¹ The High Court may grant sanction for prosecution on the strength of a statement made by the approver which is *prima facie* false; it is not necessary that the approver should have been examined as a witness in the case, as required by section 337, sub-section (2).¹²

[But see ('33) AIR 1933 Lah 868 (869) : 35 Cri L Jour 111, *Emperor v. Hussaina*. (Sanction cannot be refused unless it is established that one of the statements was made under undue influence.)]

5. ('37) AIR 1937 Lah 551 (552) : 38 Cri L Jour 1079, *Emperor v. Prabhu*.

('34) AIR 1934 All 43 (45) : 56 All 288 : 35 Cri L Jour 444, *Emperor v. Mathura*.

[See also ('33) AIR 1933 Lah 868 (869) : 35 Cri L Jour 111, *Emperor v. Hussaina*.]

6. ('34) AIR 1934 All 43 (45) : 56 All 288 : 35 Cr. L. J. 444, *Emperor v. Mathura*.

('24) AIR 1924 Lah 90 (91) : 25 Cr. L. J. 174, *Emperor v. Waryam Singh*.

[See also ('29) AIR 1929 All 321 (322) : 30 Cr. L. J. 1157, *Emperor v. Dukhu*. (Approver making two directly contradictory statements—Sanction for prosecution given.)]

7. ('37) AIR 1937 Lah 551 (552) : 38 Cr. L. J. 1079, *Emperor v. Prabhu*.

('34) AIR 1934 All 43 (45) : 56 All 288 : 35 Cr. L. J. 444, *Emperor v. Mathura*.

('32) AIR 1932 Lah 307 (308) : 33 Cr. L. J. 485, *Emperor v. Jairam Singh*.

8. ('14) 15 Cr. L. J. 76 (77) : 22 I. C. 428 (All), *Emperor v. Bodha*.

('24) AIR 1924 Lah 90 (91) : 25 Cr. L. J. 174, *Emperor v. Waryam Singh*.

[See also ('29) AIR 1929 All 321 (322) : 30 Cr. L. J. 1157, *Emperor v. Dukhu*. (Locus poenitentiae not granted.)]

9. ('32) AIR 1932 Lah 307 (308) : 33 Cr. L. J. 485, *Emperor v. Jairam Singh*.

10. ('27) AIR 1927 Nag 189 (191) : 23 Nag L R 35 : 28 Cr. L. J. 645, *Local Government v. Gambhir Bhujua*.

11. ('27) AIR 1927 Nag 189 (192) : 23 Nag L R 35 : 28 Cr. L. J. 645, *Local Government v. Gambhir Bhujua*.

12. ('13) 14 Cr. L. J. 64 (64) : 18 I. C. 352 (Lah), *Emperor v. Raja*.

('06) 3 Cr. L. J. 55 (58) : 1905 Pun Re No. 41 Cr, *Suba v. Emperor*.

339A. (1) The Court trying under section 339 Section 339A

Procedure in trial of a person who has accepted a tender
person under S. 339. of pardon shall —

(a) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271, sub-section (1), and

(b) if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

1. Legislative changes.

This section has been newly introduced by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923 : see Note 3.

2. Plea of pardon. — The procedure laid down under this section should be strictly followed.¹ It is the duty of the Court to explain the provisions of this section clearly to the accused and to tell him that he is entitled to plead that he has complied with the conditions of the pardon.² The mere fact that the accused raised such a plea before the committing Magistrate, and that the Magistrate had given his finding on such a plea, does not absolve the Sessions Judge from the duty cast upon him, under this section, of asking the accused, if he pleads compliance with the conditions of the pardon.³

3. Procedure under this section. — Before the introduction of this section in 1923, it was held that where the approver raised a plea

Section 339A — Note 2

1. ('29) AIR 1929 Oudh 256 (256) : 30 Cri L Jour 559, *Itwari v. Emperor*.
- (25) AIR 1925 Lah 15 (15, 16) : 5 Lah 379 : 26 Cri L Jour 237, *Ali v. Emperor*.
2. ('40) AIR 1940 Nag 77 (77) : 40 Cri L Jour 956, *Horilal Mohanlal v. Emperor*.
- (25) AIR 1925 Lah 15 (15, 16) : 5 Lah 379 : 26 Cri L Jour 237, *Ali v. Emperor*.
- (29) AIR 1929 Oudh 256 (256) : 30 Cri L Jour 559, *Itwari v. Emperor*.
3. ('29) AIR 1929 Oudh 256 (256) : 30 Cri L Jour 559, *Itwari v. Emperor*.
- (16) AIR 1916 Mad 290 (290) : 16 Cri L Jour 234 (235), *In re Madiga Pothugadu*.
- (15) AIR 1915 Cal 667 (673) : 16 Cr. L. J. 65 : 42 Cal 856, *Sashi v. Emperor*.

Section 339A
Note 3

that he had complied with the conditions of the pardon, it was the duty of the Court to decide and give a finding on that issue first, before trying him for the offence, in respect of which the pardon was tendered.¹ Such a course, necessarily, led to complications inasmuch as, in deciding the preliminary issue, the Court had very often to investigate into the facts of the case and to prejudge it on the merits.² These cases are no longer of any importance in view of this section, which provides specifically for the procedure to be adopted in such cases.³ Under this section, the accused should be asked at the very commencement of the proceeding, whether he pleads compliance with the conditions of the pardon. The Court has to record such a plea in case he so pleads and to *proceed with the trial*. In the course of the trial, however, and before judgment is pronounced, the Court should decide the question whether the accused has complied with the conditions of the pardon. If it is found that he has so complied with them, the Court has to pass at once a judgment of acquittal, whatever its finding may be, as to the guilt of the accused in respect of the offence.⁴ It is for the *Crown* to prove that the pardon has been forfeited by the approver.^{4a}

In a case triable by the jury, the question whether the accused has complied with the conditions of the pardon should be left to the jury to be decided, like any other question of fact in the case⁵ and in a case triable with the aid of assessors, the Court should, after recording the plea, call upon the assessors to deliver their opinions on that plea and then record its own finding.⁶

Where on grant of pardon the approver admits his complicity in the offence but later resiles completely from his position and he is tried under S. 339, it is impossible to decide whether he has complied with the condition of his pardon without deciding the question of his innocence or guilt. Hence, in such cases, the provision in sub-s.(2) of this section *viz.*, that the question as to compliance with the condition of the pardon should be decided before judgment is passed in the case, cannot apply.⁷

Note 3

1. ('06) 3 Cri L Jour 342 (343) : 1905 Pun Re No. 59 Cr, *Bahadur v. Emperor*. ('17) AIR 1917 Low Bur 143 (145) : 17 Cr. L. J. 337 (338) : 8 Low Bur Rul 447, *Emperor v. Nga Po Ket*.
- ('09) 9 Cri L Jour 571 (575) : 32 Mad 173 : 2 Ind Cas 343, *Kullan v. Emperor*.
- ('13) 14 Cri L Jour 401 (403) : 7 L.B.R. 1:20 I. C. 225, *Nga To Gale v. Emperor*.
- ('02) 1902 P. R. No. 34 Cr, p. 88 (93) : 1902 P. L. R. No. 126, *Kunwar v. Emperor*.
2. See the Reports of the Select Committee, 1922.
- ('33) AIR 1933 Lah 910 (911) : 35 Cri L Jour 168, *Anup Singh v. Emperor*.
[See also ('10) 11 Cr. L. J. 254 (255) : 33 Mad 514 : 5 I. C. 831, *In re Alagiri Swamy Naicken*.]
3. ('33) AIR 1933 Lah 910 (911) : 35 Cri L Jour 168, *Anup Singh v. Emperor*.
4. [See ('40) AIR 1940 Nag 77 (77) : 40 Cr. L. J. 956, *Horilal Mohanlal v. Emperor*. ('33) AIR 1933 Lah 910 (911, 912) : 35 Cri L Jour 168, *Anup Singh v. Emperor*.]
- 4a. ('40) AIR 1940 Nag 77 (77) : 40 Cr. L. J. 956, *Horilal Mohanlal v. Emperor*.
- ('35) AIR 1935 Lah 799 (800) : 37 Cri L Jour 79, *Dipchand v. Emperor*.
- See also S. 339 Note 4.
5. ('10) 11 Cr. L. J. 254 (255) : 33 Mad 514 : 5 I. C. 831, *In re Alagiriswamy Naicken*. See also S. 298 Note 8.
6. ('40) AIR 1940 Nag 77 (77) : 40 Cr. L. J. 956, *Horilal Mohanlal v. Emperor*.
7. ('39) AIR 1939 Lah 66 (67) : 40 Cr. L. J. 614 : ILR 1939 Lah 216, *Gurdit v. Emperor*.

4. **Non-compliance with the section.** — Failure to conform to the provisions of the section vitiates the trial.¹ It has, however, been held in the undermentioned case² that where the charge had been read out to the accused and he had been made to plead to it *before* and *not after* he had been asked to plead whether or not he had complied with the terms of the pardon, the irregularity was curable under the provisions of section 537.

Section 339A
Note 4

340.* (1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.

Section 340

Right of person against whom proceedings are instituted to be defended and his competency to be a witness.

(2) Any person against whom proceedings are instituted in any such Court under section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI, or under section 552, may offer himself as a witness in such proceedings.

This section was substituted for original S. 340, by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

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| 1. Scope. | 6a. Appointment of defence counsel by the Crown. |
| 2. "Proceedings under this Code." | 7. Arguments. |
| 3. Appellate and Revisional Courts. | 8. Citing accused's counsel as witness. |
| 4. "May of right be defended." | 9. Court and pleader. |
| 5. Right of accused while in custody. | 10. "Pleader." |
| 6. Choice of pleader. | 11. Muktears and other persons. |
| | 12. Sub-section (2). |

Other Topics (miscellaneous)

- | | |
|--|---|
| Accused person—Meaning of. See Note 1. | "Pleader" — Whether includes persons other than legal practitioners. See Note 11. |
| Agents of the accused — Whether can appear. See Note 11. | Pleader — Interview with accused to be allowed. See Note 6. |
| Limiting of arguments—Power of. See Note 7. | Written arguments. See Note 7. |
| Memorandum of appearance. See Note 10. | |

* Code of 1898, original S. 340.

Right of accused to be defended. 340. Every person accused before any Criminal Court may of right be defended by a pleader.

1882 : S. 340; 1872 : S. 186; 1861 : S. 432.

Note 4

- (140) AIR 1940 Nag 77 (77, 78) : 40 Cr.L.J. 956, *Horilal Mohanlal v. Emperor*. (Total non-compliance—Conviction quashed and re-trial ordered.)
- (29) AIR 1929 Oudh 256 (256) : 30 Cri L Jour 559, *Itwari v. Emperor*. (25) AIR 1925 Lah 15 (16) : 5 Lah 379 : 26 Cri L Jour 237, *Ali v. Emperor*.
- (39) AIR 1939 Lah 66 (67) : 40 Cr. L. J. 614 : I L R (1939) Lah 216, *Gurdit Singh v. Emperor*.

Section 340
Note 1

1. Scope. — The old section which read “every person accused before any criminal Court may of right be defended by a pleader” gave rise to speculation as to the scope of the word “accused.” Some decisions favoured a wide interpretation of the word so as to cover any person over whom a Magistrate or other Court exercises jurisdiction.¹ Consonant to this interpretation, the section was held to apply to persons against whom proceedings were instituted under Chapter VIII² and Chapter XI.³ Other decisions, however, regarded the above definition as too wide and confined the word “accused” to those persons who were accused of an offence.⁴ In conformity with this view the section was held inapplicable to persons concerned in proceedings under Division C of Chapter VIII.⁵ It was also doubted whether pleaders could appear in proceedings under S. 62 of the Code of 1861, corresponding to S. 144 of the present Code.⁶

These questions are now set at rest by the amendment of the section by Act XVIII of 1923 whereby it has been expressly made applicable not only to persons accused of an offence but to any person against whom proceedings are instituted under the Code in any criminal Court.⁷

The section is confined in terms to persons *against* whom proceedings are taken. But even complainants have been held to have the legal right to be represented by counsel; of course when Government takes up the prosecution the officer acting on behalf of the Government will take the lead.⁸ The Crown is entitled as of right to

Section 340 — Note 1

1. ('92) 16 Bom 661 (668), *Queen-Empress v. Mona Puna*.
(‘98) 21 All 107 (109) : 1898 All W N 185, *Queen-Empress v. Mutasaddi Lall*.
(The petitioner was asked to furnish security for good behaviour.)
(‘01) 3 Bom L R 437 (440), *King-Emperor v. Annaya*.
(‘03-04) 2 Low Bur Rul 80 (83, 84), *Ebrahim v. King-Emperor*. (Petitioner was asked to enter into bond for good behaviour.)
(‘09) 9 Cri L Jour 36 (37) : 36 Cal 163, *Bhom Lal Chowdhury v. R. F. Hopcroft*.
(Petitioner was asked to furnish security for peace.)
2. ('96) 23 Cal 493 (494, 495), *Jhoja Singh v. Queen-Empress*. (Such a person has a right to be heard under this section.)
(1900) 4 Cal W N 797 (798), *Abinash Malakar v. Empress*.
(‘03) 25 All 375 (377) : 1903 All W N 79, *Emperor v. Girand*.
(1900) 1900 Pun Re No. 15 Cr, p. 34 (36) : 1900 Pun L R No. 59, *Crown v. Ida*.
(1900) 4 Cal W N cxxx.
- (1900) 27 Cal 656 (658), *Nakhilal Jha v. Queen-Empress*.
3. ('33) AIR 1933 Lah 145 (146) : 34 Cri L Jour 616, *Turab Ali Khan v. Shromani Gurdwara Parbandhak Committee*.
4. ('05) 2 Cri L Jour 575 (576, 577) : 2 C L J 149 : 9 Cal W N 983, *Hirananda Ojha v. Emperor*. (Proceedings under S. 133 of this Code are more of a civil nature and persons against whom they are taken are not accused persons.)
(‘25) AIR 1225 Cal 822 (822, 824, 827, 830) : 52 Cal 721 : 26 Cri L Jour 1194 (FB), *Narendra Chandra v. Sabarali Bhuiya*.
(‘27) AIR 1927 Cal 509 (510, 511) : 54 Cal 532 : 28 Cri L Jour 407, *Krishen Doyal v. Corporation of Calcutta*.
5. ('10) 11 Cri L Jour 501 (502) : 7 I. C. 606 : 4 Sind L R 49, *Emperor v. Tawakali*.
(Proceeding relating to the fitness of the sureties offered under S. 122.)
6. ('72) 17 Suth W R Cr 37 (38), *Sheikh Laloo v. Adam Sircar*.
7. ('26) AIR 1926 Bom 551 (552, 554) : 50 Bom 741 : 27 Cri L Jour 1169, *In re Llewelyn Evans*.
8. ('70) 14 Suth W R Cr 23(23) : 5 Beng L R App 70, *Chandi Charan v. Chandra Kumar*.
(‘70) 1870 Pun Re No. 30 Cr, p. 47 (47), *Crown v. Biharee*.
[See ('25) AIR 1925 All 301(302) : 26 Cr. L. J. 734, *Tufail Ahmad v. Emperor*.]
[But see ('86) 1886 Pun Re No. 29 Cr, p. 70 (72), *Akbar v. Empress*.

be heard by counsel or pleader in support of each prosecution whether in an original or appellate Court.⁹

Section 340
Notes 1-2

2. "Proceedings under this Code." — Proceedings under Chapter X are criminal proceedings.¹ An application by the police for remand falls under S. 167 of the Code and can be held to be a proceeding instituted under the Code in a criminal Court. Therefore, at least from the moment (after the twenty-four hours of arrest) that the accused appears before the Court, his right to be defended begins. Hence access to him by his legal advisers should be allowed irrespective of whether a charge-sheet has been sent up or not.²

Both before and after the amendment, it has been held that a person with regard to whom a preliminary enquiry under S. 202 is being held is not entitled by any rule of law to intervene.³ But he may watch the proceedings which means, not merely as an on-looker but instructing legal practitioners to watch the case on his behalf, with the leave of the Court, to assist the Court in making the investigation.⁴ See also Note 12 under S. 202.

A civil Court making an enquiry under S. 476 does not thereby become a criminal Court and S. 340 will not apply to such proceedings. But the general practice is to hear pleaders on behalf of persons in civil and criminal matters and to secure their assistance as *amicus curiæ* even when parties have no right to be heard either in person or by pleader.⁵

In a case decided before the amendment, it was observed that accused persons are not entitled to be represented before public officers in the absence of express statutory provision and that they are not entitled to be represented when being dealt with under Chapters XXVIII and XXIX of the Code.⁶

(71) 8 Bom H C R A C 202 (204), *Bindachari v. Dracup*.]

9. (71) 8 Bom H C R 204n.

Note 2

1. (16) AIR 1916 Mad 970 (970) : 16 Cr.L.J. 349 (350) : 39 Mad 537, *Nissankara Rao Subbayya v. Coola Ramayya*.

2. (26) AIR 1926 Bom 551 (554) : 50 Bom 741 : 27 Cr.L.J. 1169, *In re Llewellyn Evans*.

(32) AIR 1932 Lah 13 (14) : 12 Lah 211 : 32 Cr.L.J. 1022, *Amolak Ram v. Emperor*. (Arrest during police investigation — Application under S. 491 of this Code.)

(31) AIR 1931 Lah 99 (100) : 12 Lah 435 : 33 Cri L Jour 180, *Balkrishna v. Emperor*. (Mere fact that his relations have been granted interviews is no excuse for refusing an interview with his counsel.)

(30) AIR 1930 Lah 945 (946) : 12 Lah 16 : 32 Cr. L. J. 339, *Sundar v. Emperor*. See also Note 5 and S. 167 Note 10.

3. (13) 40 Cal 444 (451) : 14 Cr. L. J. 57 : 18 I. C. 345, *Bhim Lal Shah v. Bisa Singh*. (14 Cal 141, Referred to.)

(11) 11 Ind Cas 311 (312) : 38 Cal 880, *Golap Jan v. Bholanath*.

(20) 25 Cal W N xii (xii), *Baul Pramanik v. Junior Sub-Inspector, Raigunj*. (The accused and his witnesses also were examined during the inquiry—This was held illegal.)

(26) AIR 1926 Sind 188 (189) : 20 Sind L R 43 : 27 Cri L Jour 494, *Atmaram Udhoḍas v. Topandas*.

(08) 8 Cri L Jour 20 (23) : 4 Nag L R 81, *Sheikh Chand v. Mahommed Hanif*.

4. (11) 12 Cr. L. J. 207 (208) : 10 I. C. 33 (Cal), *Sheikh Akbar v. E. F. Prance*.

5. (11) 12 Cr.L.J. 231 (232) : 10 I. C. 740 (All), *Ram Nihore Umar v. Emperor*.

6. (10) 11 Cr.L.J. 501 (502) : 4 Sind L R 49 : 7 I.C. 606, *Emperor v. Tawakali*.

Section 340
Notes 3-4

3. Appellate and revisional Courts. — The section has been held to be as applicable to an appellate Court as to the Court in which the charge was originally brought, an appeal being to all intents and purposes a trial.¹ This was doubted in an earlier case (under the Code of 1861) but even there it was conceded that though this section might not apply, the appellant's right to be represented by an authorised agent was recognised by S. 417 and S. 419 of the Code corresponding to Ss. 419 and 423 respectively of the present Code.²

The right of persons to appear personally or by pleader before Courts exercising powers of revision is expressly excluded by S. 440.³

4. "May of right be defended." — The accused is entitled to be represented by a pleader.¹ Where this right is denied, a re-trial will be ordered.² It is necessary that notice of the date fixed for hearing should be given to the accused; for, otherwise the right given under this section cannot be exercised by him.^{2a} Full opportunity should be afforded to the accused to get proper legal advice and assistance before he is called upon to cross-examine the prosecution witnesses.³ It will not be giving him a reasonable time to ask him immediately after the framing of the charge to cross-examine the prosecution witnesses.⁴ If the accused had had no sufficient opportunity before the commencement of the proceedings to engage a pleader, it has been held that the proper course is for the Magistrate to proceed with the examination-in-chief of the prosecution witnesses and then give the accused an opportunity of engaging a pleader by adjourning the case for a reasonable period, what is a proper period being a question for reasonable decision in each case.⁵ It must be remembered, however, that the services of a counsel are necessary even when witnesses are examined-in-chief, not only to check leading questions but to prevent irrelevant evidence being recorded.⁶

Note 3

1. ('70) 1870 Pun Re No. 31 Cr, p. 49, *Fuzl v. Crown*.
- ('05) 9 Cal W N cclxxxv (cclxxxv) *Hira Lal Bose v. King-Emperor*. (Refusal to postpone hearing of appeal despite there being reasonable ground for postponement — Appeal ordered to be reheard.)
2. ('70) 1870 Rat 29 (30), *Reg v. Bechar Pitamber*.
3. ('11) 12 Cri L Jour 231(232) : 10 I. C. 740 (All), *Ram Nihore Umar v. Emperor*. ('76) 1 Bom 64 (65), *Reg. v. Devama*.

Note 4

1. (1900) 27 Cal 656 (658), *Nakhi Lal Jha v. Queen-Empress*.
- ('25) AIR 1925 All 285 (285) : 47 All 147 : 26 Cri L Jour 575, *Pita v. Emperor*.
2. ('77) 1877 Pun Re No. 9 Cr, p. 23, *Nanak v. Crown*.
- 2a. ('03) 25 All 375 (377) : 1903 A W N 79, *Emperor v. Girand*.
See also S. 123 Note 11.
3. ('16) AIR 1916 Mad 933 (934) : 16 Cr. L. J. 786, *In re Rangaswami Padayachi*. ('16) AIR 1916 Mad 142 (143) : 16 Cr. L. J. 334, *In re Murugesu Naidu*. (Adjournment for obtaining copies of depositions of prosecution witnesses refused — Held, accused was prejudiced and conviction should be set aside.)
See also S. 256 Note 6.
4. ('16) AIR 1916 Mad 933 (934) : 16 Cr. L. J. 786, *In re Rangaswami Padayachi*.
- ('11) 12 I. C. 524 (525) : 12 Cri L Jour 548 (Mad), *Arumugam Pillai v. Emperor*.
5. ('25) AIR 1925 All 285 (285) : 47 All 147 : 26 Cr. L. J. 575, *Pita v. Emperor*.
- ('16) AIR 1916 Lah 445 (445) : 17 Cri L Jour 278 (279), *Sher Singh v. Emperor*.
6. ('25) AIR 1925 Mad 1153 (1154) : 27 Cri L Jour 33, *Mannargan v. Emperor*.

A Magistrate exercises jurisdiction with material irregularity when he holds a trial at a place where the accused are totally incapable of making a proper defence and are deprived of the opportunity of being represented by a pleader.⁷ Where a Magistrate held Court on a Sunday, it was held that, though holding Court on a Sunday was in itself not an illegality, yet the effect having been to prejudice the accused and deprive him of the right given to him under S. 340, the conviction should be set aside.⁸ A conviction was, however, allowed to stand, where, though the action of a Magistrate in accelerating a case had resulted in depriving the accused of the services of his senior counsel, the accused had, nevertheless, not been prejudiced thereby.⁹

An appellant is entitled to be heard through his pleader.¹⁰ A Judge contravenes the provisions of the Code in deciding an appeal without hearing counsel on such a date as to make it physically impossible for counsel to attend when the Judge had before him a petition from the accused's counsel praying to be heard.¹¹

When a person is not defended, the Magistrate or Judge ought, in the interests of justice, to test the accuracy of statements of witnesses by questions in the nature of cross-examination,¹² and in the cases of ignorant individuals accused of technical offences, to assist them in putting up obvious defensive pleas.¹³

Similarly, in cases where the prisoner being too poor to defend himself, a lawyer has been engaged to defend him at the expense of the Crown, the trial Judge must use his greater experience to cross-examine the witnesses when he sees that the defence lawyer is incompetent. He should not, however, do this unnecessarily but only when it is desirable in the interest of justice.¹⁴

5. Right of accused while in custody.—The section not only contemplates that the accused should be defended by a pleader at the time proceedings are actually going on, but also implies that he shall have a reasonable opportunity, if in custody, of getting into

7. ('18) AIR 1918 Pat 197 (199) : 19 Cri L Jour 249 : 3 Pat L Jour 147, *Mewa Lal v. Emperor*. (Case under S. 145 of this Code.)

See also Section 352 Note 4.

8. ('15) AIR 1915 Bom 254 (255) : 16 Cri L Jour 752, *Baban Daud v. Emperor*. ('30) AIR 1930 Nag 255 (257) : 31 Cri L Jour 705, *Girdhari v. Emperor*.

[See also ('25) AIR 1925 Pat 772 (782) : 4 Pat 646 : 26 Cr. L. J. 1441, *Emperor v. Akhileswar Prasad*. (Court not to sit beyond the prescribed hours, except with the consent of the pleaders on both sides.)]

See also S. 344 Note 9 and S. 537 Note 25.

9. ('98) 1898 Pun Re No. 14 Cr, p. 32 (33), *Karam Din v. Empress*.

10. ('08) 9 Cri L Jour 189 (190) : 12 C W N 248, *Rajkumar Singha v. Tincowri Mazumdar*. (An appeal against order of sanction to prosecute should not be summarily rejected without hearing appellant's pleader.)

11. ('70) 1870 Pun Re No. 31 Cr, p. 49, *Fuzl v. Crown*. (Per Cunningham and Lindsay, JJ; Campbell, J., dissenting.)

12. ('84) 7 All 160 (162) : 1884 All W N 314, *Queen-Empress v. Kallu*.

13. ('30) AIR 1930 Rang 349 (350) : 32 Cri L Jour 206, *Ali Hossein v. Emperor*. (Case under S. 19 (a), Arms Act—Accused sold military stores without license.)

See also Section 244 Note 7.

14. ('38) AIR 1938 Pat 153 (158) : 39 Cr.L.J. 384, *Darpan Potdarin v. Emperor*. (Necessity of selecting defence counsel in such cases from among young men of marked ability and not as a matter of patronage pointed out.)

Section 340
Note 5

communication with his pleader and preparing for his defence.¹ So, when accused is on remand, he has a right to have access to his legal adviser subject to such legitimate restrictions as may be necessary to prevent interference with the course of investigation.² A remand is a process of Court and it would be an abuse of that process if the police were to take advantage of it to prevent the accused from having access to his legal advisers. The High Court can, therefore, interfere under S. 561A to prevent such abuse.³

Where the accused were arrested and placed in custody and then suddenly called upon to conduct their case without any opportunity having been given to them of obtaining legal assistance, the procedure was held to be irregular.⁴

Pending his trial, a police-officer was put under certain restraints by his superior officers which hampered him in arranging for his defence. It was held that full opportunity should be given to the under-trial officer to consult his legal advisers and that all reasonable facilities should be afforded to him for the conduct of his defence.⁵ While it is beyond the province of the High Court to interfere with the discipline of the police force or the exercise by the superior officers of their lawful powers, it is nevertheless bound to satisfy itself that the conditions under which the accused is being tried do not hamper him in his defence.⁶

Although sufficient means should be adopted to prevent under-trial prisoners from escaping when holding an interview with their vakils, police or other persons should not be placed sufficiently near to overhear their conversation.⁷

Note 5

1. ('26) AIR 1926 Bom 551 (552) : 50 Bom 741 : 27 Cr.L.J. 1169, *In re Llewellyn Evans*.
2. ('35) AIR 1935 Lah 230 (244) : 35 Cri L Jour 1180, *Jahangiri Lal v. Emperor*. (These rules cannot be evaded by removing him to a place so that nobody knows where he is and his relations and friends cannot communicate with him and legal assistance cannot be availed of—The matter is really reduced to a farce if interviews are allowed only after a confession has been recorded.)
3. ('30) AIR 1930 Lah 945 (947) : 12 Lah 16 : 32 Cr.L.J. 339, *Sunder v. Emperor*. ('32) AIR 1932 Lah 13 (14) : 12 Lah 211 : 32 Cr.L.J. 1022, *Amolak Ram v. Emperor*. See also Note 2 and S. 167 Note 10.
4. ('26) AIR 1926 Bom 551 (553) : 50 Bom 741 : 27 Cri L Jour 1169, *In re Llewellyn Evans*.
5. ('20) AIR 1920 All 268 (269) : 42 All 646 : 22 Cri L. Jour. 228, *Rajbansi v. Emperor*. (Accused were arrested under S. 55 of this Code as habitual thieves and were also detained in custody.)
6. ('19) AIR 1919 Cal 156 (156) : 20 Cr. L. J. 230, *Harihar Roy v. Emperor*. ('32) AIR 1932 Cal 285 (286) : 58 Cal 1132 : 33 Cr.L.J. 15, *Ram Gopal v. Emperor*. (Confinement of a police officer under suspension to police lines is illegal and unreasonable.)
7. ('19) AIR 1919 Cal 383 (385) : 20 Cr. L. J. 675, *Harihar Roy v. Emperor*.
8. ('71) 8 Bom H C R Cr 126 (157) (F B), *Reg v. Kashinath*.
9. ('30) AIR 1930 Lah 945 (947) : 12 Lah 16 : 32 Cr.L.J. 339, *Sunder Singh v. Emperor*. ('35) AIR 1935 Cal 101 (102) : 62 Cal 384 : 36 Cr. L. J. 615, *Sudhasindhu Dey v. Emperor*. (But the professional privilege of advocates can only be upheld if they honourably bear in mind that they are officers of the Court and do not lend themselves in any way to act as go-betweens to facilitate improper communications with other undetected criminal associates of the accused.)

6. Choice of pleader. — Prisoners are to have the fullest opportunity to execute *vakalatnamas* to whomsoever they please.¹

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Notes 6-6a

An accused person has a right to be defended by a pleader of his choice and a Magistrate has no right to tell him to engage another pleader as the one he had engaged did not know how to behave.² No Court has any authority to force upon an accused person the services of a counsel if he is unwilling to accept them.³ Where the accused declines to accept the services of a counsel appointed by the Court and raises his objection at the earliest possible opportunity and neither instructs such counsel nor is allowed to conduct his own defence, the irregularity of the procedure results in an illegal trial and hence in a failure of justice. In such cases the High Court will order a new trial.⁴ The Magistrate is bound to afford the accused and his friends every opportunity of making his defence and should not personally interpose between them. He is not justified in refusing the pleader an interview with the accused or a seat in Court.⁵ A Judge cannot, however, be said to act contrary to S. 340, by interfering in a dispute between a counsel assigned for the defence and another counsel who is asked to associate himself with the former and in deciding that the defence should be conducted by the former.⁶

6a. Appointment of defence counsel by the Crown. — There is no rule providing for the employment of counsel at the expense of the Government in an enquiry before a Magistrate, but on principle there is no objection to such employment if the Crown is prepared to pay for the services of a pleader. But when the Sessions Judge or the Magistrate engages a counsel for the defence of an accused, he does so with the express or implied consent of the latter and the Court has no authority to force upon him the services of a counsel if he is unwilling to accept them.¹ See also Note 6.

In selecting lawyers to defend prisoners who are too poor to instruct counsel on their own account, those whose duty it is to select lawyers to defend at the expense of the Crown, should not treat the selection as a matter of patronage for the benefit of the lawyers so appointed. The selection should be made from among young men of marked ability.²

Note 6

1. (1863) 1 Bom H C R Cr 16 (16), *In re Shek Dadabhai*.
- (1862) 1 Mad H C R 4 (4), *Queen v. Vaidyapuri Goundan*.
2. ('96) 1896 Rat 861 (863), *In re James Fitzgerald*.
3. ('37) 39 P L R 311 (312), *Murid Husain v. Emperor*.
- ('29) AIR 1929 Lah 705 (706) : 11 Lah 220 : 31 Cr. L. J. 977, *Emperor v. Sukh Deo*.
4. ('37) 39 P L R 311 (312), *Murid Husain v. Emperor*.
5. ('99) 1 Bom L R 856 (856), *Queen-Empress v. Wasudev Hari*.
- ('93) 21 Cal 642 (661, 662), *Queen-Empress v. Sagal Samba*.
6. ('29) AIR 1929 Cal 1 (5, 6) : 30 Cri L Jour 494, *Bazlur Rahman v. Emperor*.

Note 6a

1. ('37) 39 P L R 311 (312), *Murid Husain v. Emperor*.
- ('29) AIR 1929 Lah 705 (706) : 11 Lah 220 : 31 Cr. L. J. 977, *Emperor v. Sukh Deo*.
2. ('38) AIR 1938 Pat 153 (158) : 39 Cr. L. J. 384, *Darpan Potdarin v. Emperor*.

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Notes 6a-7

See also Criminal Rules of Practice (Madras) 1931, Rr. 117, 157, 158, 159 and 160, as to the appointment of advocates for the defence of accused who have no advocates of their own.

7. Arguments. — A Court is bound to hear arguments offered at any criminal trial or proceeding.¹ It is not a question of indulgence but of right, as it is an elementary principle of law that no order ought to be made to a man's prejudice without hearing him.² Refusal to hear arguments is not a mere irregularity but an illegality.³ But where the pleaders do not attend on the day fixed for hearing arguments, the Court can pronounce judgment without hearing them⁴ and a Magistrate may cut short an argument which has proceeded for an inordinate length of time.⁵ Where a court witness was examined after the close of both parties' case and arguments, and the Magistrate was not requested to hear further arguments, it was held that no objection could be entertained in revision.⁶

Where a counsel is entitled to be heard, he is entitled generally to be heard by an *oral* address and not by a *written* speech.⁷ It is the duty of the presiding officer to take such notes of the arguments as he thinks fit when they are being submitted to the Court.⁸ The practice of allowing counsel to file memoranda of arguments has been held to be improper, especially so when they are taken behind the back of one of the parties.⁹ If in any case a pleader desires to submit to the Court the notes of his argument or of any further argument, which he thinks in the interest of his client ought to be put before the Court, he should submit them to the pleader for the opposite party, so that the latter may have an opportunity of making any remarks or any criticism in respect thereof.¹⁰ Not hearing counsel, but requiring him to file a written argument, is, however, not an illegality but an irregularity which may be waived.¹¹ Where a counsel on behalf of his

Note 7

1. ('25) AIR 1925 All 282 (283) : 26 Cri L Jour 810, *Malik v. Emperor*.
- (25) AIR 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cr. L. J. 1380, *Baij Nath v. Emperor*.
2. ('04) 1 Cri L Jour 760 (761) : 6 Bom L R 665, *Emperor v. Iboo*.
3. ('28) AIR 1928 Mad 1234 (1235) : 29 Cr. L. J. 1082, *Muthukaruppa v. Emperor*.
4. ('23) AIR 1923 Nag 208 (208) : 23 Cri L Jour 752, *Nyajukhan v. Emperor*.
(Court was in camp and the parties had due notice of this.)
- See also S. 422 Note 1.
5. ('08) 7 Cri L Jour 146 (153) : 35 Cal 243 : 7 Cal L Jour 177 : 12 C W N 299, *Chintamon Singh v. Emperor*.
6. ('24) AIR 1924 Cal 980 (980) : 25 Cr. L. J. 1107, *Abdul v. Mafizuddin Sarkar*.
7. ('21) AIR 1921 Cal 426 (428), *Amjad Ali v. Suresh Ranjan Pal*. (Submission of 'notes' in the form of a draft judgment condemned.)
- ('28) AIR 1928 Bom 557 (558) : 53 Bom 119 : 30 Cr.L.J. 185, *Vinayak v. Emperor*.
8. ('21) AIR 1921 Cal 426 (428), *Amjad Ali v. Suresh Ranjan Pal*. (If he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open Court in the presence of the other side.)
9. ('28) AIR 1928 Mad 1130 (1131) : 29 Cr. L. J. 929 (929), *Venkayya v. Emperor*.
- ('28) AIR 1928 Bom 557 (559) : 53 Bom 119 : 30 Cr.L.J. 185, *Vinayak v. Emperor*.
- ('26) AIR 1926 Sind 194 (198) : 21 S.L.R. 293 : 27 Cr.L.J. 711, *Crowder v. Morrison*. (If notes of arguments are accepted, they should form part of the record.)
10. ('21) AIR 1921 Cal 426 (428), *Amjad Ali v. Suresh Ranjan Pal*.
11. See ('28) AIR 1928 Bom 557 (559) : 53 Bom 119 : 30 Cr. L. J. 185, *Vinayak Laxman v. Emperor*.

client is entitled to be last heard in the matter, he cannot be deprived of the right¹² but the violation of the right is only an irregularity which may be cured by section 537.¹³ Writing of judgment during the arguments is irregular, but curable under section 537.¹⁴

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Notes 7-9

8. Citing accused's counsel as witness. — It is very reprehensible for the prosecution to call as a witness, in the course of the proceeding, a counsel who is actually defending an accused person. It not only affects the proper conduct of the defence but gives a handle to the prosecution to prevent a counsel who is acquainted with the facts of the case from conducting the defence. If the prosecution wants to call the defence counsel as a witness, sufficient notice ought to be given to the accused to enable him to engage a competent counsel.¹ Where the accused's counsel is cited as a witness, the rule as to exclusion of witnesses from the Court will not apply to him, for it would conflict with the provisions of section 340.²

It is desirable that counsel do not appear in cases where it is probable their evidence would be material.³ No self-respecting counsel would like to conduct a case for the defence after having been called as a witness for the prosecution.⁴ The real objection is not to his giving evidence (because he is a competent witness) but to his continuing as a counsel in the case in which he knows he is likely to be examined as a witness.⁵

9. Court and pleader. — A Magistrate should not conduct himself unpleasantly towards persons brought before him for trial or their legal advisers;¹ and it is highly improper for the Court or for persons in charge of the prosecution to intimidate either the accused or the pleaders appearing for them.²

A Magistrate has no right to ask a pleader to sit down in the middle of his cross-examination because he was asking irrelevant questions. He can only rule out the questions as irrelevant. He cannot refuse to allow the pleader to cross-examine witnesses or permit him to do so only on condition of his apologizing for his previous contumacious behaviour.³ It is improper to suspend a pleader before

12. ('28) AIR 1928 Bom 557 (559): 53 Bom 119: 30 Cr.L.J. 185, *Vinayak v. Emperor*. ('06) 11 Cal V N xliii (xliii), *Promoda v. Emperor*.

13. ('28) AIR 1928 Bom 557 (559): 53 Bom 119: 30 Cr.L.J. 185, *Vinayak v. Emperor*.

14. ('93) 21 Cal 121 (128, 129), *Danu Senapati v. Sridhar Rajwar*.

Note 8

1. ('25) AIR 1925 Mad 1153 (1154) : 27 Cri L Jour 33, *Mannargan v. Emperor*.
2. ('21) AIR 1921 Mad 424 (424) : 44 Mad 916 : 28 Cr.L.J. 588, *In re Babureddi*.
3. ('16) AIR 1916 Mad 5 (7), *Lodd Govindoss Krishnadoss v. Rukmani Bhai*. ('25) AIR 1925 Sind 99 (100) : 18 S L R 30 : 25 Cr.L.J. 571, *Ghadially v. Emperor*.
4. ('27) AIR 1927 Pat 61 (79) : 5 Pat 777, *Chandreshwar Prasad v. Bisheshwar Pratab*.
5. ('14) AIR 1914 Cal 396 (427 to 429) : 40 Cal 898 (SB), *D. Weston v. Peary Mohun Das*.

Note 9

1. ('71) 8 Bom H C R Cr 126 (157, 158) (F B), *Reg v. Kashinath Dinkar*.
2. ('01) 3 Bom L R 562 (563), *King-Emperor v. Bajya Anandrao*.
3. ('19) AIR 1919 Pat 515 (517) : 20 Cr. L. J. 566, *Mahomed Mian v. Emperor*. (As the position of the accused is always of grave anxiety.)
3. ('96) 1896 Rat 861 (863), *In re James Fitzgerald*.

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Note 9

the close of a case, as grave injustice might be done to the clients by depriving them of his services.^{3a}

Advocates have ample discretion in the conduct of the case of which they are in charge and Courts cannot fetter their discretion by insisting that their case should be put to this witness or that.⁴ As a rule, the Court should leave witnesses to the pleaders to be dealt with.⁵

A pleader has a general authority to act in the interests of his client in the manner he thinks best; he cannot be charged with misconduct if he writes out petitions without asking the client and asks or advises him to present the same.⁶

As to the authority of a pleader or counsel to make admissions on behalf of his client in criminal cases, see the undermentioned decisions.^{6a}

While Judges should be careful not to offer discourtesy or insult to the professional gentlemen who appear before them, counsel should also recognize their responsibility and their duties towards the Court and to the public and should endeavour by their conduct to prevent any unpleasantness, and to avoid provoking the Court to offer discourtesy.⁷

Some latitude should be allowed to a member of the bar, insisting in the conduct of his case upon his question being taken down or his objections being noted, where the Court thinks the question inadmissible or the objections untenable. There ought to be a spirit of give and take between the Bench and the Bar in such matters.^{7a}

It is improper for one and the same counsel to appear for two accused having conflicting defences.⁸ A pleader who is himself interested in a case ought not to appear for the accused as he is prone to allow himself to be swayed by his own feelings and improperly obstruct the course of justice.⁹

It is not the duty of an advocate to approach the trial Judge and apprise him that in his opinion the man whose fate has been entrusted to his care has no defence to make. His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence of which he is charged.¹⁰

3a. ('84) 10 Cal 256 (260, 264), *In re Kristo Lall Nag*.

4. ('19) AIR 1919 Pat 515 (516): 20 Cri L Jour 566, *Mahomed Mian v. Emperor*.

5. ('24) AIR 1924 Oudh 371 (372): 27 Oudh Cas 246: 25 Cr.L.J. 1226, *Janki v. Sheo Narain Singh*.

6. ('13) 14 Cr.L.J. 438 (439): 20 Ind Cas 598 (Oudh), *Satgur Prasad v. Emperor*.

6a. ('28) AIR 1928 Bom 241 (242, 243): 52 Bom 686: 29 Cr. L. J. 990, *Bansilal Gangaram v. Emperor*. (Pleader's admission is binding on the party.)

('20) AIR 1920 All 99 (101): 21 Cri L Jour 777, *Sheo Narain Singh v. Emperor*. (It is better in a capital case not to take admissions from defence counsel — The more prudent course is to have every fact strictly proved on the record.)

See also S. 271 Note 10.

7. ('17) AIR 1917 Pat 437 (438): 18 Cr.L.J. 670 (671), *Nibaran Chandra v. Emperor*.

7a. ('04) 1 Cri L Jour 612 (613): 6 Bom L R 541, *In re Dattatraya Venkatesh*.

8. ('90) 1890 Pun Re No. 13 Cr, p. 25 (25), *Hira v. Empress*. (Especially in a murder case where the life of each is in peril.)

9. ('33) AIR 1933 Rang 34 (34): 34 Cri L Jour 466, *In re U, a Higher Grade Pleader, Taoungoo*.

10. ('24) AIR 1924 Cal 257 (268, 269): 25 Cri L Jour 817 (F B), *King-Emperor v. Barendra Kumar Ghose*.

10. "Pleader." — The word 'pleader' means and includes a pleader, muktear, advocate, vakil and attorney of a High Court authorized by law to practise in any Court: see S. 4 (1), clause (r). Rule 10 of the Appellate Side Rules of the Bombay High Court debars advocates who are not advocates on the original side from appearing, pleading or acting in any suit or in the High Court in any matter of ordinary original jurisdiction, civil or criminal. Hence advocates on the appellate side do not come within the definition of pleader *quoad* the High Court Sessions.¹

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Notes 10-11

The question whether a vakil can act for a party in a criminal appeal from the original side of the High Court or whether the appearance can be only by an attorney depends upon the rules of that Court and is not concluded by anything in this Code.² A Munsif's Court pleader comes within the category of 'authorized pleader.'³ But a person who is licensed to appear only in certain districts cannot be said to be authorized to practise in a Court beyond those limits. But it is in the discretion of the Magistrate to permit him to appear for an accused person. The discretion should, however, be exercised judicially and sparingly.⁴

A Magistrate has no power to forbid a duly qualified pleader to appear.⁵ No *vakalat* is necessary when an authorized pleader appears in defence of an accused person either at the original trial or in an appeal. A memorandum of appearance is sufficient.⁶ Even this has been held to be unnecessary when the party also is present.⁷

District Judges have no power to forbid legal practitioners from practising pending renewal of their certificates. Any such orders must proceed from the High Court.⁸

11. Muktears and other persons. — Under the Code of 1861, an accused was entitled to be defended by a muktear¹ or authorised agent.²

The law now relative to this right is contained in S. 340 read with S. 4 (1) (r) of the Code. Every person accused before a criminal Court may of right be defended by a pleader, and "pleader" (before the amendment of 1923) included muktears and other persons, only if

Note 10

1. ('34) AIR 1934 Bom 70 (71) : 58 Bom 456 (F B), *In re Philip N. Godinho*. See also S. 4 (1) (r) Note 1.
2. ('28) AIR 1928 Cal 675(678):55 Cal 858:29 Cr.L.J.1022, *Satya Narain v. Emperor*.
3. ('79) 2 Weir 402 (402).
4. ('18) AIR 1918 Upp Bur 56 (56) : 2 Upp Bur Rul 121 : 18 Cr. L. J. 345, *In re W. Calogreedy*. (The interests of the accused must be considered in doing so.)
5. ('69) 1869 Rat 25 (25) : *Reg. v. Dajee Mansukhram*.
6. ('74) 2 Weir 402 (402).
7. ('26) AIR 1926 Pat 296 (298) : 27 Cri L Jour 666, *Subda Santal v. Emperor*.
8. ('24) AIR 1924 Mad 192 (192) : 25 Cri L Jour 73, *Manikonda Lingayya v. Emperor*. See also S. 419 Note 3.
7. ('09) 9 Cri L Jour 305 (306) : 1 Ind Cas 546 (Mad), *In re Munirama Reddi*.
8. ('31) AIR 1931 Mad 688 (688) : 54 Mad 574, *In re Gopala Menon*.

Note 11

1. ('81) 6 Bom 14 (15), *Imperatrix v. Shivram Gundu*. (Even in the case of a criminal appeal—Case was governed by Code of 1872.)
2. (1862) 1862 Rat 1 (2), *Reg. v. Ramchandra*.

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Notes 11-12

they had the Court's permission to appear.³ The amendment of 1923 has done away with the necessity for permission so far as muktears are concerned. As regards other persons, the provision regarding permission still holds good. An estate manager may be a pleader provided he has the permission of the Court to plead.⁴ A Prosecuting Inspector may, with the Court's permission, defend an accused person.⁵ In the undermentioned case,⁶ third class advocates in Burma would appear to have required permission to plead and act in a Sessions Court. See also Notes under section 4 (1) (r).

Though prior to the amendment muktears required the Court's permission to constitute them pleaders in a particular case, it was held that it would rarely be a wise discretion on the part of the Court to refuse permission to a muktear to appear for the defence as it would be depriving parties of legal aid which they can frequently obtain at a moderate cost.⁷

The practice of permitting private vakils to defend parties is not illegal as it is left to the discretion of the Magistrate to hear such agents or not.⁸

The discretion must be exercised in respect of each case individually and a general order prohibiting a person from appearing in any case in any Court or Courts is illegal.⁹ If a person is aggrieved by the refusal of a Magistrate to allow him to appear in a particular case he may move the High Court in revision.¹⁰ But when the case is ended, it would be useless to proceed with a revision petition in respect of the order refusing permission; the accused may, however, take it as a ground of appeal that he has been deprived of legal assistance.¹¹

12. Sub-section (2).—It was assumed in the undermentioned case¹ that the class of persons specified in this sub-section referred to

3. ('11) 12 Cr. L. J. 111 (111): 38 Cal 488: 9 I. C. 664, *Ishan Chandra v. Emperor*. (The character of such a person is to be taken into consideration.)

('86) 1886 Rat 314 (314), *In re Venkatesh*.

('08) 7 Cri L Jour 21 (22, 23): 30 All 66: 1908 All W N 11: 5 A L J 40, *In re Anant Ram*.

('11) 12 Cri L Jour 118 (118): 9 I. C. 711: 4 Sind LR 195, *Topanmall v. Emperor*. (6 Bom 14, distinguished.)

See also S. 4 (1) (r) Note 1.

4. ('26) AIR 1926 Bom 218 (222): 50 Bom 250: 27 Cri L Jour 440, *Dorabshah Bomanji v. Emperor*. (There must be something on record to show that such person has been duly appointed by the accused and permitted by the Court to do so.)

5. ('30) AIR 1930 Nag 150 (151): 26 Nag LR 172: 31 Cri L Jour 419, *Emperor v. Chotekhan*.

6. ('72-92) 1872-1892 Low Bur Rul 260, *In re Travers Drapes*.

7. ('11) 12 Cr. L. J. 111 (112): 38 Cal 488, *Ishan Chandra v. Emperor*.

8. ('74) 7 Mad H C R App xxxvii (xxxvii): 2 Weir 400.

9. ('23) AIR 1923 Mad 183 (184), *In re Nagaswami Iyer*. (The applicant wanted general permission to appear in all subordinate Courts in the district.)

('02) 12 Mad L Jour 354 (354): 2 Weir 401, *In re Krishnamachariar*.

('75) 2 Weir 400 (401).

('11) 12 Cr. L. J. 111 (112): 38 Cal 488: 9 I. C. 664, *Ishan Chandra v. Emperor*.

('70) 14 Suth W R Cri Cir 5 (5).

(1864) 1 Suth W R Cr 34 (34), *Queen v. Sham Chand*.

10. ('23) AIR 1923 Mad 183 (184), *In re Nagaswami Iyer*.

11. ('23) AIR 1923 Mad 484 (485), *In re Atakvri Saravayya*.

Note 12

1. ('25) AIR 1925 Cal 822 (828): 52 Cal 721: 26 Cr. L. J. 1194 (FB), *Narendra Chandra Rudra Pal v. Sabarali Bhuiya*.

accused persons and it was held that the Legislature removed, in the case of this particular class of persons, a disability which ordinarily attached to accused persons. According to another view, the new sub-section does not remove the restraint from any class of accused persons but only makes it clear that the persons mentioned therein are not *really accused persons* to whom the restriction against being put on oath would apply.²

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Note 12

Even prior to this amendment it was held that the following persons were competent witnesses and that the restriction in clause 4 of section 342 did not apply to them :

- (1) Persons against whom an order of maintenance is sought under S. 488.³
- (2) Parties proceeded against under S. 145,⁴ and a party to proceeding under S. 138.⁵

As regards persons proceeded against under S. 488, in a case decided after the amendment, it was held that by the omission of the word "accused" in sub-section (9) of S. 488, the Legislature intended that such persons should no longer be looked upon as accused persons.⁶

341.* If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Section 341

Procedure where accused does not understand proceedings.

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Scope. 2. Duties and powers of Court other than the High Court. 3. Proceedings shall be forwarded to the High Court. | <ol style="list-style-type: none"> 3a. Non-compliance with the section — Effect. 4. "High Court shall pass thereon such order as it thinks fit." 5. Criminal responsibility of deaf mutes. |
|---|---|

* 1882 : S. 341; 1872 : S. 186 para. 3; 1861 : Nil.

2. ('27) AIR 1927 Cal 509 (511) : 54 Cal 532 : 28 Cr. L. J. 407, *Krishen Doyal v. Corporation of Calcutta*.

3. ('95) 18 All 107 (108) : 1895 A W N 242, *Hira Lal v. Sahebjan*.

('89) 16 Cal 781 (787), *Nur Mahomed v. Bismullajan*. (Such proceedings are of a civil nature.)

See also S. 488 Note 5.

4. ('25) AIR 1925 Oudh 286 (286) : 26 Cr. L.J. 70, *Mohammad Ayub v. Sarfaraz Ahmad*.

5. ('05) 2 Cr. L.J. 575(577) : 9 CWN 127 : 2 CLJ 149, *Hirananda Ojha v. Emperor*.

6. ('25) AIR 1925 Cal 339 (339) : 25 Cr. L. J. 1091, *Bachai Kalwar v. Jamuna Kalwarin*. See also Section 488 Note 5.

Section 341
Notes 1-2*Other Topics (miscellaneous)*

Competency of Magistrate to make order under S. 562. See Note 2.	Order for keeping in custody. See Note 4.
Discretion of the High Court. See Note 4.	Persons of unsound mind. See Note 1.
Enquiry as to state of mind of accused. See Note 1.	Reference to High Court — Conditions for. See Notes 2 and 3.
Findings as to inability to understand. See Note 3.	Remand for recording a conviction. See Note 3.
Magistrate's views — Whether to be stated in reference. See Note 3.	Summary procedure. See Note 2.
Order for discharge. See Note 4.	Where accused is able to understand. See Note 1.
	Whether a Magistrate can pass sentence. See Note 2.

1. **Scope.** — The provisions of this section do not apply to a person who is of *unsound mind*. They apply to persons who are unable to understand the proceedings from deafness or dumbness or ignorance of the language of the country or other similar cause.¹ Where the inability to understand the proceedings is due to unsoundness of mind, the procedure to be followed is that provided for in chapter XXXIV.² Where a Magistrate found an accused to be of poor wits and wanting in apprehension of the serious consequences of his acts and incapable of understanding anything, the High Court directed that the Magistrate should hold an enquiry into the question, whether the accused was a lunatic at the time of the trial or at the time he committed the act, that if he found that he was not a lunatic at either of those times, he should proceed under S. 341 and that if he convicted the accused, he should report the case to the High Court.³ The fact that the accused is deaf and dumb does not *per se* justify a reference under S. 341. He must also be *unable to understand* the proceedings.⁴

2. **Duties and powers of Court other than the High Court.** — If the Magistrate is of opinion that the accused cannot be made to understand the proceedings, he should nevertheless proceed with the enquiry or trial till the end and if it results in a conviction or committal, the proceedings should be forwarded to the High Court with a report as to the circumstances of the case.¹ He should not proceed to pass sentence on the accused, but having convicted him should stay proceedings and report the matter to the High Court for

Section 341 — Note 1

1. ('80) 5 Bom 262 (263), *Empress v. Husen*.
2. ('80) 5 Bom 262 (263), *Empress v. Husen*.
3. ('95) 1895 Rat 832 (833), *Queen-Empress v. Kasima*.
4. ('12) 13 Cri L Jour 24 (24) : 13 Ind Cas 216 (Mad), *In re Adala Yerrivadu*.
4. ('37) 1937 Mad W N 1121 (1121), *Public Prosecutor v. Subbayya*. (Accused found to be deaf and dumb, it being impossible to communicate with him or to understand him — S. 341 applies.)
- ('27) AIR 1927 Lah 799 (799) : 28 Cri L Jour 656, *Emperor v. Gunga*.
- ('29) AIR 1929 Lah 840 (840) : 10 Lah 566 : 29 Cr. L. J. 1104, *Alla Dia v. Emperor*.
- ('01) 3 Bom L R 371 (371), *Emperor v. Dada Mahadu*.
- ('82) 1882 Rat 180 (181), *Queen-Empress v. Trikam*.
- ('73) 19 Suth W R Cr 37 (37), *Doobri Hulwai v. A dumb person*.
- ('26) 27 Cr. L. J. 1097 (1097, 1098) : 97 I. C. 361 (All), *Emperor v. Barhma Singh*.
- ('04) 1 All L Jour 273n (273n), *Jai Narain v. Emperor*. (S. 341 does not apply where the accused does, and can be made to, understand the proceedings by signs.)

Note 2

1. ('97) 1897 Rat 879 (879), *In re A dumb man*.
- ('75) 2 Weir 403 (404).
- ('02) 4 Bom L R 825 (825), *In re A deaf and dumb man*.

orders.² Nor is he empowered to pass an order under section 562 of the Code.³

Section 341
Notes 2-3

The view being, that it is impossible for a deaf mute to have lived to maturity, without being able to communicate with his relatives, High Courts have insisted on Magistrates attempting to find out whether the accused (if he is deaf and dumb) has any friends or relatives, who are accustomed to communicate with him, his antecedents and ordinary mode of life, and the manner in which he was communicated with, in the ordinary affairs of life. The Magistrate should attempt to get into communication with the accused with the assistance of his relatives.⁴ The omission to attempt to communicate with the accused is clearly wrong; where there was such a failure, and the High Court was not able to say that the accused were not prejudiced, the conviction was set aside.⁵ If no failure of justice has, however, occurred the High Court may decline to interfere with the conviction.⁶

Summary procedure is not suitable to the case of accused who cannot be made to understand the proceedings.⁷

3. Proceedings shall be forwarded to the High Court. — There should be a conviction or committal before a reference is made to the High Court.¹ If a reference is made before a conviction or committal, the record will be returned to the trying Magistrate to be reported by him only if he convicts or commits the accused.²

In submitting a case to the High Court under this section, the Magistrate must state his view of the conduct of the accused in the commission of the offence, his previous history and habits. There must also be a finding whether the accused was capable of understanding and did, in fact, understand the nature of the proceedings and the purport of the evidence given by the witnesses;³ the report should also state the reason for the Magistrate's holding that the accused did not understand the proceedings, what means were used to make him understand them, and the reason why such means were unsuccessful.⁴

2. ('89) 1889 Pun Re No. 37 Cr, p. 139 (140), *Empress v. Gahna*.

('11) 12 Cri L Jour 386 (387) : 11 Ind Cas 250 : 1 Upp Bur Rul 57, *Emperor v. Nga San Myin*.

3. ('12) 13 Cri L Jour 248 (248) : 14 Ind Cas 600 (Mad), *Addala Yerrivadu v. District Magistrate of Vizagapatam*.

See also S. 562 Note 7.

4. ('06) 4 Cri L Jour 444 (445) : 8 Bom L R 849, *In re A deaf and dumb man*.

('11) 12 Cri L Jour 386 (387) : 11 Ind Cas 250 : 1 Upp Bur Rul 57, *Emperor v. Nga San Myin*.

5. ('70) 6 Mad H C R App vii (vii).

See also S. 271 Note 4.

6. ('70) 2 Weir 402 (403).

7. ('06) 4 Cri L Jour 444 (445) : 8 Bom L R 849, *In re A deaf and dumb man*.

See also S. 260 Note 4.

Note 3

1. ('97) 1897 Rat 879 (879), *In re A dumb man*.

('82) 1882 Rat 180 (180), *Queen-Empress v. Trikam*.

(1900) 27 Cal 368 (370) : 4 C W N 421, *Empress v. Somir Bowra*.

('96) 1896 Rat 836 (836), *In re A dumb man*.

2. ('81) 1881 All W N 15 (15), *Empress v. Mathuria*.

3. ('94) 1894 Rat 696 (697), *Queen-Empress v. Reubin Samuel*.

('97) 1897 Rat 879 (879), *In re A dumb man*.

4. ('96) 1896 Rat 836 (836, 837), *In re A dumb man*.

Section 341
Notes 3-4

The proceedings to be forwarded to the High Court under this section are only those relating to an accused person who cannot be made to understand the proceedings though not insane. If in a case there are two accused and one of them though not insane is not able to understand the proceedings, the Magistrate is not to refer the proceedings of both to the High Court and the High Court under this section will have no jurisdiction to pass any order with regard to the accused who is able to understand the proceedings.⁵

3a. Non-compliance with the section — Effect. — In the undermentioned case¹ the accused, a deaf mute, unable to understand the proceedings was committed to the sessions for trial. Instead of submitting the case to the High Court under the provisions of this section, the Sessions Judge tried the case and acquitted the accused. It was held that though the Sessions Judge was wrong in proceeding to try the accused, the trial was not completely void under S. 530.

4. "High Court shall pass thereon such order as it thinks fit." — The High Court has, in a case reported under this section, full discretion to do whatever the circumstances of the case require.¹ Although the prisoner had not been able to understand the proceedings and therefore those proceedings had not, according to the principles of English common law, constituted a fair and proper trial, yet, under special circumstances, if the High Court should think fit, it might treat them as amounting to a sufficient trial and pass sentence according to the facts, which seem to be established in the course of, and as a result of those proceedings.²

The unrestricted powers vested in the High Court in dealing with cases under this section warrant its ordering that the accused be confined in a suitable place of safe custody under the orders of the Provincial Government.³ In serious cases, it is usually the practice to refer the matter to the Provincial Government.⁴ In the case of minor

(196) 9 C P L R Cr 38 (39), *Empress v. Konda*.

5. ('38) AIR 1938 Bom 352 (353): 39 Cr. L. J. 866, *Emperor v. Trimbak Damodar*.

Note 3a

1. ('37) 1937 Mad W N 1121 (1121), *Public Prosecutor v. Subbayya*. (On appeal from acquittal by the Sessions Judge, High Court heard the case on the merits and declined to interfere with the order of acquittal.)

Note 4

1. ('35) 1935 Mad W N 1287 (1288), *In re Public Prosecutor, Madras*.

2. ('74) 22 Suth W R Cr 35 (36), *Queen v. Bowka Hari*.

(1900) 27 Cal 368 (369), *Empress v. Somir Bowra*. (Where accused cannot understand the proceedings, the proceedings do not represent a complete trial.)

('11) 12 Cri L Jour 386 (388): 11 L. C. 250: 1 Upp Bur Rul 57, *Emperor v. Nga San Myin*.

3. ('89) 1889 Pun Re No. 37 Cr, p. 139 (140), *Empress v. Galna*.

('11) 12 Cr. L. J. 613 (614): 1911 Pun Re No. 13 Cr: 12 L. C. 989, *Emperor v. Dost Muhammad*.

('81) 5 Bom 262 (263), *Empress v. Husen*.

[See also ('35) 1935 Mad W N 1287 (1288), *In re Public Prosecutor, Madras*. (Accused unable to understand proceedings — His detention in custody during pleasure of Local Government was ordered instead of his trial being ordered to proceed.)]

See also S. 471 Note 1.

4. See ('35) AIR 1935 Oudh 414(415): 36 Cr. L. J. 880, *Emperor v. Ram Manohar*.

offences, the accused is sometimes discharged.⁵

The High Court may also cause notice of the reference to be served on the accused, so as to afford him another opportunity of being heard in the matter of the charge.⁶

When a case of a person unable to understand the proceedings is committed to the sessions and the proceedings are submitted to the High Court, the law does not contemplate that the sessions trial shall necessarily take place. It leaves it to the High Court to determine this, after considering whether any benefit will be likely to result, especially to the accused, by such trial.⁷

5. Criminal responsibility of deaf mutes. — Though great caution and diligence are necessary in the trial of a deaf mute, yet, if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to be punished.¹

It was formerly presumed as a matter of law that a person born deaf and dumb was an idiot, but in modern practice want of speech and hearing does not necessarily imply mental deficiency. If the accused's mind is sound, his inability to hear and speak does not excuse him from criminal liability.²

In the undermentioned case³, the accused, who was charged with murder, was not punished as an ordinary offender, but kept in detention pending orders from the Local Government, because, in addition to being unable to understand the proceedings, he was found to have been incapable, *by reason of unsoundness of mind*, from knowing that he was doing wrong; and in other cases, when the accused's infirmity led to his acquittal of the offence of theft, because it was the impossibility of his being made to understand the proceedings that prevented the High Court from determining whether he knew the nature of the act committed or whether he acted with

5. ('88) AIR 1938 Bom 352 (353) : 39 Cr. L. J. 866, *Emperor v. Trimbak Damodar*. (Offence under S. 262, Penal Code — Accused congenitally deaf and dumb and High Court not satisfied that he knew the nature of his act — High Court discharged the accused giving him the benefit of the doubt.)

('20) AIR 1920 Lah 333(334) : 1 Lah 260 : 21 Cr. L. J. 621, *Emperor v. Rahman*.

('85) 1885 Pun Re No. 34 Cr. p. 78 (78), *Atu Ram v. Empress*.

('74) 22 Suth W R Cr 35 (35), *Dwarka Nath Haldar v. Noder Chand Kamte*.

[See also ('75) 7 N W P H C R 131 (131, 132), *Queen v. Ganga*. (Deaf and dumb accused committing housebreaking through sheer hunger — High Court recommended him to be made over to his father.)

('23) AIR 1923 Bom 194 (194) : 25 Cr. L. J. 660, *Emperor v. Khasaba Tatyai*. (Attempt to commit suicide — High Court took into consideration his unhappy condition and sentenced him to one day's imprisonment.)]

6. ('74) 22 Suth W R Cr 35 (36), *Queen v. Bowka Hari*.

7. (1900) 27 Cal 368 (369, 370), *Queen-Empress v. Somir Bowra*. (Sessions trial dispensed with, accused being insane at the time of offence.)

Note 5

1. ('17) AIR 1917 Bom 288 (288) : 18 Cr. L. J. 143 (143) : 40 Bom 598, *Emperor v. Deaf and dumb man*.

2. ('11) 12 Cr. L. J. 386 (388) : 11 I. C. 250 : 1 Upp Bur Rul 57, *Emperor v. Nga San Myin*.

('74) 22 Suth W R Cr 72 (72), *Queen v. Bowka*.

('81) 1881 All W N 54 (54), *Empress v. Mathuria*.

3. (1900) 27 Cal 368 (370), *Queen-Empress v. Somir Bowra*.

Section 341
Note 5

dishonest intention,⁴ the High Court declined to draw any presumption against the accused, from the recent possession by him of stolen property, because his infirmity prevented him from offering any explanation he might have for such possession.⁵

In dealing with a deaf and dumb person, it is essential for a Magistrate, before convicting him and submitting his case to the High Court, to record a finding to the effect that he had sufficient intelligence to understand the criminal character of his act.⁶

Section 342

342.* (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put

* Code of 1882 : S. 342 — Same.

Code of 1872 : Ss. 193, 250, 342, 343 and 345.

Examination of accused. 193. The Magistrate may from time to time, at any stage of the inquiry and without previously warning the accused person, examine him, and put such questions to him as he considers necessary.

The accused person shall not render himself liable to punishment for refusal to answer such questions, or for giving false answers to them but the Magistrate shall draw such inference as may to him seem just from such refusal.

Explanation: — The answer given by an accused person may be put in evidence against him, not only in the case under inquiry, but also in trials for any other offences which his replies may tend to show he has committed.

Examination of accused. 250. The Court may from time to time, at any stage of the trial, examine the accused person, and shall question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

Accused may be questioned. 342. In all inquiries and trials, a Criminal Court may from time to time and at any stage of the proceedings, put any questions to the accused person which such Court may think proper.

Accused not punishable for refusal to answer. 343. The accused person shall not be liable to any punishment for refusing to answer, or for answering falsely, questions asked under S. 342, but the Court shall draw such inference as seems just from such refusal.

Accused not to be sworn. 345. No oath or affirmation shall be administered to the accused person.

Code of 1861 : Ss. 202, 204 and 373.

Examination of defendant. 202. It shall be in the discretion of the Magistrate, from time to time, at any stage of the enquiry, to examine the accused person, and to put such questions to him as he may consider necessary. It shall be in the option of the accused person to answer such questions.

Accused person not to be sworn. 204. No oath or affirmation shall be administered to the accused person.

When accused person may be examined. 373. The Court, at the close of the evidence on behalf of the accused person if any evidence is adduced on his behalf, or otherwise at the close of the case for the prosecution, may put any question to the accused person which it may think proper. It shall be in the option of the accused person to answer such question.

4. ('02) 4 Bom L R 296 (296), *King-Emperor v. Monya*.

5. ('15) AIR 1915 Mad 50 (50) : 15 Cri L Jour 578 (579), *In re Oomayan*.

6. ('30) AIR 1930 Lah 64 (64) : 30 Cri L Jour 948, *Emperor v. Gunga*.

such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

Section 342

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

Synopsis

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| 2. Scope of the section. | 21. Refusal to answer — Sub-s. (2). |
| 3. Applicability to summons cases and summary trials. | 22. Giving false answers— Sub-s. (2). |
| 4. Applicability to trials before Presidency Magistrates. | 23. Answers given to be taken into consideration. |
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| 13. De novo trial—Examination by successor. | 32. Examination of accused in a cross-case as a witness. |
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Section 342 Note 1

Other Topics (miscellaneous)

- Accused—Not in a different trial. See Note 31.
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 Prosecution instructing for examination of accused — Improper. See Note 12.
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 Section 164 statement. See Note 16.
 Statement not to be used against others. See Notes 23 and 27.
 Statement of accused to be taken as a whole. See Note 23.
 Time of questioning accused. See Notes 9 and 31.

1. Legislative changes. — Under the Code of 1861, it was not incumbent on the Magistrate to examine the accused, whether before or after the close of the prosecution case.¹ It was in the discretion of the Court to do so or not.² In the Code of 1872, the discretionary nature of the examination was retained so far as enquiries and trials,

Section 342 — Note 1

1. (1865) 2 Suth W R Cr 50 (50), *Queen v. Hurnath*. (Examination before committal held not necessary.)
 ('65) 2 Suth W R Cr L 11 (12). (Do.)
2. ('25) AIR 1925 Cal 361 (363); 52 Cal 522; 26 Cr.L.J. 631, *Emperor v. Alimuddi*.
 (1863) 1 Mad H C R Cr 199 (200), *Ex parte Virabhadra Gaud*.
 ('68) 10 Suth W R Cr 25 (25) : 1 Beng L R 16n, *Queen v. Shama Sunkar*.
 ('71) 16 Suth W R Cr 21 (22), *In re Dinoo Roy*.
 ('73) 19 Suth W R Cr 49 (50), *Rajah Nilmonnee Singh Deo v. Boma Churn*.
 (1864) 3 Mad H C R App ii (iii).
 [See also ('66) 1866 Pun Re No. 57 Cr, p. 64 (65), *Azeem v. Crown*.]
 [But see ('68) 9 Suth W R Cr 62 (63), *Queen v. Bissessur Sein*.]

other than sessions trials, were concerned. So far as sessions trials were concerned, such examination was made compulsory.³ In the Code of 1882, the purpose of the examination was set forth in the section.

Section 342
Notes 1-2

2. Scope of the section. — This section provides for the examination by the Court of accused persons, and except under the circumstances and restrictions set forth in this section, an accused person is incapable of being examined by the Court.¹

The section is based on the principle involved in the maxim *audi alteram partem*, namely, that no one should be condemned unheard,² and the accused should be heard, not merely on what is *prima facie* proved against him, but on every circumstance appearing in evidence against him.³

The section does not purport to be only in the interest of the accused; its object is to enable the accused to explain any circumstances appearing against him in the evidence; the intention of the provision is for the furtherance of justice and to enable the Court to decide the question of the guilt of the accused.⁴ The result of the examination may be beneficial to the accused but it may equally be injurious to him.⁵

The section consists of two parts, the first part giving a *discretion* to the Court,⁶ the second part being *mandatory*.⁷ At any stage of the

3. ('25) AIR 1925 Cal 361 (364) : 52 Cal 522 : 26 Cr. L. J. 631, *Emperor v. Alimuddi*.

Note 2

1. ('97) 19 All 200 (201) : 1897 A W N 23, *In the matter of Barkat*. (He cannot be examined as a witness either for the prosecution or for the defence.)

2. ('36) AIR 1936 Oudh 16 (18) : 36 Cr. L. J. 1303 : 11 Luck 461, *Emperor v. Karuna Shankar*.

('09) 9 Cri L Jour 56 (58) : 4 Nag L R 163, *Emperor v. Kissan Yessu*.

('29) AIR 1929 Sind 5 (5, 6) : 23 S. L. R. 1 : 29 Cr. L. J. 932, *Allah Dito v. Emperor*.

('33) AIR 1933 Sind 49 (52) : 34 Cri L Jour 591, *Ibrahim v. Emperor*.

3. ('40) AIR 1940 Cal 378 (380) : 41 Cri L Jour 783, *Emperor v. Jit Lal*.

('09) 9 Cri L Jour 56 (58) : 4 Nag L R 163, *Emperor v. Kissan Yessu*.

4. ('34) AIR 1934 All 693 (694) : 35 Cri L Jour 879, *Ishwar Das v. Bhagwan Das*.

('04) 1 Cri L Jour 854 (858) : 17 C P L R Cr 113, *Emperor v. Katay Kisan*.

('25) AIR 1925 Cal 361 (365) : 52 Cal 522 : 26 Cr. L. J. 631, *Emperor v. Alimuddi*.

5. ('09) 9 Cri L Jour 56 (58) : 4 Nag L R 163, *Emperor v. Kissan Yessu*.

6. ('40) AIR 1940 Nag 283 (288) : 41 Cr. L. J. 585, *Bhanwar Singh v. Sukhram Singh*.

('36) AIR 1936 Pesh 211 (212) : 38 Cri L Jour 399, *Hassan v. Emperor*.

('35) AIR 1935 Cal 605 (605) : 36 Cr. L. J. 1340 : 62 Cal 475, *Emperor v. Ajahar Mandal*.

('20) AIR 1920 Pat 471 (477) : 5 Pat L. J. 430 : 21 Cr. L. J. 705, *Raghu Bhumi v. Emperor*.

('25) AIR 1925 Pat 723 (725) : 26 Cri L Jour 927, *Rameshar Singh v. Emperor*.

('21) AIR 1921 Sind 131 (131, 132) : 16 Sind L R 201 : 25 Cr. L. J. 191, *Dinu v. Emperor*.

[See ('24) AIR 1924 Bom 334 (335) : 25 Cri L Jour 1127, *Emperor v. Narayan Sayanna*.]

7. ('37) 1937 M W N 574 (575), *Varahalamma v. Emperor*.

('37) AIR 1937 Pesh 20 (20) : 38 Cr. L. J. 387, *Mt. Lalan v. Emperor*. (Examination under S. 342 is obligatory only after the prosecution evidence is finished.)

('36) AIR 1936 Pesh 211 (212) : 38 Cri L Jour 399, *Hassan v. Emperor*.

('35) AIR 1935 Cal 605 (605) : 36 Cr. L. J. 1340 : 62 Cal 475, *Emperor v. Ajahar Mandal*.

('30) 31 Cri L Jour 613 (614) : 124 Ind Cas 70 (Cal), *Moyzuddin Mean v. Emperor*. (Summary trial.)

('23) AIR 1923 Cal 196 (197, 198) : 50 Cal 223 : 24 Cri L Jour 198, *Mozahur Ali v. Emperor*.

Section 342
Note 2

inquiry or trial, the Court *may* put such questions to the accused as it considers necessary for the purpose specified in the section. After the prosecution witnesses have been examined and before the accused is called on for his defence, the Court *shall* question generally on the case for the said purpose.

The accused must be examined under the section whether he offers to produce defence or not. The wording of the section does not justify the interpretation that it is necessary to examine the accused under this section only if he offers to produce defence.⁸ But, it has been held by the Bombay High Court that a Court is not bound under this section to give the accused an opportunity of explaining the circumstances appearing against him in the evidence of witnesses examined on behalf of a *co-accused*, though the Court *may* give him such an opportunity.⁹

The power to question the accused, in regard to the evidence which has been given, must be distinguished from the power to record statements which the accused may offer to make; the Court can only properly question the accused under the conditions named in the section, but it may record statements offered by the accused and to such statements this section does not apply.¹⁰

It was held in the undermentioned cases¹¹ that this section and ss. 164 and 364 are not exhaustive and do not limit the generality of s. 21, Evidence Act, as to the relevancy of admissions. For a criticism of this view, see Note 2 to s. 164 and Notes under s. 533.

(25) AIR 1925 Cal 361 (363) : 52 Cal 522 : 26 Cr. L. J. 631, *Emperor v. Alimuddi*.

(26) AIR 1926 Cal 537 (538) : 27 Cri L Jour 406, *Mahomed Rafique v. Emperor*.

(28) 29 Cri L Jour 382 (383) : 108 Ind Cas 381 (Lah), *Baz Khan v. Emperor*.

(18) AIR 1918 Lah 348 (348) : 1918 Pun Re No. 1 Cr : 19 Cr. L. J. 280, *Ghulla v. Emperor*.

(22) AIR 1922 Lah 45 (46, 47) : 23 Cr. L. J. 154, *Muhammad Baksh v. Emperor*.

(25) AIR 1925 Cal 574 (575) : 24 Cr. L. J. 943, *Hamid Ali v. Sri Kissen Gosain*.

(26) AIR 1926 Lah 551 (552) : 7 Lah 564 : 27 Cri L Jour 1007, *Lachhman Singh v. Emperor*.

(31) AIR 1931 Lah 153 (154) : 32 Cri L Jour 708, *Bhim Sen v. Emperor*.

(34) AIR 1934 Pat 330 (334) : 35 Cri L Jour 1322, *Shyama Charan v. Emperor*.

(27) AIR 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1364, *Emperor v. Nga Po Byu*.

(27) AIR 1927 Sind 175 (176) : 21 Sind L R 331 : 28 Cri L Jour 417, *Motankhan v. Emperor*.

(34) AIR 1934 All 735 (738) : 36 Cri L Jour 33, *Raghubar Dayal v. Emperor*.
See also Note 9.

8. (37) AIR 1937 Oudh 130 (131) : 37 Cr. L. J. 408 : 12 Luck 24, *Emperor v. Brij Lal*.

9. (36) AIR 1936 Bom 154 (160) : 37 Cr. L. J. 688 : 60 Bom 148, *Shapurji Sorabji v. Emperor*. (Reason for this view is not clear from the judgment— Presumably the reason is that the imperative part of the duty of the Court under the section to examine the accused arises on the completion of the evidence for the prosecution and before he is called on to enter on his defence and thereafter this duty ceases to be imperative— See Note 9.)

10. (36) AIR 1936 Bom 154 (160) : 37 Cr. L. J. 688 : 60 Bom 148, *Shapurji Shorabji v. Emperor*. (Court may allow opportunity to accused to make statement to explain circumstances appearing in evidence led on behalf of co-accused.)

(84) 1884 All W N 84 (84), *Empress v. Chaitar Singh*.

11. (36) AIR 1936 Rang 350 (351) : 37 Cr. L. J. 920, *Nga Thein Maung v. Emperor*.

(10) 11 Cr. L. J. 453 (470) : 7 I. C. 359 : 37 Cal 467, *Barindra Kumar v. Emperor*.

3. Applicability to summons cases and summary trials. —**Section 342
Note 3**

The High Court of Madras has held that this section does not apply to summons-cases and that consequently it is not *obligatory* on the Court to examine the accused, though it may be desirable to do so.¹ The ground, on which the decision proceeds, is that in summons cases there is no procedure for *calling upon the accused for his defence*, as in sessions cases and warrant-cases (Ss. 289, 256), but only for *hearing the accused* and that this section, which requires the Court to examine the accused *before the accused is called on for his defence*, has no application to such cases. A Full Bench of the High Court of Rangoon has also come to the same conclusion, on the additional ground that the words in S. 245, namely "if he thinks fit" give a *discretion* to the Court to examine the accused or not and that such discretion is incompatible with the imperative provisions of this section.² The general trend of opinion of all the other Courts is, however, that this section applies equally to summons-cases as well as to warrant-cases³ and that the words "if he thinks fit" in S. 245 have

Note 3

1. ('24) AIR 1924 Mad 15 (17) : 46 Mad 758 : 24 Cr. L. J. 833 (FB), *Ponnuswamy v. Ramaswami*.

2. ('31) AIR 1931 Rang 244 (246) : 9 Rang 506 : 32 Cr. L. J. 1190 (FB), *Emperor v. Nga La Gyi*.

The following cases are, in view of the above Full Bench ruling, no longer good law :

('04) 1 Cri L Jour 737 (737) : 2 Low Bur Rul 239, *Emperor v. Kyan Baw*.

('97-01) 1 Upp Bur Rul 82 (82), *Queen-Empress v. Nga Pyaung*.

('23) AIR 1923 Rang 135 (135) : 25 Cr. L. J. 684, *Mg. Shwe Kyi v. King-Emperor*.

3. ('40) AIR 1940 Bom 314 (315), *Emperor v. Kondiba Balaji*. (It applies to a summons-case tried summarily just as it applies to a summary trial in a warrant-case. The section would therefore apply to a case under S. 22 of the Cattle Trespass Act.)

('38) 39 Cri L Jour 841 (842) : 177 I. C. 56 (Oudh), *Kandhai v. Municipal Board, Rae Bareilly*.

('26) AIR 1926 All 358 (358) : 27 Cri L Jour 405, *Kacho Mal v. Emperor*.

('26) AIR 1926 Lah 667 (667) : 27 Cri L Jour 1000, *Demello v. Mrs. Demello*.

('26) AIR 1926 Nag 300 (300) : 22 Nag L R 65 : 27 Cri L Jour 632, *Bhagwan v. Emperor*.

('35) AIR 1935 All 217 (218) : 36 Cr. L. J. 1290 : 57 All 666, *Sia Ram v. Emperor*.

('22) AIR 1922 Bom 290 (291, 292) : 46 Bom 441 : 23 Cri L Jour 45, *Gulabjab v. Emperor*.

('26) AIR 1926 Bom 57 (61) : 50 Bom 34 : 27 Cri L Jour 165, *B. N. Gamadia v. Emperor*.

('31) AIR 1931 Bom 195 (197) : 32 Cri L Jour 719 (F B), *Emperor v. Janardhan Kashinath*.

('23) AIR 1923 Cal 164 (164) : 49 Cal 1075 : 24 Cr. L. J. 3, *Gulzari Lal v. Emperor*. (Case under S. 54A, Calcutta Police Act.)

('27) AIR 1927 Cal 250 (253) : 54 Cal 286 : 28 Cri L Jour 297, *Bechu Lal v. Injured Lady*.

('22) AIR 1922 Lah 45 (46) : 23 Cri L Jour 154, *Muhammad Baksh v. Emperor*.

('31) AIR 1931 Lah 153 (154) : 32 Cri L Jour 708, *Bhim Sen v. Emperor*.

('21) AIR 1921 Pat 11(12) : 6 Pat L. J. 174 : 22 Cr. L. J. 427, *Gulam Rasul v. Emperor*.

('26) AIR 1926 Sind 1(3) : 20 Sind L R 34 : 26 Cr. L. J. 1554 (FB), *Emperor v. Nabu*.

('26) AIR 1926 Sind 281 (282) : 19 Sind L R 121 : 27 Cr. L. J. 1290, *Emperor v. Pario*.

('21) AIR 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor v. Rustomji Mancherji*. (Following A I R 1921 Bom 374.)

('21) AIR 1921 Bom 374 (375) : 45 Bom 672 : 22 Cr. L. J. 17, *Fernandez v. Emperor*.

('20) AIR 1920 Pat 471 (477) : 21 Cr. L. J. 705 : 5 Pat L. J. 430, *Raghu Bhumi v. Emperor*. (Provisions of S. 342 are of general application and are applicable to all trials including sessions-cases.)

('22) AIR 1922 Pat 296 (297) : 23 Cr. L. J. 440, *Parameshwar Lal v. Emperor*.

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reference to cases in which the Magistrate is prepared to acquit the accused, even on a consideration of the prosecution evidence as it stands, without calling on the accused for his defence and without hearing him.⁴

As to whether this section applies also to summary trials, see Note 6 under section 263.

4. Applicability to trials before Presidency Magistrates. — Presidency Magistrates are not relieved from the obligation of questioning the accused generally under this section. The words "if any" in S. 370, clause (f), cannot be properly held as modifying the provisions of this section, as regards Presidency Magistrates.¹ See also section 370 Note 3.

5. Applicability to proceeding under Chapter VIII. — A person proceeded against under Chapter VIII of the Code (security proceedings) is not a person *accused* of any act or omission punishable by law and this section has no application to such cases.¹

6. Applicability to proceeding under section 363 of the Calcutta Municipal Act. — A person proceeded against under S. 363 of the Calcutta Municipal Act is not an *accused* person and this section has no application to such cases.¹

7. Applicability of section to proceeding under section 488. — A proceeding against a person under S. 488 is of a civil nature and the person proceeded against is not an *accused* person. This section,

[See ('25) AIR 1925 Cal 480 (480) : 51 Cal 933 : 26 Cr. L. J. 261, *Surendra Lal v. Isamaddi*.]

[But see ('27) AIR 1927 Lah 268 (269) : 28 Cri L Jour 480, *Kale Khan v. Emperor*. (Not applicable to summons-cases.)]

('27) AIR 1927 Lah 435 (435) : 28 Cri L Jour 478, *Shadi Khan v. Gul Begam*. (In maintenance cases evidence is recorded in the manner prescribed in S. 335, Criminal P. C., for summons-cases—S. 342 is not applicable to summons-cases.)]

4. ('21) AIR 1921 Bom 374 (375) : 45 Bom 672 : 22 Cri L Jour 17, *Fernandez v. Emperor*.

('26) AIR 1926 All 358 (358) : 27 Cri L Jour 405, *Khacho Mal v. Emperor*.

('68) 10 Suth W R Cr 25 (25, 26), *Queen v. Shama Shunker*. (When the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the prisoner, no examination should be made.)

('27) AIR 1927 Cal 250(252):54 Cal 286:28 Cr.L.J. 297, *Bechu Lal v. Injured Lady*.

('21) AIR 1921 Pat 11 (12) : 22 Cri L Jour 427 : 6 Pat L J 174, *Ghulam Rasul v. King-Emperor*.

('26) AIR 1926 Sind 1(2):20 Sind L R 34:26 Cr.L.J. 1554 (FB), *Emperor v. Nabu*.

[See ('33) AIR 1933 All 690 (694, 695) : 55 All 1040 : 34 Cri L Jour 967, *Jhabwala v. Emperor*. (The words "if any" in S. 289 do not affect the provisions of this section.)]

Note 4

1. ('21) AIR 1921 Bom 374 (375, 376) : 45 Bom 672 : 22 Cr. L. J. 17, *Fernandez v. Emperor*.

Note 5

1. ('24) AIR 1924 Cal 392 (393) : 50 Cal 985 : 25 Cri L Jour 1085, *Binode Behari Nath v. Emperor*.

('33) AIR 1933 Sind 49 (53) : 34 Cri L Jour 591, *Ibrahim v. Emperor*. (Per Mehta, A. J. C.)

See also S. 117 Note 4.

Note 6

1. ('27) AIR 1927 Cal 509 (510, 511) : 54 Cal 532 : 28 Cri L Jour 407, *Krishen Doyal v. Corporation of Calcutta*.

which applies to proceedings against accused persons cannot, therefore, apply to proceedings under section 488.¹

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8. Applicability to proceeding under section 476. — On the question as to whether proceedings in inquiries under S. 476 of the Code are judicial proceedings and the persons against whom they are directed are in the position of accused persons and S. 342 applies to such cases, see section 476 Note 24.

9. When questions should be put. — As seen in Note 2, the putting of questions under the first part of the section is discretionary and may be done *at any stage* of the inquiry or trial. The examination of the accused generally on the case under the second part of the section, which is mandatory, must be *after* the close of the prosecution case and *before* the accused is called on for his defence.¹ The examination under the first part of the section does not dispense with the

Note 7

1. ('28) AIR 1928 Bom 347 (348) : 52 Bom 768 : 29 Cri L Jour 1051, *In re Vithaldas Bhurabhai*.
- ('29) AIR 1929 Lah 32 (33, 34) : 10 Lah 406 : 29 Cri L Jour 1002, *Mehr Khan v. Bakat Bhari*.
- ('32) AIR 1932 Cal 488 (489) : 33 Cri L Jour 640, *Raspin v. Mrs. Raspin*. (Quere). [See ('25) AIR 1925 Cal 339 (339) : 25 Cri L Jour 1091, *Bachai Kalwar v. Jemuna Kalwarin*.]
- [See also ('92) 16 Mad 234 (234) : 2 Weir 252, *In re Ponnammal*. (Order under S. 488 is not a conviction for an offence.)
- ('27) AIR 1927 Lah 435 (435) : 28 Cri L Jour 478, *Shadi Khan v. Gul Begam*. (The ground on which section held not applicable was that it was a summons-case to which section was not applicable.)
- [But see ('26) AIR 1926 Lah 667 (668) : 27 Cri L Jour 1000, *Demello v. Mrs. Demello*. (Section was held applicable to summons-case and therefore applicable to proceedings under S. 488—Whether person proceeded against was "accused" was not adverted to.)]

See also S. 488 Note 25.

Note 9

1. ('40) AIR 1940 Pat 295 (297) : 41 Cri L Jour 267, *Feroze Kazi v. Emperor*. (Accused is not bound to summon or produce his witnesses until he himself is examined.)
- ('38) AIR 1938 Lah 543 (544, 545) : 39 Cri L Jour 781 : 1 L R (1938) Lah 603, *Mohomed Nawaz v. Emperor*. (Warrant-case — Examination of accused after further cross-examination of prosecution witnesses under S. 256 but before defence is not illegal.)
- ('37) AIR 1937 Pesh 20 (20) 38 Cri L Jour 387, *Mt. Lalan v. Emperor*.
- ('36) AIR 1936 Pesh 211 (212) : 38 Cri L Jour 399, *Hassan v. Emperor*.
- ('04) 1 All L Jour 208n (208n), *In re Kallu*.
- ('27) AIR 1927 All 475 (476) : 49 All 551 : 28 Cr. L. J. 399, *Sudaman v. Emperor*. (Accused should be questioned just before he enters on his defence.)
- ('28) AIR 1928 All 222 (227) : 30 Cri L Jour 530, *Emperor v. Jhabbar Mal*.
- ('86) 1886 Rat 227 (228), *Queen-Empress v. Bava Chela*.
- ('91) 1891 Rat 581 (582), *Queen-Empress v. Dhamba*.
- ('92) 1892 Rat 625 (625), *Queen-Empress v. Manchi*.
- ('94) 1894 Rat 710 (713), *Queen-Empress v. Abdul Razak*.
- ('07) 9 Bom L R 356 (357, 358) : 5 Cri L Jour 332, *Emperor v. Sawalya Atma*.
- ('08) 7 Cri L Jour 194 (195) : 10 Bom L R 201, *Emperor v. Harischandra*.
- ('15) AIR 1915 Bom 221 (221) : 16 Cr. L. J. 765, *Basappa Ningapa v. Emperor*.
- ('24) AIR 1924 Bom 334 (335) : 25 Cr. L. J. 1127, *Emperor v. Narayan Sayanna*. (It is incumbent on the Court to ask the accused generally whether he wishes to offer an explanation of any of the evidence which has been given against him and, if the Court does so, that would be sufficient compliance with S. 342.)
- ('29) AIR 1929 Bom 447 (448) : 31 Cri L Jour 402, *Emperor v. Genu Gopal*.
- ('81) 10 Cal L R 54 (55), *In the matter of Abdul Gufoor*.

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- (‘30) 31 Cr. L. J. 613 (614) : 124 Ind Cas 70 (Cal), *Moyzuddin Mean v. Emperor*.
 (‘19) AIR 1919 Cal 696 (700) : 46 Cal 411 : 20 Cr. L. J. 24, *Ah Foong v. Emperor*.
 (‘21) AIR 1921 Cal 269 (270) : 23 Cri L Jour 41, *Gangadhar Goala v. Reginald William Lemon Reed*.
 (‘23) AIR 1923 Cal 196 (197, 198) : 50 Cal 223 : 24 Cri L Jour 198, *Mazahur Ali v. Emperor*. (Provisions of the section are mandatory.)
 (‘23) AIR 1923 Cal 470 (481, 482) : 50 Cal 518 : 24 Cr. L. J. 248, *Promotha Nath v. Emperor*. (The accused should be examined after the re-examination of the prosecution witnesses—He cannot be examined before the close of the prosecution evidence or after the close of his defence evidence.)
 (‘23) AIR 1923 Cal 727 (729, 730, 732) : 50 Cal 939 : 25 Cr. L. J. 27, *Diba Kanta v. Gour Gopal*. (“Examine” in S. 342 is to be taken in the ordinary English sense in which it covers all kinds of examination including cross-examination and re-examination, and that the accused should have been examined again, after all the witnesses for the prosecution have been examined and cross-examined.)
 (‘25) AIR 1925 Cal 361 (363, 365, 369) : 52 Cal 522 : 26 Cr. L. J. 631, *Emperor v. Alimuddi Naskar*.
 (‘26) AIR 1926 Cal 537 (538) : 27 Cri L Jour 406, *Mahomed Rafique v. Emperor*.
 (‘28) 29 Cri L Jour 382 (383) : 103 Ind Cas 381 (Lah), *Bazkhan v. Emperor*.
 (‘18) AIR 1918 Lah 348 (348) : 1918 Pun Re No. 1 Cr : 19 Cr. L. J. 280, *Ghulla v. Emperor*.
 (‘22) AIR 1922 Lah 45 (46, 47) : 23 Cr. L. J. 154, *Muhammad Baksh v. Emperor*.
 (‘25) AIR 1925 Lah 288 (288) : 27 Cri L Jour 87, *Ghaza Ali v. Emperor*.
 (‘26) AIR 1926 Lah 551 (552) : 7 Lah 564 : 27 Cr. L. J. 1007, *Lachhman Singh v. Emperor*. (The provisions of S. 342 (1) are mandatory.)
 (‘26) AIR 1926 Lah 684 (684, 685) : 27 Cr. L. J. 1021, *Fazal Ahmed v. Emperor*. (*Held*, there was no proper compliance with provisions of S. 342.)
 (‘31) AIR 1931 Lah 153 (154) : 32 Cr. L. J. 708, *Bhim Sen v. Emperor*.
 (1900) 23 Mad 636 (637) : 2 Weir 253, *Queen-Empress v. Pandara Tevan*. (Examination of accused under S. 342 *held* obligatory before committing him to sessions.)
 (‘86) 2 Weir 507 (508), *In re Cholakel Koya*.
 (‘98) 1 Oudh Cas 84 (85), *Queen-Empress v. Bharat Singh*.
 (‘31) AIR 1931 Mad 241 (241, 242) : 32 Cri L Jour 757, *Nataraja Mudaliar v. Devasigamani Mudaliar*. (If a fresh witness for prosecution is called and examined, the accused must again be questioned according to S. 342—Filing of written statement after the close of prosecution evidence is not tantamount to examination under S. 342.)
 (‘24) AIR 1924 Nag 301 (304, 305) : 25 Cr. L. J. 417, *Udhao Patel v. Emperor*. (Court must communicate to the accused by appropriate questions everything that is alleged against him in the evidence for prosecution to its fullest extent—A general question is not sufficient.)
 (‘34) AIR 1934 Oudh 457 (458) : 35 Cr. L. J. 1417 : 10 Luck 235, *Onkar Singh v. Emperor*.
 (‘20) AIR 1920 Pat 471 (477, 478) : 5 Pat L J 430 : 21 Cri L Jour 705, *Raghu Bhumi v. Emperor*. (S. 342 is a general provision applicable to trial of all cases including sessions cases.)
 (‘21) AIR 1921 Pat 374 (375) : 22 Cr. L. J. 460, *Rammath Rai v. Emperor*. (Defect due to non-compliance of the provision condoned in the special circumstances of the case.)
 (‘24) AIR 1924 Pat 376 (376) : 24 Cr. L. J. 475, *Baldeo Dubey v. Emperor*.
 (‘25) AIR 1925 Pat 723 (724, 725) : 26 Cr. L. J. 927, *Rameshar Singh v. Emperor*.
 (‘34) AIR 1934 Pat 330 (334) : 35 Cri L Jour 1322, *Shyama Charan v. Emperor*. (Section is mandatory but not exhaustive.)
 (1892-96) 1 Upp Bur Rul 144 (144, 145), *Queen-Empress v. Nga Tha Din*.
 (‘04) 1 Cri L Jour 737 (737) : 2 Low Bur Rul 239, *Emperor v. Kyan Baw*.
 (‘10) 11 Cr. L. J. 746 (748) : 8 I. C. 988 (LB), *Emperor v. Sit Nyein*.
 (‘25) AIR 1925 Rang 101 (101) : 26 Cr. L. J. 321, *Bawa Rowther v. Emperor*.
 (‘27) AIR 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1364, *Emperor v. Nga Po Byu*. (Trial without examination under S. 342 is not proper even though the accused has been acquitted.)
 (‘21) AIR 1921 Sind 131 (131, 132) : 16 Sind L R 201 : 25 Cr. L. J. 191, *Dinu v. Emperor*. (Case exclusively triable by Sessions Court—Sessions Court examining accused under S. 342—Failure of committing Magistrate to do so is immaterial—It is, however, highly desirable, that committing Magistrate should adhere to provisions of S. 342.)

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Note 9

examination under the second part of the section.² The reason is that the Code intends that the accused shall be given an opportunity of explaining any circumstances appearing in the evidence against him. That must mean the *whole* of the evidence against him and any examination *before that evidence is closed, i. e., before all* the prosecution witnesses have been examined, cross-examined and re-examined, cannot possibly fulfil the conditions of the section,³ and is contrary to the law and unfair to the accused.⁴

The word "examination" includes cross-examination and re-examination and "examined" means *completely* examined.⁵ An examination of the accused, therefore, before the cross-examination and re-examination of the prosecution witnesses are over is not a sufficient compliance with the section.⁶ There is a conflict of opinions as to whether an accused, who has been examined once before charge is framed, should be examined a second time, when the prosecution witnesses are *re-called* under S. 256 and cross-examined a second time. The High Courts of Lahore⁷ and Madras⁸ and the Chief Court of

(25) AIR 1925 Sind 127 (128, 129) : 19 Sind L R 104 : 25 Cr. L. J. 662, *Jhangli v. Emperor*. (If fresh prosecution evidence is taken accused must again be questioned generally under S. 342.)

(27) AIR 1927 Sind 175 (175, 176) : 21 Sind L R 331 : 28 Cr. L. J. 417, *Motankhan v. Emperor*.

(32) AIR 1932 Sind 165 (166) : 34 Cr. L. J. 161, *Emperor v. Rihan Dodo*. (After examination of accused investigating officer examined—Accused should be further examined.)

[See (36) AIR 1936 Pat 626(627) : 38 Cr.L.J. 2, *Chandreshwar Prasad v. Arunendra Mohan*. (Examination under first part of section—Held, in the circumstances, Magistrate would have done well to examine accused before framing charge.)]

See also S. 540 Note 16.

2. (21) AIR 1921 Pat 374 (375) : 22 Cr. L. J. 460, *Ramnath Rai v. Emperor*.

3. (25) AIR 1925 Bom 170 (172) : 50 Bom 42 : 26 Cr. L. J. 690, *Emperor v. Nathu Kasthurchand*.

(26) AIR 1926 Lah 551 (552) : 7 Lah 564 : 27 Cri L Jour 1007, *Lachhman Singh v. Emperor*. (Examination in the course of prosecution evidence is insufficient.)

(25) AIR 1925 Cal 574 (575) : 24 Cr. L. J. 943, *Hamid Ali v. Sri Kissen Gosain*. [See (26) AIR 1926 Sind 1(2) : 20 S.L.R. 34 : 26 Cr.L.J. 1554(FB), *Emperor v. Nabu*.]

[See also (23) AIR 1923 Lah 539 (540) : 25 Cr. L. J. 426, *Barhati v. Crown*.]

4. (14) 15 Cr. L. J. 436 (438) : 24 Ind Cas 172 (Oudh), *Ram Harakh v. Emperor*.

5. (24) AIR 1924 Nag 51 (52) : 25 Cri L Jour 713, *Krishnappa v. Emperor*.

(25) AIR 1925 Nag 44 (47) : 20 Nag L R 174 : 26 Cri L Jour 971 (F B), *Local Government v. Maria*. (The decision in A I R 1925 Nag 147 must be considered to have been overruled by this decision.)

(22) AIR 1922 Pat 158(160) : 6 Pat L Jour 644 : 22 Cr.L.J. 697, *Mitarjit v. Emperor*.

(27) AIR 1927 Sind 175 (175, 176) : 21 S.L.R. 331, 28 Cr.L.J. 417, *Motankhan v. Emperor*.

(32) AIR 1932 Sind 165 (166) : 34 Cri L Jour 161, *Emperor v. Rihan Dodo*.

(23) AIR 1923 Cal 727 (732) : 50 Cal 939 : 25 Cri L Jour 27, *Dibakanta Chatterjee v. Gour Gopal*.

6. See cases cited in foot-note (5).

7. (38) 40 Pun L R 902 (903), *Jhandu v. Emperor*.

(38) AIR 1938 Lah 543 (544, 545) : 39 Cri L Jour 781 : I L R (1938) Lah 603, *Mahomed Nawaz v. Emperor*. (Further cross-examination of prosecution witnesses under S. 256 is neither a part of the prosecution case nor that of the defence case.)

(26) AIR 1926 Lah 154 (155) : 26 Cri L Jour 1418, *Fazal Karim v. Emperor*.

(29) AIR 1929 Lah 371 (371, 372) : 30 Cri L Jour 625, *Emperor v. Nadir*.

(24) AIR 1924 Lah 84 (88, 89) : 4 Lah 61 : 25 Cr. L. J. 801, *R. A. Byrne v. Emperor*. [But see (26) AIR 1926 Lah 51 (51, 52) : 26 Cr. L. J. 1370, *Md. Sadiq v. Emperor*.]

8. (23) AIR 1923 Mad 609 (609, 610, 611) : 46 Mad 449 : 24 Cri L Jour 547 (FB), *Varisai Rowther v. Emperor*. (Overruling AIR 1922 Mad 512.)

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Oudh⁹ have held that such second examination, under this section, is not necessary, the High Court of Madras proceeding on the ground that cross-examination after charge is really evidence for the *defence* and not for the *prosecution*. The Allahabad High Court is also inclined to this view.¹⁰ The High Courts of Rangoon¹¹ and Patna¹² and the Judicial Commissioner's Courts of Nagpur¹³ and Peshawar¹⁴ have, on the other hand, held that a second examination, after the cross-examination of the re-called witnesses, is necessary.

When the accused *enters upon his defence*, the stage at which he must be examined passes. It is no compliance with the section if the examination takes place at a later stage.¹⁵ This section has, therefore, no application and no fresh examination of the accused is necessary where, for example, a prosecution witness is re-called under section 257 (after the accused has entered on his defence) and cross-examined,¹⁶ or where additional evidence is taken or ordered to be taken by the appellate Court under S. 428,¹⁷ or where a court-witness is examined under S. 540 (see S. 540 Note 16), or where witnesses are re-called under S. 231 on an altered charge, after the accused has been called on for

(23) AIR 1923 Mad 694 (696) : 25 Cri L Jour 7, *In re Thachroth Hydros*. (S. 342 does not make it legally incumbent on Magistrate to further question the accused — It may be highly desirable that he should so question the accused if the evidence contains new matter of importance.)

9. (25) AIR 1925 Oudh 422 (422, 423) : 28 Oudh Cas 130 : 26 Cri L Jour 1301, *Emperor v. Brij Behari*. (AIR 1923 Mad 609 (FB), Foll.)

(32) AIR 1932 Oudh 113 (113) : 33 Cri L Jour 811, *Pitam v. Emperor*. (Relying on AIR 1925 Oudh 422.)

10. (36) AIR 1936 All 319 (320) : 37 Cr. L J. 710, *Md. Rafiq Ahmad v. Emperor*. (Re-cross-examination after charge forms part of defence—Even assuming that accused should be re-examined after re-cross-examination of witnesses, not so examining is mere irregularity.)

11. (25) AIR 1925 Rang 363 (364) : 27 Cri L Jour 336, *Ah Khaung v. Emperor*. (29) AIR 1929 Rang 331 (332, 333) : 7 Rang 470 : 30 Cri L Jour 1164, *Subbaya Naidu v. Emperor*.

[But see (25) AIR 1925 Rang 258 (259, 260, 261) : 3 Rang 139 : 26 Cri L Jour 1336, *Nga Hla U v. Emperor*.]

12. (24) AIR 1924 Pat 791 (792) : 25 Cri L Jour 711, *Bhokhari Singh v. Emperor*. (Held there was no sufficient compliance with the second part of S. 342.)

13. (25) AIR 1925 Nag 44 (46, 47) : 20 Nag L R 174 : 26 Cri L Jour 971 (F B), *Local Government v. Maria*.

(24) AIR 1924 Nag 51 (52) : 25 Cri L Jour 713, *Krishnappa v. Emperor*.

(24) AIR 1924 Nag 301 (304, 305) : 25 Cri L Jour 417, *Udhao Patel v. Emperor*.

(28) AIR 1928 Nag 162 (164) : 29 Cr.L.J. 475, *Mahommad Hayat Khan v. Emperor*.

(33) AIR 1933 Nag 192 (193) : 34 Cri L Jour 340, *Emperor v. Amirbi*.

14. (36) AIR 1936 Pesh 211 (212) : 38 Cr.L.J. 399, *Hassan v. Emperor*. (Examination of prosecution witnesses includes also further cross-examination after charge.)

15. (40) AIR 1940 Pat 295 (298) : 41 Cri L Jour 267, *Feroze Kazi v. Emperor*. (Accused examined after the conclusion of arguments — Procedure seriously prejudices the accused and vitiates the trial.)

(25) AIR 1925 Cal 480 (480) : 51 Cal 933 : 26 Cri L Jour 261, *Surendra Lal v. Isamaddi*.

16. (30) AIR 1930 Cal 219 (219, 220) : 56 Cal 1157 : 31 Cri L Jour 406, *Obedar Rahman v. Emperor*.

(33) AIR 1933 Cal 594 (596) : 35 Cri L Jour 226, *Dharni Kanta v. Emperor*. (Arguments had commenced.)

17. (40) 41 Cri L Jour 356 (359) : 1940 N L J 203 : 186 Ind Cas 660, *Nathu Singh v. Emperor*.

(28) AIR 1928 Bom 200 (200) : 52 Bom 699 : 29 Cr. L. J. 972, *Narayan Keshav v. Emperor*.

(25) AIR 1925 Pat 414 (417, 420) : 4 Pat 488 : 26 Cr.L.J. 811, *Mohiuddin v. Emperor*.

his defence,¹⁵ though in all such cases it may be *desirable* that the accused should be examined again.¹⁰

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10. Examination after framing charge. — Provided the accused is examined after the prosecution evidence is completely closed, it makes no difference whether the examination takes place before or after the charge is framed.¹ Where witnesses are examined after charge, the accused must be questioned, under this section, after the close of such examination.²

11. "Evidence," meaning of. — The word "evidence" in this section means evidence *already given* at the inquiry or trial at the time of the examination.¹

12. Examination must be by the Court itself and not by others. — The *Court alone* is authorized to examine the accused person and the counsel for the complainant or the prosecution should not be allowed to take part in the examination.¹ It is improper for a Magistrate to base his examination on detailed instructions given by the counsel for the prosecution.²

13. De novo trial — Examination by successor. — Where the Magistrate trying the case is transferred and his successor begins the trial once again, he should examine the accused once again under this section and cannot rest satisfied with the examination held by his

18. ('22) AIR 1922 Pat 393 (394) : 1 Pat 54 : 23 Cr. L. J. 146, *Shamlal Kalwar v. Emperor*.

19. ('36) AIR 1936 Pat 438 (439) : 37 Cr. L. J. 906, *Sri Krishna Prasad v. Emperor*. (When appellate Court orders additional evidence to be taken it will be quite proper to direct a further examination of the accused at the same time.)

20. ('33) AIR 1933 Sind 49 (52) : 34 Cr. L. J. 591, *Ibrahim v. Emperor*. (Per Ferrers, J. C.) [See also ('37) AIR 1937 Nag 285 (287) : 38 Cr. L. J. 1058 : ILR (1937) Nag 541, *Sheoram Idan v. Emperor*. (Where a prosecution witness is re-called and re-examined under S. 540, accused should be re-examined, but when a fresh witness is called by the Court, re-examination is not necessary.)]

Note 10

1. ('40) AIR 1940 Nag 283 (283) : 41 Cri L Jour 585, *Bhanwarsingh v. Sukhram Singh*. (Examination before framing charge is not compulsory.)

2. ('30) AIR 1930 Bom 241 (242) : 31 Cr. L. J. 743, *Vishram Narayan v. Emperor*. (Observation of Patkar, J., in AIR 1929 Bom 447, to the contrary dissented from.)

3. ('34) AIR 1934 Pesh 75 (75) : 35 Cri L Jour 1361, *Anar Gul v. Emperor*.

4. ('28) 29 Cri L Jour 382 (383) : 108 Ind Cas 381 (Lah), *Baz Khan v. Emperor*.

5. ('35) 36 Cr. L. J. 407 (407) : 153 Ind Cas 445 (Lah), *Muhammad Din v. Emperor*.

6. ('26) AIR 1926 Lah 551 (552) : 27 Cri L Jour 1007 : 7 Lah 564, *Lachhman Singh v. Emperor*.

Note 11

1. ('92) 14 All 242 (253) : 1892 A W N 83, *Queen-Empress v. Hargobind Singh*.

Note 12

1. ('38) AIR 1938 Nag 283 (285) : 40 Cri L Jour 197 : ILR (1939) Nag 686, *Nana Sadoba v. Emperor*. (Where accused has not been adequately questioned the presence of his legal adviser cannot affect question of prejudice.)

2. ('30) AIR 1930 Lah 166 (167) : 31 Cri L Jour 560, *Faqir Singh v. Emperor*. (1886) 10 Mad 121 (123), *Queen-Empress v. Kamandu*. (Complainant cannot examine accused—Per Parker, J.)

3. ('33) AIR 1933 Nag 269 (269) : 34 Cr. L. J. 1172, *Krishna Murarilal v. Emperor*. ('34) AIR 1934 Nag 213 (214, 215) : 35 Cri L Jour 1457 : 31 Nag L R 49, *Hari Krishnaji v. Emperor*. (It can only be in exceptional circumstances that a Magistrate should find himself obliged to accept suggestions from the prosecuting counsel as to the questions to be put.)

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predecessor.¹ The High Court of Madras has held that a failure to examine the accused, where no new matter has been introduced in the *de novo* trial, does not vitiate the proceedings.²

14. Nature of examination contemplated by the section. —

An accused person can be questioned under this section only "for the purpose of enabling the accused to *explain any circumstances appearing in the evidence against him.*"¹ The real object of the section is to enable the Judge to ascertain from the accused such explanation as he may desire to give, regarding any statements made by the prosecution witnesses or to elicit from the accused how he proposes to meet such evidence as, in the opinion of the Court, implicates him.² It follows that the section has no application where *no evidence* at all has been recorded on behalf of the prosecution,³ or where no evidence *implicating the accused* has been given.⁴ The reason is that no *explanation* from the accused is necessary in such cases. The section has also no application where the *purpose* of the examination is something different from that specified in the section. Thus, an examination cannot be made of the accused for the purpose of getting from the accused the names of his witnesses, the nature of his evidence and the particulars of his defence.⁵ The examination contemplated is

Note 13

1. ('27) AIR 1927 Lah 720 (720): 29 Cr.L.J. 125, *Akhtar Mohammad v. Emperor*.
2. ('35) AIR 1935 Mad 22 (22): 58 Mad 427: 36 Cr.L.J. 307, *Marudamuthu Padayachi v. Raghava Sastri*.

Note 14

1. ('02) 7 Cal W N 345 (351), *King-Emperor v. Bhut Nath Ghose*.
(78) 1 Cal L R 436 (436, 437), *In the matter of Chinibash Ghose*. (Court is not entitled to subject accused to severe cross-examination.)
(86) 10 Mad 121 (123), *Queen-Empress v. Kamandu*.
2. ('40) AIR 1940 Cal 250 (251): 41 Cr.L.J. 563, *Tahasinuddin Ahmed v. Emperor*.
(80) 6 Cal 96 (102, 103): 6 C L R 521, *Hossein Buksh v. Empress*.
3. (('91) 13 All 345 (347, 348): 1891 A W N 102, *Queen-Empress v. Hawthorne*.
(84) 1884 All W N 106 (107), *Empress v. Budha*.
(83) 1883 All W N 238 (238), *Empress v. Baljit*.
(93) 1893 Rat 679 (680), *Queen-Empress v. Narayen*.
(01) 5 Cal W N 864 (865, 866), *Gya Singh v. Mohamed Saliman*.
(25) AIR 1925 Lah 432 (433): 6 Lah 183: 26 Cr.L.J. 1238, *Bahawala v. Emperor*.
(28) AIR 1928 Lah 88 (89): 29 Cri L Jour 958, *Jagindar Singh v. Agha Safdar Ali Khan*. (Examination at the stage of enquiry under S. 202 is bad.)
(34) AIR 1934 Lah 96 (96): 15 Lah 60: 35 Cr.L.J. 1394, *Karam Din v. Emperor*. (Accused pleading guilty in summons-case—He can be convicted without taking prosecution evidence—In such cases this section does not apply.)
(10) 11 Cri L Jour 193 (193): 4 Ind Cas 1126 (Mad), *In re Sadayan*.
(82) 1882 All W N 166 (166), *Empress v. Kura*. (The question was held to be a matter of discretion.)
[See also ('21) AIR 1921 All 282 (283, 284): 22 Cri L Jour 146, *Ganga Saran v. Emperor*. (In this case the complainant only had been examined, but not cross-examined by the accused.)]
4. ('23) AIR 1923 Lah 225 (226): 4 Lah 55: 24 Cr.L.J. 693, *Devi Dial v. Emperor*.
(16) AIR 1916 Mad 407 (408): 16 Cr. L. J. 623: 39 Mad 770 (771), *In re Abibulla Ravuthan*.
(40) 1940 Mad W N 1105 (1107, 1108), *Emperor v. Kupppammal*.
(29) AIR 1929 Nag 350 (352): 31 Cri L Jour 15, *Shamlal v. Emperor*.
5. ('92) 14 All 242 (254, 255): 1892 A W N 83, *Queen-Empress v. Hargobind Singh*.
(25) AIR 1925 Nag 403 (404, 405): 22 Nag L R 1: 27 Cr.L.J. 66, *Mahadeo Singh v. Emperor*.

not a *cross-examination* or an examination of inquisitorial nature^b for the purpose of entrapping the accused and of extracting from him damaging admissions, upon which to build up the case,⁷ or to supply

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6. ('40) AIR 1940 Cal 250 (251) : 41 Cr. L. J. 563, *Tahasinuddin Ahmed v. Emperor*. ('40) AIR 1940 Mad 372 (375) : 1 L R (1940) Mad 514, *In re Annamalai Mudali*. ('83) 5 All 253 (256) : 1883 A W N 25, *Empress of India v. Yakhub Khan*. ('92) 14 All 242 (253, 254) : 1892 A W N 83, *Queen-Empress v. Hargobind Singh*. ('14) AIR 1914 Oudh 32 (37) : 15 Cri L Jour 474, *Malik Husain v. Emperor*. ('30) AIR 1930 All 17 (17) : 31 Cri L Jour 8, *Goli v. Emperor*. ('33) AIR 1933 All 690 (695) : 34 Cr. L. J. 967 : 55 All 1040, *Jhabwala v. Emperor*. ('71) 16 Suth W R Cr 21 (22), *Revision of proceedings in the case of Dinno Roy*. ('04) 6 Bom L R 94 (98), *Emperor v. Anant Narain*. ('80) 6 Cal 96 (102, 103) : 6 C L R 521, *Hossein Baksh v. Empress*. ('83) 10 Cal 140 (143) : 13 C L R 358, *Hurry Churn Chuckerbutty v. Empress*. ('78) 1 Cal L R 436 (436, 437), *In the matter of Chinibash Ghose*. (1863) 1 Mad H C R 199 (200) *Ex parte Virabuthra Gaud*. ('02) 7 Cal W N 345 (351), *King-Emperor v. Bhut Nath Ghose*. ('25) AIR 1925 Cal 361 (369) : 52 Cal 522 : 26 Cri L Jour 631, *Emperor v. Alimuddi Naskar*. ('10) 11 Cr. L. J. 171 (174) : 5 Ind Cas 602 (Lah), *Ahmad Yar Khan v. Emperor*. (Questions regarding the line of defence held not justified.) ('21) AIR 1921 Lah 32 (33) : 2 Lah 129 : 67 Ind Cas 340 (342) : 23 Cri L Jour 368, *Umar Din v. Emperor*. ('30) AIR 1930 Lah 166 (167) : 31 Cri L Jour 560, *Faqir Singh v. Emperor*. ('25) AIR 1925 Nag 403 (404) : 22 Nag L R 1 : 27 Cri L Jour 66, *Mahadeo Singh v. Emperor*. ('22) AIR 1922 Lah 456 (456) : 23 Cri L Jour 431, *Nura v. Emperor*. ('29) AIR 1929 Lah 382 (384) : 10 Lah 223 : 29 Cr. L. J. 769, *Faqir Singh v. Emperor*. ('10) 11 Cri L Jour 193 (193) : 4 Ind Cas 1126 (Mad), *In re Sadayan*. ('03) 6 Oudh Cas 204 (210, 211), *Sri Kishen v. King-Emperor*. (Under the colour of an examination under S. 342, an accused person should not be examined, as if he were being examined as an approver.) ('04) 1 Cri L Jour 699 (700) : 7 Oudh Cas 191, *Chedan v. Emperor*. ('17) AIR 1917 Low Bur 58 (59) : 18 Cri L Jour 941, *Nga Chit Ye v. Emperor*. ('18) AIR 1918 Upp Bur 34 (39) : 3 Upp Bur Rul 3 : 18 Cri L Jour 774, *Nga San Nyein v. Emperor*. ('30) AIR 1930 Rang 351 (353) : 8 Rang 372 : 32 Cr. L. J. 23, *U Ba Thein v. Emperor*. ('25) AIR 1925 Sind 116 (121) : 25 Cri L Jour 761, *Topandas v. Emperor*. ('30) AIR 1930 Sind 225 (229, 235) : 31 Cr. L. J. 1026, *Mohammad Yusif v. Emperor*. ('35) AIR 1935 All 717 (719) : 36 Cr. L. J. 773, *Bhagwan Das v. Emperor*. (Sessions Judge should not cross-examine accused to confront them with statements made to investigating officer.) 7. ('84) 1884 All W N 106 (107), *Empress v. Budha*. (It is of great importance that the spirit as well as the letter of the provisions of law in this section should be appreciated.) ('80) 6 Cal 96 (102), *Hossain v. Empress*. ('66) 3 Bom H C R Cr 51 (53), *Reg. v. J. M. Diaz*. ('78) 1 Cal L R 436 (436, 437), *In the matter of Chinibash Ghose*. (1863) 1 Mad H C R 199 (200) : 2 Weir 253, *Ex parte Virabuthra Gaud*. ('98) 2 Cal W N 702 (717), *Queen-Empress v. Bhairab Chunder*. ('80) 6 Cal L R 431 (435), *Empress v. Behari Lal Bose*. ('12) 13 Cri L Jour 283 (284) : 14 Ind Cas 667 (Cal), *Tufani Sheikh v. Emperor*. (Questions to elicit confessional statement not to be put.) ('13) 14 Cri L Jour 129 (130) : 18 Ind Cas 881 (Cal), *Haidar Ali v. Emperor*. ('87) 10 Mad 295 (315) : 2 Weir 361, *Queen-Empress v. Rangî*. ('82) 5 C P L R Cr 9 (10), *Empress v. Nagia*. ('82) 5 C P L R Cr 11 (11, 12), *Empress v. Mt. Bhura*. (It is not fair to obtain admission of an accused person by putting it in his mouth.) ('09) 9 Cri L Jour 56 (57) : 4 Nag L R 163, *Emperor v. Kissan Yessu*. ('72-92) 1872-92 Low Bur Rul 320 (322), *Nga Hmun v. Queen-Empress*. ('93-1900) 1893-1900 Low Bur Rul 349 (352), *Ali Hussan v. Queen-Empress*. ('17) AIR 1917 Low Bur 137 (139) : 17 Cr. L. J. 316, *Maung Po Nyun v. Mutukurpen Chetty*. (Proceedings under S. 476 — Accused can only be examined in accordance with provisions of S. 342 — He cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution.)

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a gap⁸ in the case for the prosecution. The Magistrate or Judge cannot thus ask the accused under this section about his previous convictions.⁹

The section is designed to secure that the Court, by the frame of its questions, performs a double duty, *viz.* —

(a) communicates to the accused to the full extent that may be necessary in each particular case, what is alleged against him in the prosecution evidence, and

(b) ascertains from him what explanation or defence he wishes to put forward in respect thereof.¹⁰

15. "Question him generally on the case." — As has been seen already in Note 2, it is imperative that the Court should question the accused *generally on the case* after the witnesses for the prosecution have been examined and before he is called on for his defence. There is a difference of opinion among the High Courts as to what is meant by questioning "generally on the case." According to one view, the word "generally" does not limit the nature of the questioning to one or more questions of a general nature relating to the case but means that the questions should *relate to the whole case* and should not be limited to particular part or parts of it; the law, therefore, intends that the *salient points* appearing in the evidence against the accused must be pointed out to him in a succinct form and he should be asked to explain them, if he wishes to do so.¹ It may be that when a general

8. ('40) AIR 1940 Cal 250 (251):41 Cr.L.J. 563, *Tahasinnuddin Ahmed v. Emperor*. ('38) AIR 1938 Mad 904 (905) : 40 Cr. L. J. 69, *Subba Rao v. Venkatachalapathi Aiyer*. (The defect in the prosecution case cannot be sought to be cured by examining the accused under S. 342.)

('37) AIR 1937 Mad 209 (210) : 38 Cr. L. J. 323 : ILR (1937) Mad 358, *Seshapani Chetti v. Emperor*.

('35) AIR 1935 Rang 509 (510):37 Cr. L. J. 328, *Narayanan Chettyar v. Emperor*. (Magistrate is not entitled to question accused under S. 342 so as to get admission of facts not proved in evidence.—Nevertheless, admission made without any intimidation and with full understanding should be taken against him.)

('99) 26 Cal 49 (51), *Basanta Kumar v. Queen-Empress*.

('25) AIR 1925 Nag 403 (404) : 22 Nag L R 1 : 27 Cr. L. J. 66, *Mahadeo Singh v. Emperor*.

('01) 28 Cal 689 (693) : 5 C W N 670, *Yasin v. Emperor*.

('30) AIR 1930 Pat 498 (499):9 Pat 504:32 Cr.L.J. 898, *Kalumanjhi v. Emperor*.

('04) 27 Mad 238 (240) : 2 Weir 408, *Mohideen v. Emperor*.

(1900-02) 1 Low Bur Rul 292 (292), *Tha Zan v. Crown*.

('23) AIR 1923 Lah 225 (226) : 4 Lah 55 : 24 Cr.L.J. 693, *Devi Dial v. Emperor*.

('08) 8 Cr. L. J. 62 (63):4 Low BurRul 244:14 Bur L R 233, *Gaung Gyi v. Emperor*.

('30) AIR 1930 Sind 225 (235) : 31 Cri L Jour 1026, *Md. Yusif v. Emperor*.

('20) AIR 1920 All 274 (275) : 42 All 522:22 Cr.L.J. 84, *Mohan Singh v. Emperor*.

9. ('01) 28 Cal 689 (693) : 5 C W N 670, *Yasin v. Emperor*.

(1900-02) 1 Low Bur Rul 8 (8), *Queen-Empress v. Nga Po Thet*.

('02-03) 1 Upp Bur Rul Cr. P. Code 23 (23), *Nga Te v. King-Emperor*.

('04) 1 Cr.L.J. 227 (243):28 Bom 129:5 Bom L R 805, *Emperor v. Allooniya Husan*.

('05) 2 Cri L Jour 227 (227) : 11 Bur L R 33, *Nga Te v. Emperor*.

10. ('04) 1 Cr L J 854 (858) : 17 C P L R 113, *Emperor v. Katay Kisan*.

('18) AIR 1918 Nag 143 (145) : 20 Cri L Jour 12, *Mt. Tani v. Emperor*.

Note 15

1. ('33) AIR 1933 P C 124 (130) : 34 Cr. L. J. 322 (PC), *Dwarkanath v. Emperor*.

('40) AIR 1940 Cal 378 (380) : 41 Cr. L. J. 783, *Emperor v. Jit Lal*.

('37) AIR 1937 Rang 83 (86) : 38 Cr. L. J. 524 : 14 Rang 666 (FB), *Emperor v. U Damapala*. (Murder case — Dying person denouncing accused as his assailant in presence of accused and other witnesses — Accused keeping silent—Omission of Court at trial of accused to question him as to his silence is irregularity.)

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question, as to whether he wishes to say anything, is asked, he will reply in the negative. If he does so, it will be no use asking further questions.² If on the other hand, it does not appear that he will refuse to answer questions, his attention must be drawn to the salient points and he should be questioned on these points.³ Merely questioning the accused generally, as to whether he has anything to say or anything to add to what he has said before the committing Magistrate is, therefore, not a compliance with the section,⁴ especially in a complicated

(‘37) AIR 1937 Sind 221 (224) : 38 Cr. L. J. 995 : 31 S. L. R. 470, *Khairo v. Emperor*. (Approver stating that deceased caused injuries to him during fight — Magistrate failing to ask explanation from accused about injuries on his body — Failure to ask explanation upon such vital point necessitates retrial of accused.)

(‘36) AIR 1936 Nag 147 (148), *Ramseshan v. Emperor*. (The filing of a written statement does not abrogate the duty of the Court in this respect.)

(‘36) AIR 1936 Oudh 405 (407) : 37 Cr. L. J. 955 : 12 Luck 261, *Mahomed Anis v. Emperor*. (Every piece of circumstantial evidence tending to incriminate accused should be pointedly brought to his notice.)

(‘25) AIR 1925 Cal 361 (365, 369, 370) : 52 Cal 522 : 26 Cr. L. J. 631, *Emperor v. Alimuddi Naskar*. (Per Mukerji, J. ; Newbould, J., *contra*.)

(‘25) AIR 1925 Cal 980 (980) : 26 Cri L Jour 572, *Shamlal Singh v. Emperor*.

(‘38) AIR 1933 Oudh 305 (308) : 34 Cr. L. J. 568 (572) : 9 Luck 1, *Sohan Lal v. Emperor*. (Relying upon AIR 1933 P C 124.)

(‘34) AIR 1934 All 735 (738) : 36 Cri L Jour 33, *Raghubar Dayal v. Emperor*.

(‘12) 13 Cri L Jour 226 (233) : 14 I. C. 418 : 36 Mad 159, *In re Basrur Venkata Row*. (Where a letter is to be used as genuine, which is not proved, the Court should ask the accused about it and put him questions respecting its significance; otherwise it ought to be ignored or a favourable construction put upon it.)

(‘18) AIR 1918 Nag 143 (145, 146) : 20 Cri L Jour 12, *Mt. Tani v. Emperor*.

(‘24) AIR 1924 Nag 301 (305) : 25 Cri L Jour 417, *Udhao Patel v. Emperor*.

(‘18) AIR 1918 Upp Bur 34 (39) : 3 Upp Bur Rul 3 : 18 Cr. L. J. 774, *Nga San Nycein v. Emperor*.

(‘24) AIR 1924 Rang 172 (173) : 1 Rang 689 : 25 Cr. L. J. 487, *Maung Hman v. Emperor*.

(‘30) AIR 1930 Rang 114 (118, 119) : 7 Rang 821 : 31 Cr. L. J. 387, *Maung Ba Chit v. Emperor*. (Prosecution mainly based on contents of documents capable of more than one explanation — Accused should be specifically asked as to what is their explanation of the doubtful passages in the more important documents.)

(‘30) AIR 1930 Sind 225 (229) : 31 Cr. L. J. 1026, *Md. Yusuf v. Emperor*. (Per Percival, J. C.)

[See also (‘33) 34 Cr. L. J. 411 (412) : 142 I. C. 785 (Nag), *Emperor v. Baliram*. (Court taking into consideration certain circumstances appearing in the prosecution evidence against the accused without drawing his attention to them in his examination under S. 142 and calling upon him for an explanation—Held it was a serious error.)]

2. (‘36) AIR 1936 Nag 147 (148), *Ramseshan v. Emperor*. (Accused refusing to answer beyond what was stated in written statement — Detailed examination on points against accused useless — There is no prejudice to accused if there be no detailed examination.)

3. (‘25) AIR 1925 Cal 361 (369) : 52 Cal 522 : 26 Cri L Jour 631, *Emperor v. Alimuddi Naskar*. (Per Mukerji, J. ; Newbould J., *contra*.)

4. (‘40) AIR 1940 Mad 1 (4, 5) : 41 Cri L Jour 369, *In re Kanakasabai Pillai*. (Murder trial—Sessions Judge reading out to the accused precis of the evidence in one breath and asking him whether he wants to say anything — Held, no sufficient compliance with the section.)

(‘36) AIR 1936 Mad 715 (716) : 38 Cr. L. J. 45 : 59 Mad 622, *In re Sangama Naicker*.

(‘36) AIR 1936 Mad 628 (629) : 37 Cr. L. J. 1107 : 59 Mad 629n, *Chinnu v. Emperor*.

(‘24) AIR 1924 Nag 301 (305) : 25 Cri L Jour 417, *Udhao Patel v. Emperor*.

(‘25) AIR 1925 Cal 980 (980) : 26 Cri L Jour 572, *Shamlal Singh v. Emperor*.

(‘31) AIR 1931 Lah 153 (154) : 32 Cri L Jour 708, *Bhim Sen v. Emperor*.

(‘18) AIR 1918 Nag 143 (146) : 20 Cri L Jour 12, *Mt. Tani v. Emperor*.

(‘24) AIR 1924 Pat 791 (792) : 25 Cri L Jour 711, *Bhokhari Singh v. Emperor*.

(‘25) AIR 1925 Pat 342 (345) : 26 Cri L Jour 716, *Durga Ram v. Emperor*.

(‘24) AIR 1924 Rang 172 (173) : 1 Rang 689 : 25 Cr. L. J. 487, *Mg. Hman v. Emperor*.

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case.⁵ According to another view, a general question, "you have heard the evidence; what is your defence," or "have you anything to say" is a sufficient compliance with the section.⁶ It was held in the under-mentioned case⁷ that, according to the practice prevailing in the province of Madras, putting specific questions was not necessary but a general question was enough. In *Kallam Narayana v. Emperor*,⁸ Mr. Justice Reilly observed as follows:

"It is a very difficult duty and a duty which has to be performed with the greatest caution so that without the slightest flavour of cross-examination, without asking anything which may lead the accused to incriminate himself, the important points against him may be brought to his notice and he may have an opportunity of explaining them. The task is such a difficult one that, when the accused is represented by counsel, it is often in his interest that the Judge should *formally* comply with the section by asking a general question and then leave the accused's counsel to offer explanations on his behalf in the way most favourable and least dangerous to him."

According to a third view, the question as to what must be the nature of the questions to be put depends upon the circumstances of each case; it would however be a sufficient compliance with the section if the accused is given an *opportunity* of explaining the circumstances appearing against him; it is neither necessary nor desirable to examine the accused in detail so as to enable the prosecution to take advantage thereof.⁹

In *Dwarkanath Varma v. Emperor*,¹⁰ Lord Atkin observed as follows:

"The other question is a general question whether there was anything else he desired to say about the charges or the evidence. The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that under S. 342 of the Code, it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation."

The first of the three views set out above must, in the light of the Privy Council decision, be accepted as correct. After the above Privy Council decision, the Madras High Court adopted this view in

(24) AIR 1924 Oudh 111 (112): 24 Cri L Jour 661, *Nageshar Prasad v. Emperor*. (Accused stating in answer to general questions, "My evidence in cross-case is correct. I have no more to say"—Examination held improper.)

5. ('38) AIR 1938 Nag 283 (285): 40 Cri L Jour 197: ILR (1939) Nag 686, *Nana Sadoba v. Emperor*.

(30) AIR 1930 Rang 114 (118): 7 Rang 821: 31 Cr. L. J. 387, *Maung Ba Chit v. Emperor*.

6. ('26) AIR 1926 Cal 424 (424): 26 Cri L Jour 1510, *Rez Muhammad v. Emperor*.

(27) AIR 1927 Nag 71 (71, 72): 27 Cr. L. J. 181, *Wasudeo v. Emperor*. (Newbould, J., in AIR 1925 Cal 361, followed.)

(23) AIR 1923 Pat 91 (93, 94): 23 Cri L Jour 233, *Panchu Chowdhry v. Emperor*. (When accused is defended by legal practitioner, lengthy examination ought not to be held.)

(25) AIR 1925 Pat 389 (389): 26 Cri L Jour 682, *Banamali Kumar v. Emperor*.

7. ('27) AIR 1927 Mad 613 (613, 614): 28 Cr. L. J. 383, *Ramaswami v. Emperor*.

8. ('33) AIR 1933 Mad 233 (238): 56 Mad 231: 34 Cri L Jour 481.

9. ('40) AIR 1940 Mad 372 (375): 1 L R (1940) Mad 514, *In re Annamalai Mudali*. (When it is clear that the accused has understood all the points against him and has tried to explain them, the failure to put to the accused all the items of evidence leading to the inference of his guilt is immaterial.)

(25) AIR 1925 Pat 713 (716): 4 Pat 459: 26 Cri L Jour 954, *Md. Nasiruddin v. Emperor*.

10. ('33) AIR 1933 PC 124 (130): 34 Cri L Jour 322: 142 IC 335: 14 PLT 305 (PC).

the cases cited below.¹¹ But in a later decision,¹² the Privy Council decision was distinguished and it was held that where the accused has shown by his replies that he has understood all the points against him and has attempted to explain them, the failure of the Judge to put to him all the items of evidence leading to the inference of his guilt is not material.

A long composite question should not be asked, but separate questions on the various points should be put and the explanation of the accused asked.¹³

16. "Without previously warning the accused." — The section does not require, as in the case of statements taken under s. 164, that the accused shall be *warned* of the consequences of the statements he makes. It has, however, been held in the undermentioned case¹ that it is extremely desirable that the Magistrate should follow the practice in England and warn the accused that they are not obliged to answer unless they desire to do so.

17. Examination of pleader of accused. — There is a conflict of opinions as to whether this section enables the Court to examine the pleader of the accused in cases where the personal attendance of the accused has been dispensed with under s. 205. According to the High Courts of Allahabad,¹ Calcutta² and Madras³ the examination must be of the accused *in person*, who should be directed under sub-s.(2) of s. 205 to be present for the purpose. The High Courts of Bombay⁴ and Rangoon⁵ and the Judicial Commissioner's Court of Sind⁶ have, on the other hand, held that the Magistrate is not bound to examine the accused personally in such cases.

18. Written statement of accused, if sufficient. — Under the Code of 1861, where the examination of the accused was in the *discretion* of the Court, it was held that where a written defence was

11. ('40) AIR 1940 Mad 1 (4, 5) : 41 Cri L Jour 369, *In re Kanakasabai Pillai*.
 ('36) AIR 1936 Mad 629 (630) : 37 Cri L Jour 1074 : 59 Mad 631n, *In re Narasimha*.
 ('36) AIR 1936 Mad 715 (717) : 38 Cr. L. J. 45 : 59 Mad 622, *In re Sangama Naicker*.
 ('36) AIR 1936 Mad 628 (629) : 37 Cr. L. J. 1107 : 59 Mad 629n, *Chinnu v. Emperor*.
 (Important circumstances which, if unexplained, would lead to his conviction should be pointed out to the accused especially in cases of circumstantial evidence.)
 12. ('40) AIR 1940 Mad 372 (375) : I L R (1940) Mad 514, *In re Annamalai Mudali*.
 13. ('27) AIR 1927 Lah 650 (650, 651) : 28 Cri L Jour 767, *Hasni v. Emperor*.

Note 16

1. ('26) AIR 1926 Mad 570 (572, 573) : 27 Cri L Jour 311, *In re Kannammal*.

Note 17

1. ('34) AIR 1934 All 693 (694) : 35 Cr. L. J. 879, *Ishwar Das v. Bhagwan Das*.
 2. ('26) AIR 1926 Cal 430 (431) : 26 Cri L Jour 1032, *Messer Bepari v. Emperor*.
 3. ('21) AIR 1921 Mad 679 (680) : 23 Cri L Jour 697, *In re Nainamalai Konan*.
 4. ('26) AIR 1926 Bom 218 (220) : 27 Cri L Jour 440 : 50 Bom 250, *Dorabshah Bomanji v. Emperor*.
 ('34) AIR 1934 Bom 212 (212) : 35 Cri L Jour 1035, *Emperor v. Jaffar Cassum*.
 (S. 342 must be read subject to provisions of S. 205—Magistrate permitting accused to appear by pleader under S. 205—He is not bound to question accused personally.)
 5. ('27) AIR 1927 Rang 73 (73) : 4 Rang 506 : 28 Cr. L. J. 226, *Maung Po Nyein v. Haka Singh*. (Personal attendance of accused under S. 205 dispensed with — Personal attendance should not be insisted on for examination under S. 342.)
 6. ('13) 14 Cr. L. J. 272 (272) : 19 I. C. 544 : 6 Sind L R 206, *Emperor v. Mt. Jamal Khatun*. (Do.)

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given, it was not necessary for the Magistrate to examine the accused orally.¹ The latter part of the present section is, however, as has been seen already, mandatory, and the accused is not entitled, as of right, to put in a written statement in lieu of answers which he may give to questions put to him under this section.² It has been generally held that this section contemplates an *oral* examination,³ that a written statement of defence cannot be allowed to take the place of the examination, which this section imperatively orders the Court to make,⁴ and that the practice of taking such statements is pernicious⁵ and entirely irresponsible.⁶ A written statement drafted by the accused's legal adviser, for instance, can never have the same value as answers coming directly from the accused's mouth.⁷ In the undermen-

Note 18

1. ('71) 16 Suth W R Cr 53 (53), *Dila Mundul v. Kally Shaha*.
2. ('29) AIR 1929 Bom 296 (300):53 Bom 479:31 Cr.L.J. 65, *Emperor v. C.E. Ring*. ('17) AIR 1917 Cal 687 (692): 17 Cr. L. J. 9, *Deputy Legal Remembrancer, Behar and Orissa v. Matukdhari Singh*. ('16) AIR 1916 Cal 633 (641): 16 Cr. L. J. 724, *Emperor v. Dwijendra Chandra*. (Putting in of a written statement instead of answering questions is particularly to be deplored.)
3. ('31) AIR 1931 Mad 241 (242): 32 Cr.L.J. 757, *Nataraja Mudaliar v. Devasingamoni Mudaliar*.
4. ('36) AIR 1936 Nag 147 (148), *Ramseshan v. Emperor*. (The filing of written statement does not abrogate the duty of the Court to put to the accused various points against him.) ('03) 1903 All W N 1 (1), *Emperor v. Ansuiya*. ('33) AIR 1933 All 690 (695): 34 Cr.L.J. 967: 55 All 1040, *Jhabwala v. Emperor*. ('25) AIR 1925 Pat 378 (380, 381): 4 Pat 231: 26 Cr. L. J. 932, *Bhagwat Singh v. Emperor*. (But when the accused refuses to answer a question, the Magistrate is not bound to go on asking questions especially when a written statement is put in at the time, meeting the points of the prosecution.) ('21) AIR 1921 Pat 374 (375): 22 Cri L Jour 460, *Ramnath Rai v. Emperor*. ('21) AIR 1921 Pat 415 (418): 22 Cri L Jour 442, *Moinuddin v. Emperor*. ('22) AIR 1922 Pat 5 (6): 23 Cri L Jour 114, *Balkesar Singh v. Emperor*. ('34) AIR 1934 Nag 213 (214,215): 35 Cr.L.J. 1457: 31 Nag LR 49, *Hari Krishnaji v. Emperor*. ('24) AIR 1924 Nag 301 (306): 25 Cri L Jour 417, *Udhao Patel v. Emperor*. ('16) AIR 1916 Cal 188(214):42 Cal 957:16 Cr.L.J. 497, *Anritlal Hazra v. Emperor*. ('20) AIR 1920 Pat 471 (479): 5 Pat L J 430: 21 Cr. L. J. 705, *Raghu Bhumij v. Emperor*. ('21) 22 Cr.L.J. 276 (279): 60 Ind Cas 676 (679)(Lah), *Harnama Singh v. Emperor*. ('21) AIR 1921 Mad 679 (680): 23 Cri L Jour 697, *In re Nainamalai Konan*. [See ('26) AIR 1926 Pat 566 (567, 568): 27 Cri L Jour 1041, *Emperor v. Zahir Haider*. (There is no provision in law for the accused filing a written statement in a sessions trial.)]
5. ('36) AIR 1936 Oudh 405 (407): 37 Cr. L. J. 955: 12 Luck 261, *Mahomed Anis v. Emperor*. (Practice of taking written statements instead of examining the accused condemned.) ('16) AIR 1916 Cal 633 (641): 16 Cr. L. J. 724, *Emperor v. Dwijendra Chandra*.
6. ('17) AIR 1917 Cal 687 (692): 17 Cr.L.J. 9, *Deputy Legal Remembrancer, Behar and Orissa v. Matukdhari Singh*.
7. ('36) AIR 1936 Oudh 405 (407): 37 Cr. L. J. 955: 12 Luck 261, *Mahomed Anis v. Emperor*. (Written statements filed on behalf of accused persons are evolved out of the brains of the counsel for the accused helped by the *pairokars* and friends of the accused, and seldom represent the ideas of the accused or the facts as known to the accused.) ('36) AIR 1936 Pat 626 (627): 38 Cri L Jour 2, *Chandreshwar Prasad v. Arunendra Mohan*. ('16) AIR 1916 Cal 633 (641): 16 Cr. L. J. 724, *Emperor v. Dwijendra Chandra*.

tioned cases,⁸ however, it was held that the filing of a written statement of defence dispensed with the necessity to examine the accused orally under this section. It is submitted that this view is not correct and is against the general trend of opinion.

The immunity under sub-s.(2) of the section does not extend to a written statement filed by the accused. See also Note 12 under S. 256.

19. Examination by committing Magistrate.—A committing Magistrate is bound, before commitment, to examine the accused, as required by this section. The words, "and he has (if necessary) examined the accused" in S. 209 of the Code cannot be taken as giving a discretion to the Magistrate, who intends to commit, to examine the accused.¹ The Calcutta High Court, however, has in the undermentioned case,^{1a} held that the mandatory provisions of this section apply only to the *Sessions Court* in such cases, as it is in that Court that the accused is called on for his defence. A similar view has also been taken by the Judicial Commissioner's Court of Sind.² See also section 287 and Notes thereon.

20. Examination of accused in sessions trials.—The section is a general provision applicable to trials in all cases including sessions cases, and even where the accused has been examined generally by the committing Magistrate, the Sessions Judge is bound to examine the accused in the trial.¹ It makes a considerable difference to listeners, like the jury, whether a statement before the Magistrate is read out in Court, or whether an accused person is carefully examined in the presence of the jury and his answers and demeanour noted by the jury.²

8. ('30) 31 Cr.L.J. 171 (172):120 Ind Cas 753(Pat), *Gurdial Singh v. Bhola Halwai*. ('25) AIR 1925 Pat 414 (417) : 4 Pat 488 : 26 Cr. L. J. 811, *Saiyid Mohiuddin v. Emperor*.

('22) AIR 1922 Pat 388 (389) : 23 Cr.L.J. 703 : 1 Pat 31, *Mir Tilawan v. Emperor*. (Filing of written statement showed that accused was not prejudiced.)

[See also ('37) AIR 1937 Nag 67 (68) : 38 Cr. L. J. 354 : I L R (1937) Nag 228, *Budhulal v. Emperor*. (Accused under S. 342 can only be examined if he is willing to answer questions put by Court—Accused declining to make statement but preferring to file written statement controverting all the points in prosecution evidence—There is no violation of S. 342.)]

Note 19

1. (1900) 23 Mad 686 (687) : 2 Weir 253, *Queen-Empress v. Pandara Tevan*.

1a. ('35) AIR 1935 Cal 605 (606) : 62 Cal 475 : 36 Cri L Jour 1340, *Emperor v. Ajahar Mandal*. (Omission to examine accused in committing Court held not to amount to illegality.)

2. ('21) AIR 1921 Sind 131 (132) : 16 S.L.R. 201 : 25 Cr.L.J. 191, *Dinu v. Emperor*. (It is not obligatory on the committing Court to examine accused under S. 342. It is, however, highly desirable that the committing Magistrates should adhere to the provisions of S. 342.)

('17) AIR 1917 Sind 24 (24) : 11 Sind L R 52 : 18 Cri L Jour 913, *Emperor v. Dosu*. (Examination of accused prior to commitment is in the discretion of the Magistrate.)

Note 20

1. ('20) AIR 1920 Pat 471 (477, 478) : 5 Pat L Jour 430 : 21 Cr. L. J. 705, *Raghu Bhumij v. Emperor*.

('26) AIR 1926 Oudh 57 (58) : 26 Cr. L. J. 1576, *Emperor v. Mahammad Shafi*. ('03-04) 2 Low Bur Rul 115 (116, 117), *Nga Thei U v. King-Emperor*.

('27) AIR 1927 Rang 19 (19) : 4 Rang 361 : 27 Cr.L.J. 1364, *Emperor v. Nga Po Byu*. ('07) 6 Cri L Jour 74 (75) : 9 Bom L R 730, *Emperor v. Raju Ahilaji*. (It has, however, been observed that the proposition was open to serious doubt.)

2. ('26) AIR 1926 Oudh 57 (58) : 26 Cr.L.J. 1576, *Emperor v. Mahammad Shafi*.

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A contrary view has, however, been taken in the undermentioned case,³ based upon the interpretation of the words, "if any" used in S. 289 of the Code. It is submitted that this view is not correct. The words, "if any" in S. 289 should not be construed as conflicting with this section. Section 289 must be taken to contemplate the case in which there are no circumstances for the accused to explain.⁴ See also section 289 Note 3.

21. Refusal to answer—Sub-section (2).—An accused person is entitled to refuse to answer questions put to him under this section,¹ and when he does so, the Court is not bound to go on questioning him.² Nor should the Court hold inquisitorial proceedings against him in such a case.³

Where an accused declines to answer questions put to him under this section, the fact should be noted on the record.⁴

Although an accused is entitled to refuse to answer, such refusal may often be attended with great risk to him, inasmuch as the Court and the jury, if any, may draw such inference against him from such refusal as it thinks just.⁵ An innocent man cannot well injure himself by a truthful explanation of the circumstances appearing against him.^{5a}

An accused person does not render himself liable to punishment by refusing to answer *questions* put to him.⁶

As to whether an accused person can refuse to sign the record of his examination under S. 364, and the effect of such refusal, see S. 364, Note 10.

The fact that the accused declines to make a statement will not necessarily indicate that he would not like to answer specific questions.⁷

22. Giving false answers — Sub-section (2). — An accused person does not, by giving false answers to the questions put to him under this section, render himself liable to punishment. The resort to

3. ('09) 10 Cr.L.J. 325 (339) : 3 Ind Cas 625 (Cal), *Khudiram Bose v. Emperor*.

4. ('03-04) 2 Low Bur Rul 115 (116), *Nga Thet U v. King Emperor*.

Note 21

1. ('31) AIR 1931 Lah 178 (181, 182) : 32 Cr.L.J. 684, *Sher Jang v. Emperor*.
[See also ('06) 3 Cri L Jour 134 (135) (Lah), *Mr. A v. Emperor*. (A counsel may legally advise the accused not to answer.)]

2. ('37) AIR 1937 Nag 67 (67, 68) : 38 Cr.L.J. 354: ILR (1937) Nag 228, *Budhulal v. Emperor*. (Accused declining to answer questions and preferring to put in written statement — No examination under S. 342 is possible.)

(('36) AIR 1936 Nag 147 (148), *Ramseshan v. Emperor*.

('25) AIR 1925 Pat 378 (381) : 4 Pat 231 : 26 Cri L Jour 932, *Bhagwat Singh v. Emperor*. (Especially where a written statement has been put in.)

3. ('30) AIR 1930 Cal 209 (212) : 57 Cal 1074 : 31 Cr.L.J. 903, *Prafulla Kumar v. Emperor*.

4. ('71) 15 Suth W R Cr 16 (17), *In re Gopal Hajjam*.

5. ('40) AIR 1940 Cal 250 (251) : 41 Cr.L.J. 563, *Tahsinuddin Ahmad v. Emperor*.

('16) AIR 1916 Cal 633 (641) : 16 Cr.L.J. 724, *Emperor v. Dwijendra Chandra*.

('31) AIR 1931 Lah 178 (181, 182) : 32 Cri L Jour 684, *Sher Jang v. Emperor*.
(He cannot defeat the ends of justice by refusing to answer.)

5a. ('16) AIR 1916 Cal 524 (525) : 16 Cr. L. J. 576, *Emperor v. Nagendra Nath*.

6. ('99) 1 Bom L R 435 (436), *Queen-Empress v. Jayapa Nagappa*. (Same rule applies to his examination by a police patel.)

7. ('30) AIR 1930 Cal 209 (212) : 57 Cal 1074 : 31 Cr.L.J. 903, *Prafulla Kumar v. Emperor*.

a false defence will, however, affect the credit to be attached to the case of the accused and raise an inference against him, though this will not relieve the Court from the task of attempting to arrive at a sound conclusion from the whole evidence, inasmuch as, notwithstanding his false defence, the accused may be innocent of the offence charged.¹

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23. Answers given to be taken into consideration. — Where facts are put forward on behalf of the prosecution, which, unless explained, justify an inference of guilt being drawn against the accused, it is both lawful and proper for the Court to consider the explanation of those facts, which the accused puts forward in his defence.¹ In cases of circumstantial evidence, the Court should always take the explanation of the accused into consideration.² The burden of proving an exception under the Penal Code is on the accused³ and in such cases, the circumstances, with his statement, may be sufficient to establish the exception in his favour.⁴

The proof of a case against the accused must depend, not on the absence of an explanation on his part, but upon the positive affirmative evidence of his guilt given by the prosecution.⁵ Where, however, the

Note 22

1. [See ('68) 1868 Pun Re No. 22 Cr, p. 52 (65), *Jehangir Khan v. Crown*.
(190) 1890 Pun Re No. 21 Cr, p. 47 (49), *Empress v. Hargas Rai*.]
[See also ('21) AIR 1921 Lah 89 (90) : 22 Cr. L. J. 595, *Har: Ram v. Emperor*.
(No inference as to guilt of accused can be necessarily drawn from an erroneous or a false statement made by him.)]

Note 23

1. ('16) AIR 1916 AH 63 (61) : 17 Cri L Jour 23, *Abdul Aziz v. Emperor*.
(190) AIR 1920 AH 72 (73, 74) : 21 Cri L Jour 410, *Jagdeo Perchad v. Emperor*.
[See ('18) AIR 1918 Cal 314 (315) : 19 Cri L Jour 81, *Ashraf Ali v. Emperor*.]
2. ('26) AIR 1926 Bom 71 (73) : 49 Bom 878 : 27 Cr. L. J. 114, *Emperor v. Abdul Gani*.
3. ('14) AIR 1914 Cal 532 (533) : 15 Cri L Jour 276, *Ram: Newaz v. Emperor*.
(190) AIR 1927 Cal 324 (326) : 28 Cri L Jour 334, *Adam Ali v. Emperor*. (Onus to establish circumstances justifying exercise of right of private defence is on the accused.)
- (190) AIR 1929 Cal 346 (348) : 56 Cal 1013 : 31 Cri L Jour 369, *Muhammad Gul v. Fazley Karim*.
(188) 1888 Pun Re No. 1 Cr, p. 1 (2), *Alia Bakhsh v. Empress*.
(187) 1887 Pun Re No. 27 Cr, p. 52 (55), *Khuda Bakhsh v. Empress*.
(184) 1884 Pun Re No. 41 Cr, p. 87 (91), *Hakim v. Empress*.
(192) AIR 1932 Lah 11 (12) : 33 Cri L Jour 186, *Umar Khan v. Emperor*. (Grave and sudden provocation.)
- (194) AIR 1924 Lah 733 (734) : 25 Cr. L. J. 1005, *Kakar Singh v. Emperor*. (Do.)
- (195) AIR 1925 Lah 399 (400) : 6 Lah 171 : 27 Cr. L. J. 438, *Rakha v. Emperor*. (Do.)
- (197) AIR 1927 Lah 786 (787) : 28 Cri L Jour 838, *Hazura Singh v. Emperor*. (Right of private defence.)
- (195) AIR 1915 Mad 250 (250) : 15 Cri L Jour 417, *In re Narisi Reddi*. (Do.)
- (192) 13 Cri L Jour 470 (471) : 15 I. C. 310 (Mad), *Veerana Nandan v. Emperor*.
- (193) 34 Cri L Jour 401 (406) : 142 Ind Cas 741 (Nag), *Suleman v. Emperor*.
- (198) AIR 1928 Nag 58 (62) : 28 Cri L Jour 996, *Surajmal v. Ramnath*.
- (193) AIR 1933 Rang 142 (143) : 34 Cri L Jour 783, *Nga Ba Shin v. Emperor*.
- (190) AIR 1929 Sind 90 (92) : 23 Sind L R 216 : 30 Cr. L. J. 548, *Allahbux Khan v. Emperor*.
[See ('21) AIR 1921 Mad 303 (303) : 22 Cri L Jour 613, *In re Rajayya*.]
[See also ('13) 14 Cri L Jour 440 (441) : 20 I. C. 600 (I. B), *Emperor v. Stella*.
(Burden of proving facts, which are peculiarly within the sole knowledge of accused, is on him.)
- (197) AIR 1927 Cal 409 (409) : 28 Cri L Jour 469, *Harendra Kumar v. Emperor*.]
See also S. 271 Note 9.
4. ('27) AIR 1927 AH 119 (119) : 27 Cri L Jour 1395, *Mangalia v. Emperor*.
5. ('24) AIR 1924 Cal 257 (283) : 25 Cr. L. J. 817 (F B), *Emperor v. Barendra Kumar*.

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prosecution evidence *prima facie* establishes his guilt or involves him in considerable suspicion, his absence of explanation may give rise to an inference against him.⁶ But when the prosecution evidence is entirely untrustworthy, it is not open to the Court to rely upon the admissions of the accused made in a statement under this section and to base a conviction thereon.^{6a}

The answers given can only be "taken into consideration" in the inquiry or trial, in which they are given. They cannot be allowed to fill up a gap in the prosecution evidence; the prosecution must make out its case by evidence.⁷ Thus, where in a prosecution for defamation, no evidence was let in to prove publication, it was held that the admission of publication, made by the accused in his statement under this section, was not sufficient to fill up the gap in the prosecution evidence.⁸ Similarly, in a prosecution for murder, where the prosecution evidence is not sufficient to connect the accused with the murder, the gap cannot be filled up by an admission made by the accused in his examination under this section.^{8a} The Lahore High Court has in the undermentioned case^{8b} expressed a doubt whether the same principle would apply to a written statement lodged by the accused of his own accord.

Where the answers given satisfactorily explain the prosecution evidence, there can be no conviction; if they do not rebut the prosecution evidence, the Court will convict; but in any case the Court cannot

6. ('18) AIR 1918 Mad 111 (115) : 19 Cri L Jour 189, *E. D. Smith v. Emperor*. (Where, the only alternative theory to guilt of accused is a remote possibility, which if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether the possibility may be disregarded or taken into account.)

('19) AIR 1919 Oudh 160 (174) : 20 Cri L Jour 465, *Sushil Chandra v. Emperor*.

('14) AIR 1914 Sind 111 (112) : 7 Sind L R 109 : 15 Cri L Jour 497, *Isharsing Sawansing v. Emperor*. (Force of suspicious circumstances is augmented in absence of explanation.)

[See ('24) AIR 1924 Cal 257 (283) : 25 Cr. L. J. 817 (FB), *Emperor v. Barendra Kumar*.]

6a. ('37) 1937 M W N 569 (570), *Krishnaayya v. Emperor*.

7. ('37) AIR 1937 Mad 209 (210) : 38 Cri L Jour 323 : 1 L R (1937) Mad 358, *In re Seshapani Chetty*.

('36) AIR 1936 Lah 28 (29) : 37 Cri L Jour 428, *Hasham v. Emperor*.

('28) AIR 1928 Oudh 373 (373) : 29 Cri L Jour 763, *Rameshwar v. Emperor*.

('29) AIR 1929 Sind 255 (256) : 24 Sind L R 10 : 30 Cr. L. J. 1135, *Saleh v. Emperor*.

('16) AIR 1916 Mad 851 (853) : 39 Mad 449 : 16 Cr. L. J. 294, *Annavi Muthiriyani v. Emperor*.

8. ('38) AIR 1938 Mad 904 (905) : 40 Cr. L. J. 69, *Subba Rao v. Venkalachalapathi Aiyar*.

('23) AIR 1923 Lah 225 (226) : 4 Lah 55 : 24 Cr. L. J. 693, *Devi Dial v. Emperor*.

('04) 1 Cr. L. J. 566 (568) : 2 Weir 408 : 27 Mad 238 (240), *Mohideen Abdul Kadir v. Emperor*.

('11) 12 Cr. L. J. 585 (587) : 12 I C 961 : 36 Mad 457, *G. G. Jerimiah v. F. S. Vas*.

[But see ('35) AIR 1935 Rang 509 (510, 511) : 37 Cri L Jour 328, *Narayanan Chettyar v. Emperor*. (Accused admitting in his examination publication of defamatory letter—Admission not a result of intimidation and found to be true because defence was solely based upon it—Held such admission could be taken into consideration against the accused even though there was no evidence of publication.)]

8a. ('41) AIR 1941 Mad 1 (4) : 1940 Mad W N 1105 (1107, 1108), *Emperor v. Kupppammal*. (Following AIR 1916 Mad 407.)

8b. ('36) AIR 1936 Lah 28 (29) : 37 Cr. L. J. 428, *Hasham v. Emperor*. (On the facts of the case it was held that the statement could be taken into consideration when the prosecution had without such statement proved its case.)

supplement the prosecution evidence by selecting only the passages which might corroborate the prosecution evidence, rejecting passages exonerating the accused; the *entire statement* should be considered.⁹

Under the Code of 1872, the statement of an accused person could be used only as *against* him. Under the corresponding section of the Code of 1882, as well as under the present section, it can be used *for or against* him¹⁰ in the same case, or, in a subsequent trial for a different offence.¹¹ It cannot, however, be used against any person *other* than the one who made it.¹²

As to the meaning of the words "taken into consideration" in S. 30 of the Evidence Act, see the undermentioned cases.¹³

24. Irrelevant answers. — In giving his answers, the accused must confine himself to relevant answers. The Judge can refuse to record irrelevant answers and may even prevent the making of such answers.¹

9. ('37) AIR 1937 Lah 243 (245) : 38 Cr. L. J. 813, *Ahman Shah Md. v. Emperor*. (Court cannot take into consideration merely the inculpatory part of an accused's statement to the exclusion of the exculpatory part.)

('29) AIR 1929 All 1 (5) : 51 All 313 : 30 Cri L. Jour 101, *Bhola Nath v. Emperor*.

('94) 21 Cal 955 (976), *Wafadar Khan v. Queen-Empress*.

('12) 13 Cri L. Jour 195 (196) : 14 I C 195 : 39 Cal 855, *Pika Dawa v. Emperor*.

('69) 5 Mad H C R App iv (iv).

('11) 12 Cri L. Jour 142 (142) : 9 Ind Cas 790 (Mad), *Kamakka v. Emperor*.

[See also ('31) AIR 1931 All 1 (2) : 32 Cr. L. J. 362 : 52 All 1011 (FB), *Bal Makund v. Emperor*. (Confession must be taken as a whole.)

('33) AIR 1933 All 401 (402) : 34 Cri L. Jour 765, *Man Singh v. Emperor*. (Held, that admissions of the accused were to be taken as a whole.)

('32) 33 Cr. L. J. 570 (571) : 138 Ind Cas 217 (Lah), *Faqir Mahomed v. Emperor*. (Admissions must be taken as a whole.)]

10. ('40) AIR 1940 Cal 250 (251) : 41 Cr. L. J. 563, *Tahsinuddin Ahmad v. Emperor*. (In some cases the Court may draw even an inference against the accused from his answer or refusal to answer.)

('21) AIR 1921 Pat 122 (122) : 6 Pat L J 241 : 22 Cr. L. J. 433, *Baldeo Koeri v. Emperor*.

[See ('67) 7 Suth W R Cr 59 (60), *Queen v. Kallychurn*. (Accused convicted of adultery on his own admission coupled with the evidence.)

('23) AIR 1923 All 90 (91) : 45 All 166 : 24 Cr. L. J. 6, *Deo Datt v. Emperor*. (Contradictory statements of accused taken into consideration against him.)]

11. ('21) AIR 1921 Pat 122 (122) : 6 Pat L J 241 : 22 Cri L. Jour 433, *Baldeo Koeri v. Emperor*.

12. ('40) AIR 1940 Cal 250 (251) : 41 Cr. L. J. 563, *Tahsinuddin Ahmed v. Emperor*. (Statement of accused under S. 342 cannot be used against his co-accused.)

('70) 2 N W P H C R 936 (937), *Queen v. Hurgobind*.

('94) 21 Cal 955 (976), *Wafadar Khan v. Empress*.

('69) 1869 Pun Re No. 27 Cr, p. 54 (54, 55), *Crown v. Hossaince*.

('78) 1878 Pun Re No. 13 Cr, p. 34 (36), *Crown v. Jhaba*.

13. ('90) 15 Bom 66 (68), *Queen-Empress v. Khandia*. (Accused jointly tried with other accused—Confessions of other accused can only be taken into consideration along with evidence—They cannot by themselves form basis of conviction.)

(1893-1900) 1893-1900 Low Bur Rul 368 (368), *Nga Tha Nyan v. Queen-Empress*.

('86) 1886 Rat 311 (311, 312), *Queen-Empress v. Bayaji*. ("Taken into consideration" mean "taken so" for the purpose of arriving at a conclusion of fact.)

('89) 1889 Rat 456 (456), *Queen-Empress v. Ganapabhat*. (Confession of co-accused cannot, though it may be taken into consideration for purposes of S. 30, Evidence Act, be treated as of the same value as the evidence of an accomplice taken on oath and tested by cross-examination.)

('66) 5 Suth W R Cr 1 (1), *Queen v. Suncchur*. (Statement of a prisoner, whether taken as a confession or on examination, may be received as evidence.)

Note 24

1. ('33) AIR 1933 All 690 (695) : 55 All 1040 : 34 Cr. L. J. 967, *Jhabwala v. Emperor*.

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Notes 25-27

25. Answers making defamatory statements. — It has been held by the High Courts of Allahabad¹ and Madras² that a defamatory statement, made in answer to questions put by the Court under this section, will not render the accused liable to punishment. The High Court of Bombay has, on the other hand, held that he will render himself liable.³

26. Answers amounting to contempt of Court. — A statement, which amounts to contempt of Court, will render the accused liable to punishment.¹

27. Answers by one accused, if can be considered against co-accused. — It has already been seen that the answers given by the accused can be used only for or against *him* and not against others. There is no indication in the language of this section that the answers given by one accused under this section could be considered against his co-accused. On the question whether statements made under this section can be taken into consideration under S. 30, Evidence Act, against a co-accused, there is a divergence of judicial opinion. The Bombay High Court has held that for the purposes of S. 30, there is no distinction between a confession made by an accused before the trial and one made by him in the course of the trial and hence, a confession made by one accused in the course of his statement under this section can be taken into consideration against his co-accused under S. 30 of the Evidence Act.¹ The Lahore High Court agrees with this view.² But the Allahabad,³ Madras,⁴ Calcutta⁵ and Nagpur⁶ High Courts

Note 25

1. ('27) AIR 1927 All 707(708):50 All 169:29 Cr.L.J. 262, *Murli Pathak v. Emperor*.
2. ('09) 9 Cr. L. J. 276 (277) : 1 I. C. 248 (Mad), *In re Payini Chellaya*. (Statements held privileged.)
3. ('12) 13 Cr.L.J. 275(278,282):14 I.C. 659:36 Mad 216 (FB), *Potaraju v. Emperor*.
4. ('26) AIR 1926 Bom 141(143):50 Bom 162:27 Cr.L.J. 423(FB), *Santa v. Umrao*.

Note 26

1. ('22) AIR 1922 Bom 261 (264) : 46 Bom 973 : 23 Cr. L. J. 325, *Emperor v. Venkatrao*. (Imputation of prejudice to presiding Judge made in accused's statement amounts to contempt.)

Note 27

1. ('30) AIR 1930 Bom 354 (355, 356) : 54 Bom 531 : 31 Cr. L. J. 1137, *William Cooper v. Emperor*.
2. ('36) AIR 1936 Lah 337 (338) : 37 Cr. L. J. 508 : 16 Lah 651, *Dial Singh v. Emperor*. (Value of confession as against co-accused depends on facts and circumstances of case.)
3. ('23) AIR 1923 All 322(323) : 25 Cr.L.J. 305: 45 All 323, *Mahadeo v. Emperor*.
4. ('31) AIR 1931 Mad 820 (821) : 32 Cr. L. J. 1099 : 54 Mad 788, *In re Marudamuthu Padayachi*.
5. ('29) AIR 1929 Mad 285 (285) : 30 Cr. L. J. 932, *In re Govinda Naidu*. (S. 30 does not refer to statements made at the trial but the statements made before and proved at the trial.)
[But see ('14) AIR 1914 Mad 45 (46) : 15 Cr. L. J. 13 : 38 Mad 302, *In re Vempalli Bali Reddi*.]
6. ('40) AIR 1940 Cal 250 (251) : 41 Cr. L. J. 563, *Tahasinuddin Ahmed v. Emperor*. (The Court is not entitled to draw any inference against a co-accused from the answer of one accused given in response to questions put to him under the provisions of S. 342, Criminal Procedure Code.)
[See also ('81) 7 Cal 65 (68, 69) : 8 C L R 352, *Empress v. Chandranath*. (Each accused in absence of other — Conviction on statement of co-accused cannot be supported.)]
7. ('40) AIR 1940 Nag 287 (290, 291), *Sumitra v. Emperor*. (Distinction between confession before trial and one made when examined under S. 342 pointed out.)

have taken a contrary view on the ground that S. 30 of the Evidence Act refers only to a confession made before the trial and not in the course of the trial. It is submitted that the latter view is correct. The reason is this: S. 30 of the Evidence Act requires that the confession must be "proved" before the Court. Under S. 3 of the Evidence Act, a fact is said to be proved when on considering the matters before it the Court *believes* such fact to exist or considers its existence so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it exists. When a confession is made before a Court in the course of a trial, the Court perceives with its own senses the fact of the confession and *knows* such fact; the Court does not *believe* it or consider it to be probable.

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Notes 27-29:

28. Several accused — Each to be examined separately. — Where there are several accused in a case, it is incumbent on the Magistrate to examine each of them separately; a joint statement of all the accused in a single paragraph is not authorized by the section.¹ Where, after the Judge took an explanation from one of the accused persons, as regards the nature of his defence, and subsequently took another statement from a co-accused under this section, it was held that he was entitled to do so.²

Where there are several accused, the case of each of them should be individually considered and each of them should be questioned with reference to the particular position brought out by the evidence against him.³

29. Accused's defence in general. — The nature of the defence should be ascertained, not only from the statement of the accused but from the trend of the cross-examination of the prosecution witnesses, and from the arguments of the accused's pleader at the close of the trial.¹

[See ('40) AIR 1940 Nag 66 (69, 70) : 41 Cr. L. J. 158, *Motilal v. Emperor* (Statement not taken into consideration—Question left open.)]

[But see ('31) AIR 1931 Nag 169 (170) : 32 Cr. L. J. 1222 : 27 N L R 163, *Ganpat v. Emperor*. (Disapproved in A I R 1940 Nag 287.)]

Note 28

1. ('37) AIR 1937 Sind 304 (301) : 39 Cr. L. J. 59 : 32 S L R 30, *Emperor v. Shivalomal*. (Section contemplates individual statements of accused and not joint statement.)

('31) AIR 1931 Bom 132 (135) : 55 Bom 356 : 32 Cr. L. J. 572, *Balakrishna Anant v. Emperor*.

('14) AIR 1914 Lah 42(43, 44) : 1913 Pun Re No. 20 Cr: 15 Cr. L. J. 11, *Emperor v. Nanak Chand*.

('28) 29 Cr. L. J. 469 (469) : 109 I. C. 117 (Lah), *Girdhari Lal v. Emperor*.

[But see ('25) AIR 1925 Nag 403 (403, 404) : 22 Nag L R 1 : 27 Cr. L. J. 66, *Mahadeo Singh v. Emperor*. (Co-accused not debarred from giving concerted statement.)]

2. ('28) AIR 1928 Cal 675 (677) : 55 Cal 858 : 29 Cr. L. J. 1022, *Satya Narain v. Emperor*.

3. ('38) AIR 1938 Nag 283 (285) : 40 Cr. L. J. 197 : I L R (1939) Nag 686, *Nana Sadoba v. Emperor*. (Where a complicated question is put to each accused without reference to the particular position of each as brought out by the evidence against him, it is not a sufficient compliance with the section.)

Note 29

1. ('30) AIR 1930 Cal 442 (442, 443) : 31 Cri L Jour 1203, *Kutti v. Emperor*.

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Note 29

An accused person is entitled to put forward any defence open to him, technical or otherwise, and to have the Court's judgment on it.² Nor is there anything in law to prevent him from setting up alternative and inconsistent defences,³ though such defence may ordinarily weaken his case.⁴ It is open to an accused person to plead the right of private defence, either specifically, or in the alternative.^{4a}

It is not the affair of the defence to explain or to supply gaps in the prosecution evidence.⁵ Nor can the Court call upon the accused to frame a theory, particularly in a case of difficulty, in which the theory of the prosecution is itself not clear.^{5a} Where, however, a *prima facie* case is made out by the prosecution, it is the duty of the defence to rebut the presumption arising therefrom, by some tangible evidence.⁶

An accused can make admissions of *facts* at his trial, which may relieve the prosecution from bringing evidence to prove such admitted facts: a plea of guilty is an extreme instance of such an admission and

2. ('14) AIR 1914 Cal 456 (459) : 41 Cal 350 : 15 Cr. L. J. 385, *Ramesh Chandra v. Emperor*.

3. ('18) AIR 1918 All 189 (190) : 40 All 284 : 19 Cri L Jour 371, *Yusuf Hussain v. Emperor*. (Alternative defence.)

('19) AIR 1919 Cal 439 (441) : 20 Cr.L.J.661, *Afiruddi Chakdar v. Emperor*.(Do.)

('15) AIR 1915 Cal 786 (787) : 16 Cr. L. J. 76 (78), *Kali Prasad v. Emperor*.

('27) AIR 1927 Lah 710 (712) : 29 Cr. L. J. 117, *Santa Singh v. Emperor*. (Inconsistent pleas.)

('20) AIR 1920 Pat 843 (843, 844) : 21 Cri L Jour 799 : 5 Pat L Jour 64, *Faudi Keot v. Emperor*. (Alternative defence.)

('28) AIR 1928 Rang 167 (167) : 30 Cri L Jour 239, *Abdul Aziz v. Fazal Rahman*. (Even where accused deny having made statements alleged to be defamatory, they are entitled to prove that the allegations, if made by them, would bring them within one of the exceptions to S. 500, Penal Code.)

See also S. 256 Note 10 and S. 290 Note 1.

4. ('23) AIR 1923 Cal 717 (718) : 25 Cr. L. J. 190, *Nagendra Chandra v. King-Emperor*.

('27) AIR 1927 Lah 710 (712) : 29 Cri L Jour 117, *Santa Singh v. Emperor*.

4a. ('20) AIR 1920 Pat 843 (843,844) : 21 Cri L Jour 799 (800) : 5 Pat L Jour 64, *Faudi Keot v. Emperor*.

5. ('14) AIR 1914 Cal 456 (466) : 41 Cal 350 : 15 Cr.L. J. 385, *Ramesh Chandra Banerjee v. Emperor*.

5a. ('18) AIR 1918 All 160 (166) : 19 Cri L Jour 935, *Surendra Nath v. Emperor*.

('30) 1930 Mad W N 1211 (1215), *Pichumma Naidu v. Emperor*. (Accused charged with murder is under no obligation to suggest any other way in which the deceased might have met his death—Failure to do so should not occasion adverse comment.)

('94) 1894 Rat 686 (686), *Queen-Empress v. Jethmal Narayan*.

6. ('28) AIR 1928 Cal 27(39) : 29 Cr.L.J.49, *Hari Narayan Chandra v. Emperor*. (Per Suhrawardy, J.)

('14) AIR 1914 Sind 111 (112) : 7 Sind L R 109 : 15 Cr. L. J. 497 (498,499), *Isarsing Sawansing v. Emperor*.

('33) AIR 1933 Cal 599 (600) : 34 Cri L Jour 1015, *Arman Ulla v. Jainulla*. (Once the elements of an offence under S. 215, Penal Code, have been established by evidence the onus of proving that the accused is entitled to the benefit of the exception mentioned in S. 215 is on the defence.)

('28) AIR 1928 Pat 100 (101) : 6 Pat 627 : 29 Cri L Jour 239, *Ghanshyam Singh v. Emperor*. (Merely relying on discrepancies in prosecution evidence is not sufficient.)

('31) AIR 1931 Pat 384 (386) : 10 Pat 590 : 33 Cri L Jour 111, *Leda Bhagat v. Emperor*. (Facts indicating only one reasonable inference—Accused to escape consequences of that inference must offer alternative inference equally probable.)

('27) AIR 1927 Sind 85 (87) : 27 Cri L Jour 1265, *Bukshan v. Emperor*. (Force of suspicious circumstances is augmented when no explanation of facts is offered.)

See also S. 257 Note 1 and S. 290 Note 5.

a decision may be based thereon.⁷

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30. Court, if can ask accused to give thumb impressions. — Section 73 of the Evidence Act provides that the Court may direct any person present in Court to write any words or figures or to give his thumb impressions. Section 5 of the Identification of Prisoners' Act, XXXIII of 1920, also enables the Court to direct the measurements (which include thumb impressions) of any person to be taken for the purpose of any proceeding under the Code. It was held in the undermentioned cases¹ that the taking of thumb impressions of accused persons is in the nature of questioning the accused for the purpose of eliciting incriminating statements from them, and that it is, therefore, prohibited by this section. These decisions have not been followed by later decisions of the same Courts on the ground that s. 342 applies only to oral statements and has no application to the taking of thumb impressions and signatures.²

Where the accused refused to give his handwriting in a forgery case against him, it was held that an adverse inference can be drawn against him by reason of such refusal.³

31. "No oath shall be administered to the accused" — Sub-section (4). — Under the Indian law, a person cannot be administered an oath in any case, in which he is an accused person.¹

7. ('06) 4 Cri L Jour 471 (475) : 3 Low Bur Rul 208 (FB), *Abbas Ali v. Emperor*.

Note 30

1. ('17) AIR 1917 Low Bur 137 (139) : 17 Cri L Jour 316, *Maung Po Nyun v. Mutu Kurpen Chetty*.
(22) AIR 1922 Pat 73 (74, 75) : 1 Pat 242 : 23 Cri L Jour 638, *Bazari Hajam v. King-Emperor*. (Identification of Prisoners' Act not referred to.)
2. ('28) AIR 1928 Pat 103 (104) : 6 Pat 623 : 28 Cri L Jour 1028, *Zahuri Sahu v. Emperor*. (Court can direct accused to give his thumb impression in Court.)
(28) AIR 1928 Pat 129 (131, 132) : 6 Pat 305 : 28 Cri L Jour 850, *Basgit Singh v. Emperor*.
(24) AIR 1924 Rang 115 (116, 117) : 1 Rang 759 : 26 Cri L Jour 108 (F B), *King-Emperor v. Nga Tun Hlaing*.
[See also ('26) AIR 1926 Cal 531 (533) : 27 Cr. L. J. 409, *Emperor v. Kiran Bala Dasi*.
(23) AIR 1923 Mad 178 (179) : 23 Cr. L. J. 694 : 46 Mad 715, *Public Prosecutor v. Viram Mal.*]
3. ('32) AIR 1932 Bom 406 (409) : 56 Bom 304 : 33 Cri L Jour 666, *Emperor v. Ramrao Mangesh*.

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1. ('31) AIR 1931 Cal 341 (342) : 58 Cal 1214 : 32 Cr. L. J. 667, *Mohammad Yusuf v. Emperor*.
(19) AIR 1919 Upp Bur 31 (32) : 3 Upp Bur Rul 115 : 20 Cri L Jour 341, *Nga Ngwe Gyaw v. Emperor*. (Co-accused tried jointly at one trial — One of them cannot be put on his oath or examined as a witness.)
(11) 12 Cri L Jour 577 (578) : 12 Ind Ons 841 (LB), *Emperor v. Lal Meah*. (Solemn affirmation of person in the position of accused is bad.)
(31) AIR 1931 Lah 476 (478) : 12 Lah 635 : 32 Cri L Jour 913, *In the matter of Khairatiram*. (Accused can, in no case, be examined as a witness.)
(06) 3 Cri L Jour 225 (226) : 28 All 331 : 3 All L J 98 : 1906 A W N 42, *Bindsri Singh v. Emperor*. (No one can be prosecuted in respect of false statements made in affidavit sworn by him in a case in which he is an accused.)
(86) 5 Cal L R 574 (575), *In the matter of A. David*. (Two prisoners tried together for different offences committed in the same transaction — It is improper and illegal to examine one as a witness against the other.)

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In *Emperor v. Kazi Davood*,² the High Court of Bombay observed :

"It is repugnant to all principles of criminal law as administered in this country to compel a person to give evidence in the very matter in which he is accused, or is liable to be accused and then to base the charge on such evidence, and at the trial of the accused, to use such evidence given on oath as a statement tending to prove the guilt of the accused."

"Accused" means the accused *then under trial* and under examination by the Court.³ In other words, he must be an accused in

- ('19) AIR 1919 Cal 1021 (1022) : 45 Cal 720 : 19 Cri L Jour 663, *Akhoy Kumar v. Emperor*. (Accused person actually under trial cannot be sworn as witness.)
 ('82) 5 C P L R Cr 1 (2), *Empress v. Shakur*. (Unless an accused person is convicted or acquitted, he should not, except in the case where he is made Queen's witness, be examined as witness touching the matter of which he is accused.)
 ('29) AIR 1929 Pat 145 (148) : 30 Cri L Jour 646 (FB), *Indra Chandra Narang v. Emperor*. (It is most unfortunate that Indian Law of Evidence does not permit an accused to give evidence in support of his defence.)
 (1900-02) 1 Low Bur Rul 59 (60), *Queen-Empress v. Nga Saw*. (Making some of the accused persons witnesses held illegal.)
 ('02) 26 Mad 116 (118) : 2 Weir 189, *In re Paree Kunhammad*.
 ('79) 2 All 260 (262), *Empress of India v. Asghar Ali*.
 ('10) 11 Cri L Jour 537 (537) : 33 All 163 : 7 Ind Cas 914, *Mattan v. Emperor*. (Accused cannot be convicted under S. 182, Penal Code, for statement made by him during his examination on oath by a Magistrate or in course of an application for transfer.)
 ('96) 19 Mad 209 (210) : 1 Weir 850, *Queen-Empress v. Bhasyam Chetti*. (Affidavit by accused sought to be used for purpose of showing that he did not plead guilty, held inadmissible — That vakil and not the client should have made affidavit pointed out.)
 ('02) 1902 Pun Re No. 12 Cr, p. 33 (35, 36); 1902 Pun L R No. 100, *Nabi Baksh v. Emperor*.
 [See also ('80) 1880 Pun Re No. 3 Cr, p. 8 (9), *Raj Mal v. Empress*. (The administering of an oath or affirmation to an accused person although prohibited does not render the statement inadmissible either against him or against a co-accused at the trial.)]
 [But see ('66) 6 Suth W R Cr 91 (91), *Queen v. Ashruff Sheik*. (Persons jointly tried—No community of interest — Any person jointly indicted is a competent witness against others.)]
 2. ('26) AIR 1926 Bom 144 (146) : 50 Bom 56 : 27 Cri L Jour 433. (Statement of accused on oath before Coroner at inquest is not admissible in evidence.)
 [See also ('08) 7 Cri L Jour 131 (131) : 3 M L T 138, *Anthony v. Emperor*. (Conviction based on the deposition of the accused taken on solemn affirmation is bad.)]
 [But see ('26) AIR 1926 Bom 151 (152) : 50 Bom 111 : 27 Cr. L. J. 466, *Emperor v. Ramnath Mahabir*. (Statement of accused on oath at Coroner's inquest is admissible at his trial either under S. 26, or under Ss. 18 and 21, Evidence Act.)]
 3. ('38) AIR 1938 Bom 481 (482, 483) : 40 Cri L Jour 118 : ILR (1939) Bom 42, *Emperor v. Karamali Gulamali*.
 ('98) 23 Bom 213 (219), *Empress v. Durant*.
 ('02) 15 C P L R 112 (114), *Emperor v. Vinayak Jageshwar*.
 ('16) AIR 1916 Bom 229 (231, 235) : 17 Cr. L. J. 256, *Govind Balvant v. Emperor*.
 ('19) AIR 1919 Cal 1021 (1022) : 45 Cal 720 : 19 Cri L Jour 663, *Akhoy Kumar Mukerjee v. Emperor*.
 ('20) AIR 1920 Nag 255 (256) : 16 Nag L R 9 : 21 Cr. L. J. 769, *Govinda Sambuji v. Emperor*.
 ('25) AIR 1925 Oudh 227 (227) : 25 Cri L Jour 1194, *Makhdam v. Emperor*. (Accused in case before Sub-Magistrate making false statements in application before District Magistrate not protected.)
 ('25) AIR 1925 Rang 122 (125) : 3 Rang 11 : 26 Cri L Jour 492, *A. V. Joseph v. King-Emperor*. (Co-accused tried separately is a competent witness for or against the other.)
 ('92) 16 Bom 661 (668), *Queen-Empress v. Mona Puna*. ("Accused" means a person over whom the Magistrate or other Court is exercising jurisdiction.)
 ('96) 23 Cal 493 (494), *Jhoja Singh v. Queen-Empress*. (Do.)
 ('01) 28 Cal 709 (714) : 5 C W N 749, *Lalit Mohan Moitra v. Surja Kanta Acharjee*.
 ('98) 21 All 107 (109) : 1898 A W N 185, *Empress v. Mutasaddi Lal*.

the enquiry or trial in which he is presented as a witness.⁴ It cannot include an accused over whom the Court is exercising jurisdiction in another inquiry or trial.⁵ Thus, A, against whom an enquiry or trial is pending in Court X, can file an affidavit in the High Court in support of an application for transfer under S. 526⁶ or for leave to appeal under section 449 (1), clause (c)⁷ inasmuch as such application is a different proceeding from that in which he is an accused person.

The word "accused" cannot include any person who, at the time he is administered an oath, is not on his trial in any proceeding.⁸ Thus,

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- (35) AIR 1925 Bom 186 (189) : 59 Bom 355 : 36 Cri L Jour 937, *Keshar Vasudeo v. Emperor*. (Persons not sent up for trial — Mere inclusion of their names in police charge-sheet does not make them accused.)
4. ('40) AIR 1940 Nag 410 (413) : 189 I. C. 885 (888), *Shkoshankar Dhondbaji v. Emperor*.
- (37) AIR 1937 Nag 17 (22, 23) : 38 Cri L Jour 237 and 251 : ILR (1937) Nag 315 (FB), *Amdumiyar Guljar v. Emperor*. (The word 'inquiry' in the section does not include an investigation.)
- (20) AIR 1920 Nag 255 (256) : 16 Nag L R 9 : 21 Cr L J 769, *Govinda Sambhuji v. Emperor*.
- (87) 1887 Pun Re No. 38 Cr, p. 85 (90), *Mal Singh v. Empress*.
5. ('38) AIR 1938 Bom 481 (482) : 40 Cr. L. J. 118 : ILR (1938) Bom 42, *Emperor v. Karamali Gulamali*.
- (37) AIR 1937 Nag 17 (22) : 38 Cri L Jour 237 and 251 : ILR (1937) Nag 315 (FB), *Amdumiyar Guljar v. Emperor*. ('Inquiry' in S. 342 does not include investigation and 'accused' means one over whom the Magistrate is exercising jurisdiction.)
- (98) 20 All 426 (427) : 1898 A W N 102, *Queen-Empress v. Tirbeni Sahai*.
- (08) 7 Cr. L. J. 95 (102) : 35 Cal 161 : 7 C L J 63, *Bepin Chandra Pal v. Emperor*.
- (19) AIR 1919 Cal 1021 (1022, 1023) : 45 Cal 720 : 19 Cr. L. J. 663, *Akhoy Kumar Mukerjee v. Emperor*. (When two persons, though accused of complicity in the same offence, are tried separately, each is a competent witness at the trial of the other.)
- (28) AIR 1925 Cal 557 (559) : 56 Cal 400 : 30 Cri L Jour 818, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Murray*.
- (31) AIR 1931 Cal 341 (342) : 58 Cal 1214 : 32 Cr. L. J. 667, *Muhammad Yusuf v. Emperor*.
- (87) 1887 Pun Re No. 38 Cr, p. 85 (90), *Mal Singh v. Empress*.
[See also ('95) 1895 Rat 776 (777), *Queen-Empress v. Ramchandra Sawairam*.]
6. ('33) AIR 1933 Nag 201 (202) : 29 Nag L R 338 : 34 Cr. L. J. 1035, *Sadasheo Suryabhanji v. Emperor*. (S. 342, sub-s. (4), applies only to the conduct of trials and to the examination of the accused at the trial and does not apply to any proceeding outside the trial, such as an application to the High Court for transfer.)
- (28) AIR 1928 All 182 (184) : 29 Cri L Jour 336, *Baddu Khan v. Emperor*.
- (22) AIR 1922 Lah 113 (113) : 3 Lah 46 : 23 Cr. L. J. 399, *Ghulam Muhammad v. Emperor*.
- (25) AIR 1925 Lah 312 (313, 314) : 6 Lah 34 : 27 Cri L Jour 98, *Emperor v. Pir Qadir Baksh Shah*.
- (26) AIR 1926 Lah 12 (13) : 26 Cri L Jour 1869, *Mt. Allah Wasai v. Emperor*.
- (09) 10 Cri L Jour 509 (512, 513) : 12 Oudh Cas 308 : 4 I. C. 160, *Tribhavan v. Emperor*.
- (08) 8 Cri L Jour 378 (379) : 1 Sind L R 124, *Imperator v. Khan Mahommed*. (Statements in affidavit not made to questions put, not protected by clause 2.)
7. ('27) AIR 1927 Cal 307 (308) : 54 Cal 52 : 28 Cri L Jour 481, *Gallagher v. Emperor*. (Sub-section (4) of S. 342 is intended to relate to the proceedings which are specified in S. 342.)
[But see ('96) 19 Mad 209 (210) : 1 Weir 850, *Queen-Empress v. Bhashyam Chetti*. (Affidavit in revision is not admissible.)]
8. ('20) AIR 1920 Nag 255 (256) : 16 Nag L R 9 : 21 Cr. L. J. 769, *Govinda Sambhuji Mali v. Emperor*.
- (87) 1887 Pun Re No. 38 Cr, p. 85 (85, 86), *Mal Singh v. Empress*.
[See also ('68) 5 Bom H C R Cr 1 (2), *Reg. v. Narayan Sundar*.]

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where an accused person is pardoned under S. 337,⁹ or is discharged,¹⁰ he ceases to be an accused. Where several persons were arrested in the course of a police investigation and the police discharged one of them and made him a witness in the trial started against the others, it was held that he was a competent witness, even though his discharge by the police was illegal.¹¹ So also, where several accused were charge-sheeted by the police but subsequently one of them was placed on a separate charge-sheet and tried separately, it was held that he was not an accused for the purposes of the trial of the other accused and was a competent witness against them.^{11a} It has also been held that where the police refrain from prosecuting a person against whom there is adequate evidence to justify his production for inquiry and trial before a Magistrate, he can be a competent witness even though he was not pardoned under S. 337.^{11b} Where A and B are charged with theft but process is issued by the Magistrate only against A, B is a competent witness in the trial against A.¹² An accused person, who has not been legally granted a pardon,¹³ or who has not been legally discharged by the Magistrate,^{13a} does not cease to be an accused person. A pardon granted by the Government to an accused after the commencement of the trial is not one under S. 337 and he does not cease to be an "accused" person. His evidence is, therefore, not admissible against his co-accused.^{13b}

9. ('04) 1 Cr. L. J. 1066 (1067, 1068) : 1904 Pun Re No. 21 Cr, *Sardar Khan v. Emperor*.

('15) AIR 1915 Sind 43 (45):9 Sind L R 43:16 Cr.L.J. 632, *Harumal Parmanand v. Emperor*.

10. ('18) AIR 1918 All 111 (113):19 Cr. L. J. 401 : 40 All 416, *Abdul Latif Khan v. Emperor*.

('17) AIR 1917 Cal 261 (262) : 17 Cri L Jour 428, *Emperor v. Nanda Gopal Roy*. ('09) 9 Cri L Jour 370 (372, 374) : 4 Low Bur Rul 362, *Aung Min v. Emperor*.

('67) 7 Suth W R Cr 44 (45), *Queen v. Behary Lall Bose*.

11. ('92) 16 Bom 661 (663, 668) *Queen-Empress v. Mona Puna*.

11a. ('38) AIR 1938 Bom 481 (483) : 40 Cri L Jour 118 : ILR (1939) Bom 42, *Emperor v. Karam Ali Gulam Ali*.

11b. ('37) AIR 1937 Nag 17 (23):38 Cr.L.J. 237 & 251 : ILR (1937) Nag 315 (FB), *Andumiyar Guljar v. Emperor*. (But his evidence must ordinarily be of less value than that of a person who has been granted a valid pardon and is no longer under fear of a prosecution.)

12. ('82) 10 Cal L R 553 (554), *Mohesh Chunder Kopali v. Mohesh Chunder Dass*. ('23) AIR 1923 Lah 666 (667) : 25 Cri L Jour 520, *Emperor v. Darya Singh*.

13. ('06) 4 Cri L Jour 282 (283) : 1906 Pun Re No. 9 Cr, *Alladad v. Emperor*.

('02) 1902 Pun Re No. 12 Cr, p. 33 (36) : 1902 Pun L R No. 100, *Nabi Baksh v. Emperor*.

('79) 2 All 260 (262), *Empress of India v. Ashgar Ali*.

('66) 3 Bom H C R Cr 59 (60), *Reg. v. Remedios*.

('77) 1 Bom 610 (618), *Reg. v. Hanmanta*.

('20) AIR 1920 Lah 215 (216) : 1 Lah 102 : 21 Cr.L.J. 599, *Mahandu v. Emperor*. (Mere promise of immunity to accomplice does not amount to discharge so as to make him competent witness against his co-accused.)

('06) 4 Cri L Jour 44 (45, 46) : 10 C W N 847, *Paban Singh v. Emperor*. (Conditional pardon invalid — Not a competent witness.)

13a. ('89) 1889 Rat 461 (461), *Queen-Empress v. Lilladhur*.

13b. ('06) 4 Cri L Jour 282 (283) : 1906 Pun Re No. 9 Cr, *Alladad v. Emperor*.

('02) 1902 Pun Re No. 12 Cr, p. 33 (36) : 1902 Pun L R No. 100, *Nabi Baksh v. Emperor*.

('79) 2 All 260 (262), *Empress of India v. Ashgar Ali*.

[See also ('36) AIR 1936 Lah 353 (356) : 37 Cr. L. J. 515 : 16 Lah 594, *Fakir Singh v. Emperor*.]

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Where an accused person is *convicted*, he ceases to be an accused person.¹⁴ Where, therefore, one of several co-accused is convicted on his plea of guilty, he becomes a competent witness against others who were originally jointly put up for trial with him.¹⁵ It was also held in the undermentioned case^{15a} that where an accused person *pleads guilty*, his incompetency of being a witness is removed, though he is convicted on such plea some time later. Where a prosecution is withdrawn against one of several accused under S. 494, he ceases to be an accused person and is a competent witness, to whom an oath can be administered, in further proceedings against others.¹⁶

A criminal appeal is a *continuation* of the criminal case and the appellant has the privilege of the accused and cannot be administered an oath.¹⁷

A Magistrate should not put persons on oath unless he is satisfied of his authority to do so. Where he examines persons, against whom a complaint is laid, before issue of process, the procedure is irregular and illegal.¹⁸

Section 10 of the Bombay Gambling Act, 1887, empowers the Magistrate to examine as witnesses, any of the persons arrested and brought before him in accordance with S. 6 (b) thereof. This procedure is a special procedure which overrides the general law enacted in this section.¹⁹ A contrary view was, however, expressed in the

14. ('01) 3 Bom L R 437 (438), *King-Emperor v. Annaya*. (Per Candy, J., Fulton, J., *contra*.)

('31) AIR 1931 Cal 341 (343, 344) : 58 Cal 1214 : 32 Cr. L. J. 667, *Muhammad Yusuf v. Emperor*.

('78) 1878 Pun Re No. 23 Cr. p. 60 (61, 62), *Muhammad Ali v. Crown*.

[See also ('75) 24 Suth W R Cr 8 (9), *Queen v. Ram Rutton Mookerjee*.]

15. ('01) 3 Bom L R 437 (438), *King-Emperor v. Annaya*. (Per Candy, J., Fulton, J., *contra*.)

[See ('92) 2 Weir 520 (520, 521), *In re Marudaimuthu*. (Such evidence stands on a different footing from that of an approver or unconvicted accomplice—The Judge is justified in saying that the jury may look to the evidence of such person for confirmation of the story told by an approver.)]

15a. (1900) 10 Mad L Jour 147 (158, 159, 160) (FB), *N. A. Subramaniya Aiyar v. Queen-Empress*.

16. ('10) 11 Cr. L. J. 21 (21, 22) : 5 I. C. 21 (All), *Muhammad Nur v. Emperor*. (1900) 25 Bom 422 (424, 428) : 2 Bom L R 1095, *Queen-Empress v. Hossein Haji Abba*.

('16) AIR 1916 Bom 229 (231, 234, 235) : 17 Cr. L. J. 256, *Govind Balwant v. Emperor*.

('07) 5 Cr. L. Jour 142 (145, 146) : 5 C. L. J. 224, *Deputy Legal Remembrancer v. Bannu Singh*.

('15) AIR 1915 Cal 184 (184) : 15 Cr. L. Jour 693, *Sherati Sheikh v. Emperor*.

('20) AIR 1920 Cal 300 (301) : 46 Cal 700 : 21 Cr. L. J. 5, *Sital Singh v. Emperor*.

('29) AIR 1929 Cal 319 (320, 321) : 56 Cal 1023 : 31 Cr. L. J. 315, *G. V. Raman v. Emperor*.

('33) AIR 1933 Cal 148 (149) : 34 Cr. L. Jour 675, *Sudam Chandra v. Emperor*.

('24) AIR 1924 Lah 235 (235) : 24 Cr. L. Jour 696, *Chhaprolia v. Emperor*.

('26) AIR 1926 Nag 426 (427, 428) : 27 Cr. L. Jour 807, *Mahadeo v. Emperor*.

('06) 4 Cr. L. J. 145 (149) : 33 Cal 1353 : 10 C W N 962, *Bannu Singh v. Emperor*. See also S. 540 Note 8.

17. ('89) 12 Mad 451 (453) : 1 Weir 113, *Queen-Empress v. Subbayya*.

('26) AIR 1926 Lah 309 (309) : 7 Lah 148 : 27 Cr. L. J. 463, *Dulla v. Emperor*. (Co-accused cannot be examined as witness, although he has not appealed.)

18. ('96) 1896 Rat 844 (846), *Queen-Empress v. Shidlingappa*.

('06) 4 Cr. L. Jour 165 (166, 167) : 8 Bom L R 587, *In re Trimbak Balaji*.

19. ('14) AIR 1914 Sind 45 (46, 47) : 8 Sind L R 309 : 16 Cr. L. J. 447, *Liladhar Umersi v. Emperor*.

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undermentioned case.²⁰

In the undermentioned case²¹ it was held that a proceeding for the forfeiture of recognizances is in the nature of a civil proceeding, and that the person proceeded against can give evidence on oath on his own behalf.

See also section 539A Note 5.

32. Examination of accused in cross-case as a witness. — Where there is a case and a counter or cross-case, both pending, it was held in the undermentioned cases¹ that the examination of the accused in the one case, as witness in the other, constituted a grave irregularity, as it was impossible to assume in such a case that the evidence, so given, could be impartial. This view, it is submitted, cannot be accepted as correct, if it means that such examination is not authorised by the law. The said view has not been followed in later cases.² In any case, if the accused is not prejudiced by the course adopted, it will not vitiate the trial.³ See also the undermentioned cases.⁴

32a. Applicability of section to proceedings under section 14 of the Legal Practitioners Act. — The High Court of Madras has held that a pleader, against whom proceedings are taken under s. 14 of the Legal Practitioners Act, is an *accused* person and he cannot be solemnly affirmed.¹ The High Court of Calcutta has, in the undermentioned case,² taken a contrary view.

32b. Applicability to proceedings under section 145. — None of the parties litigating under s. 145 can be called an accused person, and therefore they can be examined as witnesses in the case.¹

33. Examination of accused — How recorded. — See Section 364.

34. Destruction of record — Proof of examination. — Where the records have been destroyed and, in his explanation the

20. ('15) AIR 1915 Bom 123 (123, 124) : 17 Cr.L.J. 2, *Babilal Balwant v. Emperor*.
21. ('71) 15 Suth W R Cr 87 (88), *In re Jehan Buksh*. (Per Ainslie, J.)

Note 32

1. (1886) 14 Cal 358 (359, 360), *Bachu Mullah v. Sia Ram Singh*.
(1880) 6 Cal 96 (97, 98, 101) : 6 Cal L R 521, *Hossain Buksh v. Empress*.
(1883) 13 Cal L R 275 (278, 279), *Chakowri Lall v. Moti Kurmi*.
2. ('04) 1 Cr. L. J. 199 (202, 203, 204) : 8 C W N 344, *Sahadev Ahir v. Emperor*.
(92) 20 Cal 537 (548, 549), *Queen-Empress v. Chandra Bhuiya*.
(28) AIR 1928 Cal 557 (559) : 56 Cal 400 : 30 Cri L Jour 818, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Murray*. (Case under Factories Act.)
3. ('87) 14 Cal 358 (360), *Bachu Mullah v. Sia Ram Singh*.
(04) 1 Cri L Jour 199 (203, 204) : 8 C W N 344, *Sahadev Ahir v. Emperor*.
(28) AIR 1928 Cal 557 (559) : 56 Cal 400 : 30 Cri L Jour 818, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Murray*.
4. ('25) AIR 1925 Cal 1260 (1261, 1262) : 26 Cr. L. J. 1615, *Makhan v. Monindra*.
(16) AIR 1916 Low Bur 20 (20) : 17 Cri L Jour 503, *Ram Sarup v. Emperor*.

Note 32a

1. ('83) 6 Mad 252 (253) : 1 Weir 116, *Kotha Subba Chetti v. Queen*.
2. ('22) AIR 1922 Cal 515 (529, 535) : 49 Cal 732 : 24 Cr. L. J. 33 (SB), *Emperor v. Rajani Kanta*. (Proceedings under this section are quasi-criminal proceedings.)

Note 32b

1. ('25) AIR 1925 Oudh 286 (286) : 26. Cr. L. J. 70, *Mohammad Ayab v. Sarfaraz*.

Magistrate states that the accused was examined under this section, his statement must be accepted.¹

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35. Non-compliance with the section — Effect of. — There is a conflict of opinions as to the effect of a non-compliance with the provisions of the section, one set of cases holding that such a non-compliance vitiates the trial.¹ This view is based upon the

Note 34

1. ('29) AIR 1929 Cal 406 (406) : 56 Cal 1067 : 30 Cr. L. J. 526, *Sadagar Chaudhuri v. Emperor*.

Note 35

1. ('38) AIR 1938 Lah 543 (513) : 39 Cri L Jour 781 : 1 L R (1938) Lah 603, *Mahomed Nawaz v. Emperor*.
(('36) AIR 1936 Oudh 16 (17, 18) : 36 Cri L Jour 1303 : 11 Luck 461, *Emperor v. Karuna Shankar*. (Prejudice may be presumed — Failure to examine held vitiated trial.)

No examination made after close of prosecution evidence

- (('37) 1937 Mad WN 574 (575), *Varahamma v. Emperor*. (Provision is mandatory — Accused not examined after prosecution evidence — Conviction must be set aside.)
(('15) AIR 1915 Bom 221 (221) : 16 Cri L Jour 765, *Basapa Nangaj v. Emperor*.
(('33) AIR 1933 Cal 347 (348) : 31 Cri L Jour 519, *Hoogly Chansura Municipality v. Keshab Chandra*.
(('26) AIR 1926 Lah 667 (668) : 27 Cri L Jour 1000, *Mr. Demello v. Mrs. Demello*.
(('07) 5 Cri L Jour 332 (333) : 9 Bom L R 356, *Emperor v. Saranya Alma*. (Non-compliance of this mandatory provision raises a presumption of prejudice.)
(('28) AIR 1928 Lah 382 (386) : 30 Cri L Jour 18, *Pritchard v. Emperor*.
(('31) AIR 1931 Mad 241 (241) : 32 Cri L Jour 757, *Nateraja Mudaliar v. Devasingamani Mudaliar*. (Provision is mandatory — Examination of prosecution witness after examination of accused — Latter must again be examined.)
(('21) AIR 1921 Bom 370 (371) : 23 Cr. L. J. 21, *Emperor v. Rustomji Manchherji*. (Non-examination in summons-case.)
(('21) AIR 1921 Bom 374 (376, 377) : 45 Bom 672 : 22 Cri L Jour 17, *Fernandes v. Emperor*.
(('22) AIR 1922 Bom 290 (291) : 46 Bom 441 : 23 Cr. L. J. 45, *Gulabjap v. Emperor*.
(('14) AIR 1914 Cal 663 (663) : 41 Cal 743 (745, 746) : 15 Cr. L. J. 190, *Mohammad Hossain v. Emperor*.
(('23) AIR 1923 Mad 609 (610) : 46 Mad 449 : 24 Cri L Jour 517 (FB), *Varisai Rowther v. Emperor*.
(('25) AIR 1925 Bom 170 (172, 173) : 50 Bom 42 : 26 Cri L Jour 690, *Emperor v. Nathu*. (Accused examined before the close of prosecution evidence but not after.)
(('26) AIR 1926 Bom 57 (58) : 50 Bom 31 : 27 Cr. L. J. 165, *B. N. Gamadia v. Emperor*. (Non-compliance constitutes illegality — Consent of accused does not affect.)
(('28) AIR 1928 Bom 140 (141) : 29 Cri L Jour 535, *Emperor v. Bhau Dharma*. (Examination of witnesses after examination of accused — Accused not further examined subsequently.)
(('21) AIR 1921 Cal 605 (606) : 25 Cri L Jour 524, *Kashi v. Damu*. (Proper course is to remit the case for re-trial.)
(('23) AIR 1923 Cal 470 (482) : 50 Cal 518 : 24 Cri L Jour 248, *Promotha Nath v. Emperor*.
(('24) AIR 1924 Cal 975 (976) : 51 Cal 924 : 26 Cri L Jour 15, *Remembrance of Legal Affairs, Bengal v. Satish Chandra*.
(('24) AIR 1924 Cal 153 (153) : 25 Cri L Jour 460, *Sailendra Chandra v. Emperor*. (Re-trial should be ordered.)
(('25) AIR 1925 Cal 574 (575) : 24 Cr. L. J. 943, *Hamid Ali v. Sri Kissen Gosain*.
(('28) 29 Cri L Jour 882 (383) : 108 Ind Cas 381 (Lah), *Baz Khan v. Emperor*.
(('34) 36 Cr. L. J. 407 (407) : 153 Ind Cas 445 (Lah), *Muhammad Din v. Emperor*. (Framing of charge — Recording of fresh prosecution evidence after framing charge — Accused must again be called upon to make his statement — Omission to do so is not curable by S. 537.)
(('18) AIR 1918 Lah 348 (348) : 1918 Pun Re No. 1 Cr: 19 Cri L Jour 280, *Ghulla v. Emperor*. (Omission to perform such a duty must be deemed to have prejudiced seriously the accused and necessitates a re-trial.)
(('22) AIR 1922 Lah 45 (47) : 23 Cr. L. J. 154, *Haji Muhammad Baksh v. Emperor*.
(('24) AIR 1924 Lah 734 (736, 737) : 25 Cr. L. J. 1020, *Nanak Chand v. Emperor*.

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- (25) AIR 1925 Lah 288 (288) : 27 Cri L Jour 87, *Ghaza Ali v. King-Emperor*. (Questioning accused is mandatory.)
- (26) AIR 1926 Lah 51 (52) : 26 Cr. L. J. 1370, *Muhammad Sadiq v. Emperor*.
- (26) AIR 1926 Lah 551 (552) : 7 Lah 564 : 27 Cr. L. J. 1007, *Lachman Singh v. Emperor*.
- (26) AIR 1926 Lah 683 (683) : 27 Cri L Jour 1023, *Ismail v. Emperor*.
- (26) AIR 1926 Lah 684 (684, 685) : 27 Cr. L. J. 1021, *Fazal Ahmad v. Emperor*. (Note by Magistrate that accused does not wish to add to his previous statement is not proper compliance with S. 342.)
- (27) AIR 1927 Lah 720 (720) : 29 Cri L Jour 125, *Akhtar Mohammad v. Emperor*. (Magistrate trying case transferred — Successor beginning trial *de novo* but not again examining accused under S. 342—*Held*, proceedings were vitiated.)
- (28) AIR 1928 Lah 230 (231) : 29 Cri L Jour 905, *Emperor v. Gian Singh*.
- (34) AIR 1934 Lah 96 (96) : 15 Lah 60 : 35 Cr.L.J. 1394, *Karam Din v. Emperor*.
- (34) AIR 1934 Lah 415 (415) : 35 Cri L Jour 1447, *Amir v. Emperor*.
- (34) AIR 1934 Lah 631 (632) : 36 Cri L Jour 401, *Anand Prakash v. Emperor*.
- (34) AIR 1934 Nag 213 (215) : 31 Nag L R 49 : 35 Cr. L. J. 1457, *Hari Krishnaji v. Emperor*. (Magistrate not examining accused when written statement filed.)
- (21) 22 Cr. L. J. 598 (598) : 62 Ind Cas 870 (870) (Pat), *Tilak Gope v. Bhayaram*.
- (20) AIR 1920 Pat 471 (475, 479) : 21 Cr.L.J. 705 : 5 Pat L J 430, *Raghu Bhumij v. Emperor*. (Written statement cannot take place of examination under S. 342.)
- (20) AIR 1920 Pat 729 (729, 730) : 21 Cr. L. J. 793, *Suraj Pandey v. Emperor*.
- (21) AIR 1921 Pat 11 (12) : 22 Cr.L.J. 427 : 6 Pat L J 174, *Gulam Rasul v. Emperor*.
- (21) AIR 1921 Pat 109 (114) : 22 Cr.L.J. 417 : 6 Pat L J 147, *Fatu Santal v. Emperor*.
- (22) AIR 1922 Pat 5 (6) : 23 Cri L Jour 114, *Balkesar Singh v. King-Emperor*.
- (22) AIR 1922 Pat 212 (213), *Ram Nandan Singh v. Emperor*.
- (22) AIR 1922 Pat 296 (297) : 23 Cr.L.J. 440, *Parameshwar Lal Mitter v. Emperor*.
- (22) AIR 1922 Pat 299 (299) : 22 Cri L Jour 259, *Rameshwar Singh v. Emperor*. (Accused examined before evidence for prosecution closed.)
- (23) AIR 1923 Pat 292 (293) : 24 Cr. L. J. 311, *Bajinath Sahay v. King-Emperor*.
- (25) AIR 1925 Pat 723 (724) : 26 Cri L Jour 927, *Rameshwar Singh v. Emperor*.
- (26) AIR 1926 Pat 29 (29) : 26 Cri L Jour 1289, *Ram Charan Singh v. Emperor*.
- (34) AIR 1934 Pesh 75 (75) : 35 Cri L Jour 1361, *Anar Gul v. Emperor*.
- (18) AIR 1918 Upp Bur 43 (44) : 4 Upp Bur Rul 18 : 18 Cr. L. J. 944, *Emperor v. Nga Po Mya*.
- (23) AIR 1923 Rang 132 (133) : 4 Upp Bur Rul 127 : 25 Cri L Jour 319, *King-Emperor v. Nga Sein*. (Particulars of offence not explained.)
- (27) AIR 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1364, *King-Emperor v. Nga Po Byu*. (Accused not examined under S. 342—Re-trial ordered even though accused had been acquitted.)
- (26) AIR 1926 Sind 1 (3) : 20 S.L.R. 34 : 26 Cr. L. J. 1554 (FB), *Emperor v. Nabu*.
- (26) AIR 1926 Sind 281 (282) : 19 S.L.R. 121 : 27 Cr. L. J. 1290, *Emperor v. Pario*.
- (92) 1892 Rat 625 (625), *Queen-Empress v. Manchi*.
- (03) 2 Low Bur Rul 115 (116), *Nga Thet U v. Emperor*.
- (05) 1 Cri L Jour 737 (737) : 2 Low Bur Rul 239, *Emperor v. Kyan Baw*. [See also (90) 2 Weir 405 (407), *In re Raja Padayachi*. (Not a mere error of form—But where no prejudice, High Court will not interfere.)]
- Examination after prosecution witnesses were examined and before their cross-examination**
- (23) AIR 1923 Cal 196 (197, 198) : 50 Cal 223 : 24 Cri L Jour 198, *Mozahur Ali v. Emperor*.
- (24) AIR 1924 Nag 51 (52) : 25 Cri L Jour 713, *Krishnappa v. Emperor*.
- (28) AIR 1928 Nag 162 (164) : 29 Cri L Jour 475, *Mahommad Hayat Khan v. Emperor*. (Failure to examine after second cross-examination of re-called witnesses — *Held*, that the illegality only affected such portion of the trial as was subsequent to the stage at which it occurred.)
- (33) AIR 1933 Nag 192 (193) : 34 Cr. L. J. 340, *Emperor v. Amirbi*. (Omission to examine accused after second cross-examination of re-called witnesses.)
- (29) AIR 1929 Bom 447 (448, 450, 451) : 31 Cr. L. J. 402, *Emperor v. Genu Gopal*.
- (31) 32 Cri L Jour 623 (623) : 130 Ind Cas 845 (Cal), *Moharrum Muhammad v. Emperor*. (Statement after examination and before cross-examination of prosecution witnesses.)
- (25) AIR 1925 Nag 44 (47) : 20 Nag L R 174 : 26 Cri L Jour 971 (F B), *Local Government v. Maria*.

observations of their Lordships of the Privy Council in *Subramania Ayyar v. King-Emperor*² to the following effect :

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"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase, as irregularity, is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment."

In the undermentioned cases,³ a contrary view has been expressed, namely, that a non-compliance with the section does not vitiate the trial unless the accused has been prejudiced by the procedure adopted.

('23) AIR 1923 Cal 164 (164) : 49 Cal 1075 : 24 Cr. L. J. 3, *Gulzari Lal v. Emperor*. (Accused examined after the examination-in-chief of some of the prosecution witnesses, but not examined again after another witness for the prosecution had been examined after the cross-examination of the previous witnesses.)

('23) AIR 1923 Cal 668 (668) : 50 Cal 308 : 25 Cri L. Jour 799, *Jummon Christian v. Emperor*. (Examination of accused after examination-in-chief of the prosecution witnesses is not sufficient — He must be examined after their cross-examination and re-examination.)

('24) AIR 1924 Cal 182 (182, 183) : 25 Cri L. Jour 289, *Haro Nath Malo v. Ala Buz*. (Examination before cross-examination of prosecution witnesses.)

('34) AIR 1934 Lah 648 (648) : 36 Cr. L. J. 468, *Kundan Lal v. Emperor*. (Failure to examine after second cross-examination.)

('34) AIR 1934 Oudh 457 (458, 459) : 35 Cr. L. J. 1417 : 10 Luck 235, *Onkar v. Emperor*.

('22) AIR 1922 Pat 158 (159, 160) : 22 Cr. L. J. 697 : 6 Pat L. J. 614, *Mitarjit Singh v. King-Emperor*. ("Examined" includes cross-examination and re-examination.)

('25) AIR 1925 Rang 363 (364) : 27 Cri L. Jour 336, *Ah Khaung v. King-Emperor*. (No examination after further cross-examination of prosecution witnesses.)

('27) AIR 1927 Sind 175 (175, 176) : 21 Sind L. R. 331 : 28 Cr. L. J. 417, *Motankhan v. Emperor*.

Asking general questions

('38) AIR 1938 Sind 97 (98, 99) : 39 Cr. L. J. 618 : 32 S. L. R. 709, *Raban Lahu v. Emperor*. (Confession forming integral part of prosecution case—Failure to examine accused about it is not covered by S. 537—Retrial should be ordered.)

('25) AIR 1925 Pat 342 (344) : 26 Cri L. Jour 716, *Durga Ram v. Emperor*. (AIR 1922 Pat 388 dissented from—Court must ask specific questions—General questioning is not enough.)

('21) AIR 1921 Mad 679 (680, 681) : 23 Cri L. Jour 697, *In re Nainamalai Konan*. (Accused not asked to account for facts appearing in evidence against him—Retrial ordered.)

('18) AIR 1918 Nag 143 (145, 146) : 20 Cri L. Jour 12, *Mt. Tani v. Emperor*. (Accused ignorant—His attention should be directed to vital parts of evidence against him—Mere general question is not enough.)

('24) AIR 1924 Nag 301 (305) : 25 Cr. L. J. 417, *Udhao Patel v. Emperor*. (General questioning illegal.)

Taking joint statement from several accused

('37) AIR 1937 Sind 304 (304) : 39 Cri L. Jour 59 : 32 Sind L. R. 20, *Emperor v. Shivalomal*.

('31) AIR 1931 Bom 132 (135) : 55 Bom 356 : 32 Cr. L. J. 572, *Balkrishna v. Emperor*.

('28) 29 Cri L. Jour 469 (469) : 109 Ind Cas 117 (Lah), *Girdhari Lal v. Emperor*.

('26) AIR 1926 Lah 155 (155) : 27 Cr. L. J. 408 : 6 Lah 554, *Mt. Ghasiti v. Emperor*.

Examination after the defence began

('25) AIR 1925 Cal 480 (480) : 51 Cal 933 : 26 Cr. L. J. 261, *Surendra v. Isamaddi*.

Miscellaneous

('38) 40 P. L. R. 902 (903), *Jhandu v. Emperor*. (Accused examined before charge — Witnesses cross-examined after charge and a medical witness examined — Failure to examine accused again vitiates trial.)

2. ('02) 25 Mad 61 (97) : 28 I. A. 257 : 8 Sar 160 (PC).

3. Failure to examine at all

('40) AIR 1940 Bom 314 (314), *Emperor v. Kondiba Balaji*. (When statement of accused is not taken at all, prima facie he is prejudiced.)

('37) AIR 1937 Oudh 130 (131) : 37 Cr. L. J. 408 : 12 Luck 24, *Emperor v. Brijlal*. (Failure to examine raises presumption of prejudice but it can be rebutted.)

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- ('26) 27 Cri L Jour 719 (720) : 94 Ind Cas 911 (912) (All), *Rammu v. Emperor*. (Examination after some only of the prosecution witnesses were examined—No further examination after all the witnesses were examined.)
- ('24) AIR 1924 All 763 (763, 764) : 26 Cri L Jour 132, *Ganga Sahai v. Emperor*. (*Held*, accused was not prejudiced by irregularity.)
- ('35) AIR 1935 All 217 (219) : 36 Cr. L. J. 1290 : 57 All 666, *Sia Ram v. Emperor*. (Summary trial—More fact that statement of accused has not been recorded is not fatal.)
- ('24) AIR 1924 Oudh 111 (112) : 24 Cri L Jour 661, *Nageshar Prasad v. Emperor*. (Court reading out accused's statement in cross-case and getting it admitted by him—*Held*, that S. 342 was not properly complied with and procedure followed amounted to grave irregularity—However accused was not prejudiced.)
- ('25) AIR 1925 Oudh 491 (491) : 26 Cri L Jour 655, *Emperor v. Sheopal*. (Accused *held* prejudiced.)
- ('26) AIR 1926 Oudh 424 (424, 425) : 27 Cr. L. J. 852, *Girdhari Lal v. Emperor*. (Omission to examine an accused under S. 342, in a warrant-case tried summarily when not prejudicing the accused is covered by the provisions of S. 537 of the Code.)
- ('22) AIR 1922 Pat 388 (389) : 1 Pat 31 : 23 Cr. L. J. 703, *Mir Tilawan v. Emperor*. (Accused not examined but filing written statement — High Court refusing to interfere as accused were not prejudiced.)
- ('25) AIR 1925 Pat 414 (417, 418, 419) : 4 Pat 488 : 26 Cri L Jour 811, *Saiyid Mohiuddin v. Emperor*.
- ('29) AIR 1929 Pat 64 (64) : 29 Cri L Jour 771, *Sheodutt Roy v. Emperor*.
- ('32) AIR 1932 Rang 190 (191, 192) : 10 Rang 511 : 34 Cr.L.J. 121 (FB), *Emperor v. Nga Po Min*.
- ('34) AIR 1934 All 389 (390) : 35 Cri L Jour 784, *Hikmat Ali v. Emperor*. (Where there is prejudice it will vitiate trial.)
- ('26) AIR 1926 Bom 231 (232) : 50 Bom 174 : 27 Cri L Jour 1335, *Emperor v. Harjivan Valji*. (Accused putting in written statement on questioning by Magistrate—Omission to orally examine is not illegality.)
- [See ('35) AIR 1935 Cal 605 (606) : 36 Cri L Jour 1340 : 62 Cal 475, *Emperor v. Ajahar Mandal*. (Sessions trial—Omission to examine the accused in the committing Magistrate's Court does not vitiate trial.)]
- [See also ('21) AIR 1921 Cal 269 (270) : 23 Cri L Jour 41, *Gangadhar v. Reed*. ('85) 2 Weir 405 (405), *In the matter of Gandhi Tataiya*. (Assumed.) ('19) AIR 1919 Cal 696 (700) : 46 Cal 411 : 20 Cr.L.J.24, *Ah Foong v. Emperor*.]
- Examination before the close of prosecution evidence**
- ('38) 39 Cr. L. J. 841 (842) : 177 I C 56 (Oudh), *Kandhi v. Municipal Board, Rae Bareli*. (Failure to re-examine accused after a court witness is examined—*Held*, accused not prejudiced.)
- ('36) AIR 1936 All 319 (320) : 37 Cri L Jour 710, *Hafiz Mahomed v. Emperor*. (Accused examined before framing of charge but not after second cross-examination—Irrregularity is cured if no injustice is caused.)
- ('36) AIR 1936 Oudh 311 (312) : 37 Cri L Jour 616 : 12 Luck 263, *Bachchu Lal v. Emperor*. (Failure to re-examine accused after the close of prosecution evidence when he has been examined at length before, will not vitiate the trial unless it is shown to have caused prejudice.)
- ('36) AIR 1936 Pesh 211 (213) : 38 Cri L Jour 399, *Hassan v. Emperor*. (Failure to examine after the second cross-examination will not vitiate trial unless prejudice is caused.)
- ('23) AIR 1923 All 81 (82, 83) : 45 All 124 : 24 Cri L Jour 67, *Bechu Chaube v. Emperor*. (Examination of prosecution witness after recording statement.)
- ('26) AIR 1926 All 358 (358, 359) : 27 Cri L Jour 405, *Khacho Mal v. Emperor*.
- ('27) AIR 1927 All 475 (476) : 49 All 551 : 28 Cr. L. J. 399, *Sudaman v. Emperor*.
- ('28) AIR 1928 All 222 (227, 228) : 30 Cri L Jour 530, *Emperor v. Jhabbar Mal*.
- ('24) AIR 1924 Lah 84 (88, 89) : 4 Lah 61 : 25 Cri L Jour 801, *R. A. Byrne v. Emperor*. (Fresh examination of accused after examination of prosecution witnesses recalled by accused is not necessary.)
- ('25) AIR 1925 Oudh 422 (422, 423) : 28 Oudh Cas 130 : 26 Cr. L. J. 1301, *Emperor v. Brij Behari*. (Non-examination after second cross-examination.)
- ('25) AIR 1925 Oudh 603 (604) : 26 Cr.L.J. 1374, *Khuman Singh v. Emperor*. (Do.)
- ('30) 31 Cri L Jour 171 (172) : 120 I. C. 753 (Pat), *Gurdial Singh v. Bholanath Halwai*.
- ('25) AIR 1925 Rang 258 (260, 261) : 3 Rang 139 : 26 Cr. L. J. 1336, *Nga Hla U v. Emperor*.

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In *Abdul Rahman v. King-Emperor*,⁴ which was a case arising under s. 360 of the Code, their Lordships of the Privy Council distinguished *Subramania Ayyar's case* on the ground that in that case the procedure adopted was one which the Code *positively prohibited*, and held that an omission or irregularity in the case of other provisions of the Code, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction. It is submitted that unless the provisions of this section are construed as conveying a positive prohibition, the cases holding that a non-compliance *ipso facto* vitiates conviction require re-consideration.

Where the non-compliance with the section is held to vitiate the trial whether by reason of prejudice to the accused, or independently of any prejudice, ordinarily the proper course is to order a re-trial from the stage at which the provisions of this section were not complied

(²⁹) AIR 1929 Rang 331(332,333):7 Rang 470:30 Cr.L.J. 1164, *Subbayya v. Emperor*.

(²⁹) AIR 1929 Sind 5 (5,6) : 23 Sind L R 1 : 29 Cri L Jour 932, *Allah Dito v. Emperor*. (Additional evidence not disclosing fresh facts.)

(³²) AIR 1932 Sind 165 (166) : 34 Cri L Jour 161, *Emperor v. Rihan Dodo*. (No fresh examination after additional prosecution evidence — Held, there was great probability of accused having been prejudiced.)

(³⁴) AIR 1934 Sind 67 (67, 68) : 28 S.L.R. 106 : 35 Cr. L. J. 1175, *Hidayatullah v. Emperor*. (No fresh examination after additional prosecution evidence.)

Examination after the defence was over

(²⁷) AIR 1927 Cal 330 (331) : 28 Cr. L. J. 347, *Tamez Khan v. Rajjabali*. (Obiter.)

(²⁶) AIR 1926 Pat 393 (394) : 27 Cr. L. J. 1017, *Balagobind Thakur v. Emperor*. (Technical failure to comply is not fatal in the absence of prejudice—A I R 1925 Pat 414, Followed.)

Failure to question specifically

(⁴⁰) AIR 1940 Mad 372 (374) : ILR (1940) Mad 514, *In re Anna Malai Mudali*.

(³⁷) AIR 1937 Rang 83 (86, 87) : 38 Cr. L. J. 524 : 14 Rang 666 (FB), *Emperor v. U Damayala*. (See observations of Roberts, C. J.)

(³⁶) 1936 O W N 364 (365, 366), *Shafaat v. Emperor*. (Accused charged with offence under S. 147, I. P. C., with other charges—No question in respect of riot having been committed or in respect of its common object put to the accused — Held accused was prejudiced by omission and the trial vitiated.)

(³⁸) AIR 1938 Nag 283 (285) : 40 Cri L Jour 197 : ILR (1939) Nag 686, *Nana Sadoba v. Emperor*.

(³⁰) AIR 1930 Rang 114 (118) : 7 Rang 821 : 31 Cr. L. J. 387, *Maung Ba Chit v. Emperor*. (In complicated cases merely asking general questions is not sufficient.)

Questions in the nature of cross-examination

(³⁰) AIR 1930 Rang 351 (353, 354) : 8 Rang 372 : 32 Cri L Jour 23, *U Ba Thein v. Emperor*. (Conviction should not be set aside unless failure of justice has been occasioned.)

Miscellaneous

(³⁵) AIR 1935 All 217 (219) : 36 Cri L Jour 1290 (1291) : 57 All 666, *Sia Ram v. Emperor*. (Particulars of examination, if any had taken place, not recorded — Held, accused was not prejudiced.)

(³⁶) AIR 1936 Oudh 16 (17, 18) : 36 Cr. L. J. 1303 (1304) : 11 Luck 461, *Emperor v. Karunashankar*. (Prejudice may be presumed in circumstances of a case.)

(⁹⁵) 1895 Rat 735 (735), *Queen-Empress v. Posha Hari*. (Held, that as the accused had a vigilant pleader, they had probably suffered no prejudice by the Sessions Judge having ignored the provisions of this section.)

[See (⁴⁰) AIR 1940 Pat 295 (298) : 41 Cri L Jour 267, *Feroze Kazi v. Emperor*. (Accused examined after close of arguments — Such procedure even if amounts to irregularity is such that it seriously prejudices the accused and the trial is vitiated—Obiter.)]

4. (²⁷) AIR 1927 P C 44 (48, 49) : 5 Rang 53 : 54 I. A. 96 : 28 Cr.L.J. 259 (PC).

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with.⁵ In other words, the matter should be set right by again questioning the accused as required by this section and then by calling on him to enter on his defence.⁶ The Court remanding the case should not keep the case on its own file and simply call for a re-submission, after taking the necessary examination; it should remand the whole case to be tried on the merits, as if it were before the Court for the first time.⁷ But where the case is a petty one,⁸ or the offence is merely technical,⁹ it has been held that it is not in the interest of justice that the case should be tried *de novo* and that the accused should be acquitted.

Where questions are put in contravention of the section, such as questions in the nature of cross-examination,¹⁰ or where further

5. ('40) AIR 1940 Bom 314 (315), *Emperor v. Kondiba Balaji*.
- ('38) AIR 1938 Nag 283 (285) : 40 Cri L Jour 197 : I L R (1939) Nag 686, *Nana Sadoba v. Emperor*. (Non-compliance — Trial vitiated by prejudice to accused — Retrial ordered from point at which defect occurred.)
- ('37) AIR 1937 Sind 221 (224) : 38 Cr.L.J. 995 : 31 S L R 470, *Khairo v. Emperor*. (Failure of Magistrate to ask explanation from accused on a vital point necessitates a retrial — Question of illegality or irregularity of such non-compliance was not adverted to.)
- ('33) AIR 1933 Lah 1002 (1003) : 35 Cr. L. J. 104, *Tej Ram v. Emperor*. (Except where the case is a petty one.)
- ('28) AIR 1928 Lah 230 (231) : 29 Cr.L.J. 905, *Emperor v. Gian Singh*. (Appellate Court may not interfere in revision but must do so in appeal.)
- ('28) AIR 1928 Lah 382 (386) : 30 Cri L Jour 18, *M. L. Pritchard v. Emperor*.
- ('30) AIR 1930 Lah 153 (153) : 31 Cri L Jour 727, *Taj Mohammad v. Emperor*.
- ('26) AIR 1926 Nag 348 (349) : 27 Cr. L. J. 475, *Pai Mahomed v. Emperor*. (Non-compliance will not *ipso facto* result in acquittal.)
- ('28) AIR 1928 Nag 162 (164) : 29 Cri L Jour 475, *Mohammad Hayat Khan v. Emperor*. (Breach of the same vitiates such portion of the trial as is subsequent to the stage where it occurred.)
- ('21) AIR 1921 Pat 374 (375) : 22 Cri L Jour 460, *Ramnath Rai v. Emperor*. (But retrial not ordered under the special circumstances of the case.)
- ('24) AIR 1924 Pat 376 (376) : 24 Cr. L. J. 475, *Baldeo Dubey v. Emperor*.
- ('26) AIR 1926 Pat 29 (29) : 26 Cri L Jour 1289, *Ram Charan Singh v. Emperor*.
- ('25) AIR 1925 Sind 127 (129) : 19 S L R 104 : 25 Cr.L.J. 662, *Jhangli v. Emperor*. (Unless the appellate Court, on going into merits of the case, holds that there is no case against the appellant — Retrial not ordered under special circumstances of the case.)
- [See also ('21) 22 Cr. L. J. 598 (599) : 62 Ind Cas 870 (871) (Pat), *Tilak Gope v. Bhaya Ram*.]
6. ('25) AIR 1925 Nag 433 (433) : 26 Cri L Jour 1425, *Wasudeo v. Emperor*.
7. ('25) AIR 1925 Cal 172 (172) : 26 Cr.L.J. 313, *Id. Abdus Samad v. Emperor*.
8. ('37) 1937 M W N 574 (575), *Varahalamma v. Emperor*. (Case under Ss. 323 and 114, Penal Code.)
- ('36) AIR 1936 Oudh 16 (18) : 36 Cr.L.J. 1303 : 11 Luck 461, *Emperor v. Karuna Shankar*. (Accused charged under S. 4, Gambling Act, not examined in accordance with S. 342 — Trial held vitiated but retrial held not necessary.)
- ('34) AIR 1934 Lah 415 (415, 416) : 35 Cri L. J. 1447, *Amir v. Emperor*.
- ('33) AIR 1933 Lah 1002 (1003) : 35 Cri L Jour 104, *Tej Ram v. Emperor*.
- ('33) AIR 1933 Nag 192 (193) : 34 Cri L Jour 340, *Emperor v. Amirbi*.
- ('22) AIR 1922 Pat 212 (213), *Ram Nandan v. Emperor*.
9. ('34) AIR 1934 Lah 648 (648) : 36 Cri L Jour 468, *Kundan Lal v. Emperor*.
10. ('23) AIR 1923 Lah 225 (226) : 4 Lah 55 : 24 Cr.L.J. 693, *Devi Dial v. Emperor*.
- ('08) 8 Cr. L. J. 62 (64) : 4 Low Bur Rul 244, *Gaung Gyi v. Emperor*. (Questions about confession inadmissible — Therefore, answers to such questions are inadmissible.)
- ('09) 10 Cr. L. J. 325 (339, 340) : 3 I. C. 625 (Cal), *Khudiram Bose v. Emperor*. (Some questions proper and others in the nature of cross-examination — Answers to former may be considered.)

evidence is taken after the examination of the accused, and the latter is not examined again under this section,¹¹ the answers given in the one case and the further evidence taken in the other should be rejected and not taken into account. It will not be proper for the Judge to take into consideration circumstances appearing in the prosecution evidence against the accused, if he had not drawn his attention to them in his examination and called for an explanation.¹² In cases where the evidence against the accused is entirely circumstantial, unless the Magistrate has elicited from the accused any explanation he has to give in respect of the facts appearing in evidence against him, the trial will be vitiated and conviction based on such evidence cannot be sustained.¹³

An objection, on the ground of the failure to comply with the provisions of this section, raises a point of law and can be taken at the hearing of an application for revision, although it was not urged in the Courts below and is not set forth in the application.¹⁴ But in revision proceedings, the High Court is not *bound* to interfere, even if the non-compliance with S. 342 is held to be illegal.¹⁵

Where a Magistrate examines an accused person before any evidence has been recorded, it has been held that such statements cannot be rejected as inadmissible on account of the irregularity in procedure and that they may be evidence, as being admissions under S. 21 of the Evidence Act.¹⁶

Section 342
Note 35

343.* Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

Section 343

No influences to be used to induce disclosures.

* 1882 : S. 343; 1872 : S. 344; 1861 : S. 203.

(16) AIR 1916 Mad 407 (408) : 39 Mad 770 : 16 Cr. L. J. 623, *In re Abibullah Rowthan*. (Questions put when no evidence implicating the accused had been taken—Answers held not admissible in evidence.)

11. ('27) AIR 1927 Lah 916 (916) : 29 Cr. L. J. 11, *Mangta v. Emperor*.

12. ('33) 34 Cr.L.J. 411(412) : 142 I.C. 785 (Nag), *Emperor v. Baliram Krishnaji*. [See also ('36) AIR 1936 Mad 629 (630) : 37 Cr. L. J. 1074 : 59 Mad 631n, *In re Narasimham*. (Evidence against accused entirely circumstantial — Judge not affording opportunity to him to explain facts appearing against him — Conviction based on such evidence cannot be sustained.)]

13. ('36) AIR 1936 Mad 628(629) : 37 Cr.L.J.1107:59 Mad 629n, *Chinnu v. Emperor*. ('36) AIR 1936 Mad 629 (630) : 37 Cr. L. J. 1074 : 59 Mad 631n, *In re Narasimham*. (The non-performance of this imperative duty will compel the appellate Court to order a fresh trial.)

(36) AIR 1936 Mad 715(717) : 38 Cr.L.J. 45 : 59 Mad 622, *Sangama v. Emperor*.

14. ('21) AIR 1921 Pat 415 (418) : 22 Cr. L. J. 442, *Moinuddin v. Emperor*.

15. ('38) AIR 1938 Lah 832 (832) : 40 Cr. L. J. 186, *Gurdas Singh v. Emperor*. (High Court will order retrial only when prejudice is caused to the accused due to non-compliance with the section.)

(28) AIR 1928 Lah 230 (231) : 29 Cr. L. J. 905, *Emperor v. Gian Singh*.

(26) AIR 1926 Lah 553 (554) : 27 Cr. L. J. 727, *Hazara Singh v. Emperor*.

(32) AIR 1932 Oudh 113 (113, 114) : 33 Cr. L. J. 811, *Pitam v. Emperor*.

(21) AIR 1921 Pat 374 (375) : 22 Cr. L. J. 460, *Ramnath Rai v. Emperor*.

(08) 7 Cri L Jour 422 (422, 423) : 4 Low Bur Rul 143, *Emperor v. Ba Pe*.

16. ('93) 1893 Rat 679 (680), *Queen-Empress v. Narayen*.

Section 343 Notes 1-3

1. Scope of the section. — Section 163 is an analogous provision applicable where an *investigation* is proceeding under chapter XIV. This section applies to *accused* persons and during the stage of *inquiries and trials*.¹ The words “accused person” have the same meaning as the word “accused” in S. 342² and unless influence is used to a person who is an “accused” within the meaning of that section, this section does not apply.³ Thus, it does not apply where an inducement is offered to a *witness* and not to an accused person then under bail.⁴ See Note 31 to section 342 as to the meaning of “accused person.”

2. “Except as provided in sections 337 and 338.” — Sections 337 and 338 provide for the grant of pardon to accused persons. Except under those sections, no inducement can be offered to an accused person to make any disclosures. Thus, a conditional pardon cannot be tendered by any authority save as provided by Ss. 337 and 338.¹

Where the pardon tendered turns out to be illegal under S. 337, it would be unlawful to examine the accused as a witness and his statement would be irrelevant and inadmissible in evidence.²

3. No influence, etc. — An accused person is neither bound nor is under an obligation to make any admission injurious to his own interests. No judicial officer should attempt to compel him to make any such admission.¹ Where, however, the accused wishes to make a statement of his own accord, it is not necessary that the Magistrate

Section 343 — Note 1

1. ('37) AIR 1937 Nag 17 (21) : 38 Cr. L. J. 237 & 251 : I L R (1937) Nag 315 (FB), *Amduniyan Guljar v. Emperor*.
2. ('37) AIR 1937 Nag 17 (21) : 38 Cr. L. J. 237 & 251 : I L R (1937) Nag 315 (FB), *Amduniyan Guljar v. Emperor*. (The expression “accused person” in this section means one who is in the array of the accused persons under inquiry or trial.) ('26) AIR 1926 Nag 426 (427) : 27 Cr. L. J. 807, *Mahadeo v. Emperor*. [See also ('01) 25 Bom 422 (425) : 2 Bom L R 1095, *Queen-Empress v. Hussein Haji*.]
3. ('72-92) 1872-1892 Low Bur Rul 246 (248, 252), *In the matter of Nga Po Aung*.
4. ('16) AIR 1916 Bom 229 (232, 233) : 17 Cr. L. J. 256, *Govind Balwant v. Emperor*. ('20) AIR 1920 Nag 255 (257) : 16 Nag L R 9 : 21 Cr. L. J. 769, *Govinda Sambhaji v. Emperor*. (Person though could be tried with accused under S. 239 not so tried — Such person is competent witness — Overruled by A I R 1937 Nag 17 (FB) on another point.)

Note 2

1. ('06) 4 Cr. L. J. 44 (45) : 10 C W N 847 *Paban Singh v. Emperor*. (The evidence of accused taken under conditional pardon is wholly inadmissible.) [See also ('36) AIR 1936 Lah 353 (355) : 16 Lah 594 : 37 Cr. L. J. 515, *Faqir Singh v. Emperor*. (Assuming that S. 343 is a bar to a pardon being tendered to an accused person during the course of trial otherwise than in accordance with S. 337 or S. 338, it would only make the evidence of such approver inadmissible.)]
2. ('02) 1902 Pun L R No. 52 Cr, p. 191 (192, 193), *Durga v. Emperor*. ('02) 1902 Pun Re No. 12 Cr, p. 33 (36) : 1902 Pun L R No. 100, *Nabi Baksh v. Emperor*.

Note 3

1. ('97) 19 All 291 (292, 293) : 1897 A W N 52, *In the matter of Gudar Singh*. (1864) 1 Suth W R Cr 24 (24), *Queen v. Ramdhun Sing*. (Honorary Magistrate holding out promises to prisoners as inducement to them to confess.) [See ('22) AIR 1922 Pat 73 (74, 75) : 1 Pat 242 : 23 Cr. L. J. 638, *Bazari Hajam v. Emperor*.]
- [See also ('16) AIR 1916 Upp Bur 1 (1) : 17 Cr. L. J. 402 : 2 U B R 113, *Nga Kyaw Zan Hla v. Emperor*. (Accused person should not be encouraged to confess by the knowledge that if he does so he will receive lenient punishment.)]

should give him any caution before taking his statement.² The eliciting of an admission by putting words into the mouth of the accused is unfair.³

Section 343,
Notes 3-4

An accused person is not bound to produce his co-accused who are absconding and the Court cannot exercise any pressure upon him for the purpose of producing them.⁴

An assurance of amnesty given to a *witness* is not within the mischief of the section, and does not affect the competency of the witness, though it may affect his credibility.⁵

4. Evidentiary value of statements. — See also Note 6 to S.163. This section does not declare what the consequences would be if an accused person did make a statement under inducement.¹ It seems to be, however, clear that the statements so made would be inadmissible in evidence.

344.* (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Section 344

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation. — If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

* 1882 : S. 344; 1872 : Ss. 194, 208, 219, 264;
1861 : Ss. 224, 269, 253, 377.

2. ('69) 5 Mad H C R App xi (xi).

3. ('92) 5 C P L R Cr 11 (11, 12), *Empress v. Mt. Bhura*.

4. ('30) AIR 1930 Lah 953 (954) : 32 Cr. L. J. 344, *Fakir Muhammad v. Emperor*.

5. ('25) AIR 1925 Nag 313 (316) : 26 Cr. L. J. 1467, *Anant Wasudeo v. Emperor*.

Note 4

1. ('16) AIR 1916 Bom 229 (233) : 17 Cr. L. J. 256, *Govind Balvani v. Emperor*.

Section 344
Notes 1-2

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and applicability of the section. 3. Postponement and adjournment. 4. Postponement of case sine die. 5. Inquiry or trial. 5a. Adjournment by public proclamation. 6. "May, if it thinks fit." 7. Reasonable cause for adjournment. 8. "Stating the reasons therefor." 9. Adjournment to and trial on holiday. 10. Advancement of hearing. 11. Stay of criminal proceedings. 12. Adjournment of one of two cross-cases. 13. Power of High Court to set aside order of adjournment. | <ol style="list-style-type: none"> 14. Power of Sessions Judge or District Magistrate to stay criminal proceedings pending before subordinate Magistrate. See Note 11. 15. "On such terms as it thinks fit" — Costs. 15a. Adjournment for cross-examination of prosecution witnesses in trials of warrant-cases — Power to impose terms on accused. 16. Remand. 17. Distinction between detention under S.167 and under S. 344. 18. Grounds of remand. 19. Remand in absence of accused. 20. Period of detention. 21. "By a warrant." 22. Magistrate's liability for unreasonable detention. |
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Other Topics (miscellaneous)

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| <p>Adjournment of appeals — Costs. See Note 15.</p> <p>Costs against absent accused. See Note 15.</p> <p>Detention — Period of. See Note 16.</p> <p>Detention — Whether intended to be penal. See Note 18.</p> <p>Grounds held insufficient for adjournment. See Note 7.</p> | <p>Protraction of trial — Impropriety of. See Note 2.</p> <p>Remand for getting a confession — Remand when objectionable. See Note 18.</p> <p>Remand in bailable cases. See S. 496.</p> <p>Remand to police custody. See Note 16.</p> <p>Revision. See Note 13.</p> <p>Second remand. See Note 18.</p> <p>Who can be ordered to pay costs. See Note 15.</p> |
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1. Legislative changes. — There was no separate chapter in the Codes of 1861 and 1872 dealing with the general provisions applicable to all kinds of trials. Hence a provision of adjournment was made under each chapter relating to different proceedings such as preliminary inquiry by Magistrates, trial of warrant-cases, of summons-cases and sessions trials. When the 1882 Code was passed, re-casting in many respects the two former Codes, some of the general provisions applicable to all kinds of trials were clubbed together in chapter XXIV and the Court's power to adjourn and remand was provided for in S. 344. The section as re-enacted provided also for the postponement of the *commencement* of an inquiry or trial for which there was no provision in the Codes of 1861 and 1872. In the present Code the words "if it thinks fit" in sub-section (1) were inserted between the words "the Court may" and "by order in writing," etc.

2. Scope and applicability of the section. — This section provides for the *postponement of the commencement* or the *adjournment* of any inquiry or trial, and also for remand of the accused where such postponement or adjournment is made. Thus, after a Magistrate has taken cognizance of an offence, his powers of postponement and adjournment are regulated by this section.¹

Section 344 — Note 2

1. ('24) AIR 1924 Cal 614 (616) : 26 Cri L Jour 68, *Bholanath Das v. Emperor*.

Section 344
Note 2

The policy of law is that criminal cases should be disposed of with the least possible delay.² The object is to avoid hardship to the parties and witnesses.³ If the accused is in custody, frequent adjournments will be a harassment to him and, from the point of view of the prosecution, time will efface recollection of facts. The longer the period allowed to elapse from the time of the arrest to the time the witnesses give evidence, the greater is the probability of confusion and of the truth being obscured.⁴ The section consequently provides that a postponement or adjournment can be given only in two cases —

- (1) where witnesses are absent, or
- (2) for any other reasonable cause.^{1a}

It is not expedient for a sessions trial to be adjourned. When once begun, such trial should be continued *de die in diem* — from day to day — until it is finished.⁵ The section applies only to proceedings in

2. ('29) AIR 1929 Nag 42 (43) : 29 Cri L Jour 1092, *Raotmal v. Sampat*. (Intention of Code is that criminal trial should be continued from day to day until termination.)
- ('25) AIR 1925 Cal 1017 (1019) : 27 Cr. L. J. 129, *Thomas James Henry Arnup v. Kedar Nath Ghose*. (Whether considered from the point of view of the complainant or of the accused delay is inexcusable.)
- ('26) AIR 1926 Cal 102 (104) : 26 Cr. L. J. 1050, *Rash Behary v. Corporation of Calcutta*. (Frequent adjournments, at the instance of the prosecution, condemned.)
- ('17) AIR 1917 Sind 73 (76) : 18 Cri L Jour 54 (57) : 10 Sind L R 148, *Jehangir Perozshah v. Gangaram Naumal*. (Do—Sind Courts Criminal Circulars Ch. 5 R. 22.)
- ('23) AIR 1923 Cal 725 (727) : 25 Cri L Jour 492, *Shermull v. Corporation of Calcutta*. (Long adjournment for three years condemned.)
- ('18) AIR 1918 Cal 533 (530) : 18 Cri L Jour 609 (611), *Mahomed Ibrahim v. Emperor*. (Protracted trial in the Presidency Magistrate's Court animadverted on.)
- ('71) 16 Suth W R Cr 53 (58), *Mahomed Alum v. Sheikh Akil*. (Constant unnecessary adjournment is reprehensible.)
- ('17) AIR 1917 Sind 46 (47) : 18 Cri L Jour 834 : 11 Sind L R 27, *F. W. Soler v. Emperor*. (Protracted trial by lengthy cross-examination.)
- ('32) AIR 1932 Pat 276 (278) : 34 Cri L Jour 263, *Birahi Chand v. Darbari Jaysawal*. (Numerous adjournments in petty cases.)
- ('30) AIR 1930 Pat 241 (243) : 9 Pat 113 : 31 Cr. L. J. 789, *Narayan v. Emperor*. (Do.)
- ('68) 9 Suth W R Cr Cir 5 (6).
- ('99) 2 Bom L R 322 (323), *Queen-Empress v. Mahadu Tukaram*.
- ('29) AIR 1929 Cal 776 (776) : 31 Cri L Jour 614, *Sirajuddin Kazi v. Sergeant H. Jenner*. (The case of an accident to a motor due to the negligent and reckless driving of another motor car ought to be tried within a week.)
- ('25) AIR 1925 Oudh 501 (502) : 27 Oudh Cas 327 : 26 Cri L Jour 530, *Bahadur v. Emperor*. (A delay of over four and half months in hearing an appeal would amount to denial of justice in a majority of cases.)
- [See ('32) AIR 1932 Cal 63 (64) : 58 Cal 1293 : 33 Cr. L. J. 303, *U. K. Mitra v. Corporation of Calcutta*. (Proceedings allowed to drag on indefinitely — Attention of Government was called.)
- (1900) 2 Bom L R 1092 (1094), *Queen-Empress v. Majesty*. (The committing Magistrate and the Sessions Judge should inquire into any great delay in investigation and consider its bearing on the story of the prosecution.)]
3. (1865) 4 Suth W R Cr Cir No. 12, p. 1.
[See also ('24) AIR 1924 Cal 18 (44) : 25 Cr. L. J. 1313, *P. E. Billingham v. Emperor*.]
4. ('25) AIR 1925 Cal 1017 (1020) : 27 Cr. L. J. 129, *Thomas James Henry Arnup v. Kedar Nath Ghose*. (Simple assault case which could have disposed of within a few days took a period of more than a year.)
- 4a. ('36) AIR 1936 Sind 235 (236) : 38 Cr. L. J. 119 : 30 S L R 357, *Jethanand v. Tahilram*.
5. ('12) 13 Cri L Jour 861 (862) : 35 All 63 : 17 I C 797, *Badri Prasad v. Emperor*. (Evidence recorded by Assistant Sessions Judge and judgment given by Sessions Judge after the case remaining pending for one year.)

Section 344
Notes 2-5a

inquiries and trials. It does not apply to *appeals*,⁶ or to proceedings in revision.⁷

As to other provisions relating to adjournment, see sections 229, 508 and 526.

3. Postponement and adjournment. — The section empowers the Court not only to *adjourn* an enquiry or trial, but to postpone its *commencement*. Thus, a Magistrate receiving a complaint may postpone the issue of a process under S. 204, and is not bound to pass any order under S. 202, S. 203 or S. 204 immediately after examining the complainant.¹

In the undermentioned case,² the Bombay High Court pointed out the desirability of having a fixed time each day for the purpose of appointing new dates for cases which cannot be reached on that day.

4. Postponement of case sine die. — A postponement or adjournment of a case *sine die* is not in accordance with this or any other provision of the Code.¹ The postponement or adjournment under this section can only be "from time to time" and for such time as the Court considers reasonable, *i. e.*, for *fixed and definite* periods.² See also Note 11.

5. Inquiry or trial. — See Section 4 (1), clause (k).

5a. Adjournment by public proclamation. — An adjournment must, under this section, be by *an order in writing*. It is irregular and objectionable to adjourn a trial by public proclamation.¹

(19) AIR 1919 All 200 (201): 20 Cri L Jour 127, *Ram Sarup v. Emperor*. (Single day fixed for sessions trial—Trial not possible to be completed in one day—Sessions Judge should postpone trial to some such convenient date when it is possible to continue case *de die in diem*.)

6. ('20) AIR 1920 Lah 289 (290): 1919 Pun Re No. 29 Cr: 21 Cri L Jour 201, *Suraj Bhan v. Emperor*.

7. ('36) AIR 1936 Sind 235 (236): 38 Cri L Jour 119: 30 S L R 357, *Jethanand v. Tahliram*.

Note 3

1. ('25) AIR 1925 Pat 619 (620, 621): 26 Cr. L. J. 1179, *Ram Saran Singh v. Nikhad Narain Singh*. (Complainant examined and case postponed till disposal of counter case.)

(29) AIR 1929 Cal 281 (282): 31 Cr. L. J. 262, *Ram Golam Singh v. Sarat Chandra*. (Even apart from S. 344, the Magistrate, under inherent jurisdiction, has jurisdiction to postpone commencement of proceedings.)

2. ('34) AIR 1934 Bom 130 (133): 35 Cr. L. J. 1139, *In re Jamnabai Meghji*.

Note 4

1. ('09) 9 Cr.L.J. 35 (36): 13 C W N 104: 8 C L J 564, *Abdur Rauf Mia v. Rahamuddi*. (Adjournment *sine die* of proceedings under S. 145.)

('32) AIR 1932 Sind 214 (215): 27 Sind L R 17: 34 Cr. L. J. 139, *Tarachand v. Emperor*. (Distinguishing 11 Cr.L.J. 7 — Adjournment *sine die* pending disposal of another case.)

('33) AIR 1933 Sind 358 (359): 27 Sind L R 219: 35 Cri L Jour 517, *Emperor v. Dinalshah Rajanshah*. (Criminal case for theft—Civil suit by accused for declaration of title to property removed—*Held* criminal case should not remain undisposed till decision of civil suit.)

[But see ('10) 11 Cr.L.J. 7(8): 4 I.C. 537 (Cal), *Guru Das Hazara v. Weatheral*.]

2. ('26) AIR 1926 All 421 (422): 27 Cr. L. J. 560, *Kewal Ram v. Emperor*.

Note 5a

1. (1870-71) 6 Mad H C R App xxix (xxx).

6. "May, if it thinks fit." — These words show that the question of postponement or adjournment of an enquiry or trial is a matter of the Court's *discretion*. The discretion is, however, not an *arbitrary* one but should be exercised judiciously and only in cases which come within the terms of the section.¹

A Court is not obliged to pay attention to a telegram from a pleader of one of the parties asking for adjournment.²

7. **Reasonable cause for adjournment.** — An adjournment can be granted only on the ground of the *absence of a witness*^{1a} or for any other *reasonable cause*.^{1b} As a general rule Magistrates should refrain from granting adjournments save in cases where they are clearly necessitated for the purposes of justice.¹

The following have been held to be good grounds for adjournment:

- (1) To enable the accused to secure the attendance of his witnesses.²
- (2) To enable an accused to examine such of his witnesses as he has produced.³
- (3) To enable an accused to engage the services of a pleader to properly defend himself in complicated cases.⁴
- (4) Where the accused's advocate is absent at another place to fulfill a long-standing engagement.⁵
- (5) Where a large number of witnesses have been examined for the prosecution and the accused wants two days' time to consider what evidence he should produce.⁶

Note 6

1. ('72) 17 Suth W R Cr 55 (57) : 9 Beng L R 354, *Muthoora Nath v. Heera Lal*. (Absence of reasonable cause for adjourning enquiry—High Court under S. 15 of Charter Act set aside order of Magistrate adjourning enquiry.)
2. ('40) AIR 1940 Nag 283 (283) : 41 Cr. L. J. 585, *Bhanwarsingh v. Sukhramsingh*. (Especially where the telegram does not arrive until after the proceedings are over.)

Note 7

- 1a. ('24) AIR 1924 Cal 534 (534) : 24 Cri L Jour 370, *Mihir Lal v. Emperor*. (If witness is reported ill, Court must issue fresh summons and grant adjournment.)
- (66) 5 Suth W R Cr L 10 (10). (But accused cannot be discharged on that ground.)
- (96) 19 Mad 375 (381) : 6 M L J 195, *Queen Empress v. Virasami*.
[See ('70) 5 Mad H C R App xxvii (xxvii).]
- 1b. ('25) AIR 1925 Pat 619 (621) : 26 Cr. L. J. 1179, *Ram Saran v. Nikhad*.
1. ('80) AIR 1930 Pat 241 (243) : 9 Pat 113 : 31 Cr. L. J. 789, *Narayan v. Emperor*. (Petty criminal case—Parties should appear at first hearing for completion of entire trial—Adjournment should be deprecated in such case.)
2. ('14) AIR 1914 Lah 84 (84) : 15 Cri L Jour 521, *Lal Singh v. Emperor*.
('70) 5 Mad H C R App xxvii (xxvii).
- (71) 16 Suth W R Cr 21 (22), *In the case of Dinoo Roy*. (As a general rule, accused should have his witnesses present on day of trial.)
3. ('03) 7 Cal W N 714 (716), *Emperor v. Keso Singh*. (Witnesses for defence actually in attendance though attendance had not been certified—Adjournment prayed but refused on ground that witnesses were not in attendance—*Held*, adjournment wrongly refused.)
4. ('16) AIR 1916 Mad 142 (142, 143) : 16 Cr. L. J. 334 (336), *In re Murugesu Naidu*.
('02) 1 Low Bur Rul 270 (271), *Taung Bo v. Crown*. (But not in petty cases.)
[See also ('05) 9 Cal W N cclxxxv (cclxxxv), *Hira Lal v. King-Emperor*. (Appeal, hearing of—Pleader's unforeseen and unavoidable absence—Refusal of postponement of hearing—Re-hearing of appeal was ordered by High Court.)]
5. ('11) 12 Cri L Jour 474 (476) : 12 Ind Cas 82 (LB), *E. J. Esteves v. Emperor*.
6. ('20) AIR 1920 Pat 25 (28) : 21 Cri L Jour 321, *Rameshwar v. Emperor*.

Section 344
Note 7

- (6) Where the counsel for the accused in a capital case wants to cross-examine the witnesses on the following day as he was not prepared to cross-examine on that day.⁷
- (7) Where a party is asked to cross-examine a witness at 6-30 P.M., and he asks for time on the ground that the pleader is not then available.⁸
- (8) Where the accused is tried for separate offences and an appeal is pending against the conviction in respect of one of such offences.⁹
- (9) Where a new witness is produced in the Sessions Court who was not examined before the committing Magistrate and the accused wants time on the ground that it is a surprise to him.¹⁰
- (10) For producing material documents filed in a civil case.¹¹
- (11) Where in a sessions trial it is found that a witness is absent and therefore his deposition before the committing Magistrate could not be received and the witness has consequently to be summoned.^{11a}

The following have been held not to be sufficient grounds for granting an adjournment :

- (1) To enable the accused to get a ruling from the High Court on a point of law.¹²
- (2) The absence of a co-accused and desirability of a joint trial.¹³
- (3) To enable the complainant to examine witnesses whom he had not cared to have in attendance.¹⁴
- (4) To enable a party to summon witnesses where sufficient time has already been allowed for the purpose.¹⁵
- (5) To enable the prosecution to find out evidence, the existence of which is entirely problematical.¹⁶

7. ('14) AIR 1914 Cal 834 (835):41 Cal 299 : 15 Cr.L.J. 596, *Sadasiv v. Emperor*. See also S. 286 Note 10.

8. ('28) AIR 1928 Pat 277 (278) : 29 Cri L Jour 299, *Gulai Jha v. Emperor*.

9. ('09) 9 Cr.L.J. 495 (496) : 2 I. C. 128 (Mad), *In re Mantri Kamaraju*. (Obiter.)

10. ('89) 1889 Pun Re No. 1, Cr, page 1 (4), *Khan Muhammad v. Empress*.

11. ('21) 22 Cri L Jour 335 (336) : 61 Ind Cas 63 (Cal), *Biswambhar Roy v. Aminuddi*. (Order refusing adjournment for purpose of procuring necessary documents is an arbitrary order constituting denial of justice.)

11a. ('74) 21 Suth W R Cr 56 (57), *Queen v. Lukhun Santhal*.

[See also ('82) 12 Cal L R 120 (121), *Empress v. Sagambar*. (Depositions before committing Magistrate taken in the absence of accused—Prosecution failing to lay down any basis for such reception of evidence—Adjournment for summoning material witnesses is necessary.)]

See also S. 512 Note 12.

12. ('07) 7 Cri L Jour 400 (401) : 12 Cal W N 604 (604), *Mohesh Sonar v. Emperor*. (Postponement granted for obtaining ruling of High Court on the point, whether certain coins were kings coins or not.)

(('33) AIR 1933 Sind 17 (20):26 Sind L R 255:33 Cr.L.J. 908, *Abdullah v. Emperor*.

13. ('01) 1 Low Bur Rul 60 (61), *Queen-Empress v. Nga Tun Hla*.

(('22) AIR 1922 Cal 334 (335) : 49 Cal 182 : 22 Cr. L. J. 465, *Billinghurst v. Meek*. (Principal accused absent.)

14. ('25) AIR 1925 Sind 315 (316) : 26 Cri L Jour 958, *Ali Sher v. Mir Mahomed*. See also S. 256 Note 9.

15. ('74) 23 Suth W R Cr 9 (11), *Chahun Tewari v. Sukedad Khan*.

(('23) AIR 1923 Mad 185 (186) : 46 Mad 253 : 24 Cri L Jour 84, *In re Derwish Hussain*. (Where accused did not ask for fresh process after the witness failed to attend though served.)

16. ('30) AIR 1930 Rang 76 (77) : 7 Rang 592 : 31 Cri L Jour 296, *Ah Phone v. Emperor*. (At a stage when case is ready for hearing.)

- (6) To enable the prosecution to examine witnesses not named in the *chalan*.¹⁷
- (7) To enable the pleader of one of the parties in a petty case to be present where the pleader of the opposite party was present and the date had been announced beforehand.¹⁸
- (8) The absence of the counsel of one of the accused in a sessions case in which a number of witnesses had been summoned.¹⁹

8. "Stating the reasons therefor." — The reasons for the adjournment should be clearly expressed on record. It is not enough that a reasonable cause *exists*. Such cause should be stated in the order as the prisoner is entitled to know what such cause is, and an appellate Court cannot form an opinion of its reasonableness unless it is stated on record.¹

9. Adjournment to and trial on holiday. — A trial of an accused person on a Sunday or other holiday would not necessarily make the proceedings illegal or invalid.¹ Where, however, the result of taking the unusual procedure of trying the case on a holiday is to cause prejudice to the accused, as for example, by preventing him from engaging a pleader to defend him, the conviction will be set aside.²

10. Advancement of hearing. — This section does not stand in the way of the Court advancing the hearing of a case to an earlier date, provided due notice thereof is given to the parties.¹ An acceleration of the date of hearing against the wishes of the accused or his pleader is not proper.²

11. Stay of criminal proceedings. — This section authorizes only the postponement or adjournment of a criminal case from *time to time* and does not contemplate a stay of proceedings for an *indefinite*

17. ('34) AIR 1934 Nag 156 (157) : 35 Cri L Jour 1163, *Hajari Tika Lodhi v. Emperor*. (Prosecution not entitled to file fresh list of witnesses.)

18. ('40) AIR 1940 Nag 253 (233) : 41 Cr. L. J. 585, *Bhanwarsingh v. Sukhramsingh*. (Telegram from pleader asking for adjournment — Court is not bound to pay attention to it.)

19. ('37) AIR 1937 All 171 (171) : 38 Cri L Jour 416, *Salag Ram v. Emperor*.

Note 8

1. ('83) 6 Mad 63 (68), *Manickam Mudali v. Queen*. (In this case the endorsement was "It appears necessary to defer the examination of witnesses in order that further evidence may be produced.")

Note 9

1. [See ('68) 10 Suth W R Civ 350 (351) : 1 Beng L R A C 17, *In re D. Abraham*, (Applicability of Lord's Day Act.)]

2. ('71) 8 Beng L R App 12 (12, 13), *Queen v. Hargobind Datta*. (System of trying cases by Magistrates, while moving about from day to day, also condemned.)

('64) 1864 Suth W R Gap Cr 2 (2, 3), *Grijamonee v. Issur Chunder*. (Magistrates should not take up judicial work on a Sunday.)

('15) AIR 1915 Bom 251 (255) : 16 Cr. L. J. 752, *Baban v. Emperor*. (Trial on Sunday or other holiday irregular as contrary to Criminal Circular No. 37 of the Bombay High Court.)

('30) AIR 1930 Nag 255 (258, 259) : 31 Cri L Jour 705, *Girdari v. Emperor*. See also S. 340 Note 4 and S. 537 Note 25.

Note 10

1. ('29) AIR 1929 Nag 42 (43) : 29 Cr. L. J. 1092, *Raotmal v. Sampat*. (Because the intention of the Code is that criminal trial should proceed from day to day.)

2. ('98) 1898 Pun Re No. 14 Cr, p. 32 (33), *Karamdin v. Queen*.

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period (see Note 4 above). But every Court has an *inherent power* to stay a case pending on its file where it is necessary for the ends of justice to do so.¹ The power of the High Court in this respect is expressly recognized by S. 561A of the Code.² The High Court had also, independent of S. 561A, power under S. 107 of the Government of India Act, 1915, to stay proceedings in subordinate Courts in the exercise of its powers of superintendence over inferior Courts.³ But under S. 224 of the Government of India Act, 1935, which corresponds to S. 107 of the Act of 1915, the High Court has now no power to interfere with the judicial orders of the lower Courts: see sub-s.(2) of S. 224 and the undermentioned cases.^{3a}

Questions very often arise as to whether a criminal proceeding should be stayed during the pendency of a *civil* proceeding in respect

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1. ('16) AIR 1916 Lah 174 (175) : 17 Cri L Jour 7 (8), *Parsram v. Jalal Din*. (Criminal action stayed pending disposal of civil suit.)
(('66) 2 Bom H C R Cr 384 (385), *Reg. v. Dalsukaram*. (A Magistrate is not warranted in convicting and imprisoning a person for disobeying an order, the legality of which is then properly under the consideration of an appellate Court.)
(('24) AIR 1924 Mad 888 (888), *In re Periaswami Muthiryan*. (Stay of criminal proceeding until disposal of civil litigation between parties respecting same subject-matter should be ordered where title and attempt to get possession are pleaded and not where possession on date of trespass is pleaded.)
[See ('34) AIR 1934 Sind 143 (144) : 36 Cri L Jour 94, *Rewatmal v. Sajajmal Mehrumal*. (Where the remarks in the judgment imply that the pendency of civil proceeding between the parties is a reasonable ground for adjournment or postponement of proceeding under this section.)]
[See also ('84) 8 Mad 140 (147), *In the matter of the petition of Paul De Cruz*. (Intimidation—Excommunication by Roman Catholic priest—Criminal proceeding stayed until complainant established the illegality of priest's acts in a civil Court.)]
[But see ('29) AIR 1929 Sind 115 (116) : 23 Sind L R 225 : 30 Cri L Jour 399, *Ramchand v. Emperor*. (No power except under S. 344 to adjourn from time to time—The question of inherent power was not adverted to.)
(('27) AIR 1927 Mad 851 (851) : 28 Cr.L.J. 849, *Murugan v. Gutha Rami*. (Do.)
(('33) AIR 1933 Sind 358 (359) : 27 Sind L R 219 : 35 Cri L Jour 517, *Emperor v. Dinalshah Rajanshah*. (Following A I R 1929 Sind 115 and AIR 1932 Sind 214—Criminal case for theft — Civil suit by accused for declaration of title to property removed — Held criminal case should not remain undisposed till decision of civil suit.)]
2. ('28) 29 Cr. L. J. 1053 (1055) : 112 Ind Cas 477 (Bom), *Jehangir v. Framji Rustomji Wadia*. (Criminal proceeding need not be stayed where accused is not likely to be prejudiced by criminal proceeding being allowed to proceed.)
(('26) AIR 1926 All 30 (33) : 48 All 60 : 26 Cr. L. J. 1485, *Kanhaiya Lal v. Bhagwandas*. (Proceedings in both Civil and Criminal Courts regarding same dispute.)
3. ('23) AIR 1923 Mad 595 (595) : 25 Cr. L. J. 280, *Nambia v. Sudalaimuthu*.
(('96) 23 Cal 610 (614, 616), *Rajkumari v. Bama Sundari*. (Rampini, J., contra.)
(('31) AIR 1931 Pat 411 (414) : 33 Cr. L. J. 147, *Jagannath v. Rajagopalachari*.
(('08) 8 Cri L Jour 390 (391) : 31 Mad 510 : 4 M L T 186, *In re Jogiah*.
(('07) 6 Cri L Jour 131 (132) : 30 Mad 226, *Anna Aiyar v. Emperor*.
[See ('21) AIR 1921 All 365 (366) : 43 All 180 : 22 Cr.L.J.236, *Rajkunwar Singh v. Emperor*.]
[See also ('24) AIR 1924 Mad 235 (326) : 24 Cr. L. J. 640, *Ankamma v. Adribhotlu*.]
- 3a. ('38) AIR 1938 F. C. 1 (3) : ILR (1939) Kar (F.C.) 1 : 1939 F C R 13, *Pashupati Bharti v. Secy. of State*.
(('38) AIR 1938 All 639 (640), *Lakshmi Iron and Steel Manufacturing Co. v. Firm Radhey Lal Manni Lal*.
(('38) AIR 1938 Lah 80 (81) : ILR (1938) Lah 377, *Peoples Bank of Northern India v. Kanaya Lal*. (High Court cannot interfere with judicial orders in the exercise of its administrative functions under S. 224.)
(('38) AIR 1938 Lah 442 (442), *Amar Singh v. Secy. of State*.

of the same or substantially the same subject-matter. There is now a consensus of judicial opinion that there is no *invariable* rule that a criminal proceeding should be stayed pending the issue of a civil suit,⁴ but that the matter is entirely one of *discretion* of the Court to

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4. ('35) AIR 1935 Sind 187 (188) : 36 Cr. L. J. 1350, *Faiz Md. v. Abbas*.
 - ('29) AIR 1929 Pat 500 (501) : 30 Cr. L. J. 1101, *Hriday Narain Singh v. Emperor*.
 - ('30) AIR 1930 Pat 194 (194) : 30 Cr. L. J. 1144, *Bhagirath Bhagat v. Ram Narain*.
(It must be assumed that each Court must be allowed to proceed with the business on its file without any intervention of this kind.)
 - ('33) AIR 1933 Lah 37 (38, 39) : 34 Cr. L. J. 96 (98), *Bashesharnath v. Ratan Chand*.
 - ('16) AIR 1916 Lah 137 (137, 138) : 17 Cr. L. J. 205 (206), *Nur Din v. Emperor*.
 - ('30) AIR 1930 Lah 802 (803) : 31 Cr. L. Jour 1053, *Lorind Singh v. Emperor*.
(Rule of staying criminal trial when civil litigation is pending is rule of prudence and its application must depend on merits of each particular case.)
 - ('93) 18 Bom 581 (584), *In re Devaji*.
 - ('96) 23 Cal 610 (621), *Raj Kumari v. Bama Sundari*.
 - ('23) AIR 1923 Mad 595 (596) : 25 Cr. L. Jour 280, *Nambia v. Sudalaimuthu*.
 - ('30) AIR 1930 Pat 351 (352) : 31 Cr. L. Jour 766, *Bhagwat Prasad v. Ramkisun Ram*. (Order can be justified only on special grounds, the general rule being that the High Court should avoid staying proceedings.)
 - ('27) AIR 1927 Mad 308 (310) : 28 Cr. L. J. 181, *Gnanasigamani v. Vedamuthu*.
(If law allows a legal process, it should not be condemned as unjust.)
 - ('21) AIR 1921 Lah 386 (388) : 23 Cr. L. Jour 700, *Taj-ud-din v. Tajmuhammad Nasir*. (There is no statutory provision making it compulsory to stay the criminal proceeding.)
 - ('21) AIR 1921 Pat 484 (484), *Jodhi Singh v. Emperor*. (Criminal case should not be stayed if questions involved are not identical.)
 - ('27) AIR 1927 Mad 778 (778, 779) : 50 Mad 839 : 28 Cr. L. J. 812, *Ramiah v. Ramiah*.
 - ('10) 11 Cr. L. Jour 4 (6) : 4 Ind Cas 485 (Cal), *Brojobashi Panda v. Emperor*.
 - ('02) 26 Bom 785 (791) : 4 Bom LR 618, *In re Bal Gangadhar Tilak*. (Ordinarily it is not desirable — Dissenting from Jardine, J.'s remarks in 16 Bom 729.)
 - ('22) 23 Cr. L. Jour 84 (84, 85) : 65 Ind Cas 436 (436) (All), *Anrudh Kumar v. Emperor*. (Criminal law should proceed with expedition.)
 - ('12) 13 Cr. L. Jour 848 (848) : 17 Ind Cas 720 (Bom), *In re Kesava Narayan*.
 - ('28) 29 Cr. L. Jour 1053 (1056) : 112 Ind Cas 477 (Bom), *Jehangir v. Framji*.
 - ('08) 8 Cr. L. Jour 435 (437) : 35 Cal 909, *Hemchandra v. Atal Behari*.
 - ('04) 1 Cr. L. Jour 852 (854) : 31 Cal 858, *Dwarkanath Rai v. Emperor*. (Special reason is necessary to grant stay.)
 - ('02) 2 Weir 415 (416, 417), *In re Subramania Chetty*.
 - ('29) AIR 1929 Cal 563 (566) : 57 Cal 558 : 31 Cr. L. Jour 211, *Gopal Chandra v. Suresh Chandra*. (In case of Crown prosecution with Crown a party whose interest is for public justice, proceeding in Criminal Court cannot be stayed pending decision in civil suit.)
- But see the following cases which seem to proceed upon the view that ordinarily there should be a stay in such cases :*
- ('26) AIR 1926 All 30 (33) : 48 All 60 : 26 Cr. L. Jour 1485, *Kanhaiya Lal v. Bhagwan Das*. (Inherent power of the High Court to stay proceedings is very wide and can be properly exercised in such cases.)
 - ('11) 12 Cr. L. Jour 615 (616) : 12 Ind Cas 991 (Lah), *Parasram v. Emperor*.
 - ('13) 14 Cr. L. Jour 128 (128) : 18 Ind Cas 688 (Lah), *Anant Singh v. Emperor*.
 - ('15) AIR 1915 Cal 596 (596) : 16 Cr. L. J. 309 (310), *Asrabuddin Sarkar v. Kali Doyal*.
 - ('14) AIR 1914 Sind 80 (80) : 8 Sind LR 20 : 15 Cr. L. J. 661, *Mathra Das v. Emperor*.
 - ('14) AIR 1914 Upp Bur 18 (19) : 15 Cr. L. J. 488, *Kalima Bibi v. Macbul Ahmed*.
 - ('20) AIR 1920 Low Bur 47 (48) : 10 Low Bur Rul 103 : 21 Cr. L. J. 353, *Soorayya v. Shive Bwin*. (Matter purely of civil dispute.)
 - ('16) AIR 1916 Bom 163 (164) : 17 Cr. L. J. 153 (153) : 41 Bom 1, *In re Markur*.
 - ('16) AIR 1916 Lah 174 (175) : 17 Cr. L. Jour 7 (8), *Parasram v. Jalal Din*.
 - ('92) 16 Bom 729 (731), *In re Shri Nana Maharaj*. (Criminal proceedings for perjury or forgery arising out of civil litigation.)
 - ('07) 5 Cr. L. J. 199 (200) : 5 C L J 233, *Ram Charan Singh v. Emperor*.
 - ('21) AIR 1921 Pat 495 (495), *Haribax Ram v. Gopal Ram*.
 - ('20) AIR 1920 Pat 816 (818) : 22 Cr. L. J. 489, *Mt. Phuleshra Kuer v. Emperor*.
(Irreparable injustice likely if convicted—No chance of evidence becoming stale.)
 - ('92) 1892 Rat 587 (588), *In re Ebrahim*.

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be exercised having regard to the merits and all the circumstances of the case.⁵ The real principle to be looked to is whether the accused is likely to be *prejudiced* if the criminal proceeding is not stayed until the disposal of the suit.⁶ Where the matter in issue is not of such a complicated kind for the decision of which Civil Courts are preferred as peculiarly qualified as, for example, the genuineness of a will or other document, the validity of a will, and the *bona fides* of a civil claim, it cannot be assumed that there will be a manifest and irreparable injustice done in the Criminal Court when the integrity of the Court is not questioned.⁷

(‘01) 5 Cal W N 44 (45), *Goberdhone v. Iswar Chunder*. (Prosecution under S. 82 of the Registration Act—Civil suit pending.)

(‘06) 10 Cal W N cexi (cexii), *Gopeshwar Pal v. Emperor*.

(‘22) AIR 1922 Lah 424 (424): 23 Cri L Jour 595, *Janki Das v. Emperor*.

(‘30) AIR 1930 Lah 664 (665): 32 Cri L Jour 463, *Maniram v. Emperor*.

(‘27) AIR 1927 Lah 17 (18): 27 Cri L Jour 1114, *Bhishambar Das v. Emperor*.

[But see (‘27) 106 Ind Cas 463 (464): 29 Cr.L.J. 47 (Lah), *Phuman Singh v. Emperor*. (1862) 1 Mad H C R 66 (67, 68): 2 Weir 22, *Ex parte Varadarajulu Naidu*.

5. (‘37) AIR 1937 Pat 8 (9): 38 Cr. L. J. 264, *Molhu Rai v. Emperor*. (High Court will not ordinarily interfere with discretion.)

(‘35) AIR 1935 Sind 187 (188): 37 Cri L Jour 1350, *Faiz Muhammad Abbas v. Abbas Jafferli*.

(‘30) AIR 1930 Lah 802 (803): 31 Cr. L. J. 1053, *Lorind Singh v. Emperor*. (The rule that criminal proceeding should not be started when the same question is also involved in a pending civil litigation is a rule dictated by prudence and its application must depend on the merits of each case.)

(‘29) AIR 1929 Pat 500 (501): 30 Cr. L. J. 1101, *Hirday Narain Singh v. Emperor*. (High Court cannot interfere with the lower Court’s order unless it is unjudicial.)

(‘27) AIR 1927 Lah 744 (745): 28 Cr. L. J. 326, *Linton v. Emperor*. (Matter in criminal case identical with issue to be decided in civil suit instituted prior to complaint in criminal case — Criminal case should be stayed.)

(‘25) AIR 1925 Pat 193 (193): 26 Cri L Jour 286, *Dasarate v. Joy Chand*.

(‘25) AIR 1925 Mad 39 (42): 47 Mad 722: 25 Cri L Jour 1009, *Ramanathan v. Sivarama Subramaniya*. (Prosecution not launched in public interest — This is good ground for staying criminal proceedings pending civil suit.)

(‘92) 1892 Rat 587 (588), *In re Ebrahim*.

(‘33) AIR 1933 Bom 307 (309): 34 Cri L Jour 900, *In re Ramchandra Babaji*.

(‘34) AIR 1934 Sind 143 (144): 36 Cr. L. J. 94, *Rewatmal v. Sajanmal*.

[See (‘94) 2 Weir 260 (261), *Sankarayya v. Subba Aiya*. (Complaint of forgery of document — Question of genuineness of this document pending in civil Court — Criminal proceeding should be stayed.)]

6. (‘28) 29 Cr. L. J. 1053 (1056): 112 Ind Cas 477 (Bom), *Jehangir v. Framji*.

(‘26) AIR 1926 Nag 315 (316), *Madhao Bhagwant v. Emperor*.

(‘16) AIR 1916 Mad 1123 (1123): 16 Cr. L. J. 637, *Mad. Ibrahim v. Kattayyan*. (Refusal to register document alleged to be forged—Suit to compel registration—Criminal trial for forgery must be stayed pending disposal of civil suit to compel registration.)

(‘32) AIR 1932 Nag 86 (87, 88): 34 Cri L Jour 119, *Jhummaklal v. Sunderlal*. (Where very constitution of committee of trustees which authorised particular individual from amongst them to lodge on its behalf criminal complaint against manager of trust property is challenged as invalid in previously instituted suit — Held criminal trial should be stayed pending decision of civil suit.)

(‘17) AIR 1917 Pat 621 (622): 18 Cri L Jour 771, *Khobhari Rai v. Bhagwat Rai*. (Property forming subject-matter of civil suit — Charge of theft of such property — Criminal case should be stayed.)

(‘20) AIR 1920 Pat 816 (817): 22 Cr. L. J. 489, *Mt. Phuleshra Kuer v. Emperor*.

(‘16) AIR 1916 Pat 7 (8): 18 Cr. L. J. 125, *Debi Mahto v. Emperor*. (Proceedings instituted as a result of order under S. 476—Order appealed against—Proceedings should be stayed pending appeal.)

(‘07) 6 Cr. L. J. 131 (132): 30 Mad 226, *Anna Ayyar v. Emperor*.

(‘02) 2 Weir 415 (416, 417), *In re Subramanya Chetty*.

7. (‘31) AIR 1931 Pat 411 (415, 416): 33 Cr.L.J. 147, *Jaganath v. Rajagopalachari*.

In exercising the discretion in the matter of stay, the following principles may be remembered:

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- (1) Where a criminal proceeding is instituted with the motive of hampering the conduct of the civil proceeding, the former may be ordered to be stayed.⁸ This, however, will not apply in the case of public prosecutions, such as prosecutions under S. 195 or S. 476, Criminal Procedure Code.⁹
- (2) Where a civil proceeding is filed for the purpose of delaying or the conduct of which would result in a long delay of the trial of the criminal case, no stay should be granted.¹⁰
- (3) Where the civil suit has been filed *before* the institution of the criminal proceeding and it appears that the decision in the former will be of value in arriving at the truth in the criminal case, the latter may be stayed.¹¹

[See also ('27) AIR 1927 Mad 778 (779) : 50 Mad 839 : 28 Cr. L. J. 812, *Ramiah v. Ramiah*. (It must be assumed that in either Court justice will be done and which Court precedes the other is merely a question of convenience.)]

8. ('28) 29 Cr. L. J. 1053 (1056) : 112 I. C. 477 (Bom), *Jehangir v. Framji*. ('07) 6 Cr. L. J. 131 (132) : 30 Mad 226, *Anna Ayyar v. Emperor*. ('02) 2 Weir 415 (416, 417), *In re Subramanya Chetty*.
- ('33) AIR 1933 Bom 307 (309) : 34 Cr. L. J. 900, *In re Ramchandra Babaji*. (If criminal case is filed after the civil case, intention to prejudice the latter may often be suspected especially when there is long delay in presenting the criminal case.)
9. ('29) AIR 1929 Cal 563 (566) : 57 Cal 558 : 31 Cr. L. J. 211, *Gopal Chandra v. Suresh Chandra*. ('28) 29 Cr. L. J. 1053 (1055) : 112 I. C. 477 (Bom), *Jehangir v. Framji*. ('04) 31 Cal 858 (862) : 1 Cr. L. J. 852, *Dwarka Nath Rai v. Emperor*. ('02) 26 Bom 785 (791) : 4 Bom L R 618, *In re Bal Gangadhar Tilak*. ('22) 23 Cr. L. J. 84 (84) : 65 I. C. 436 (436) (All), *Anrudh Kumar v. Emperor*. ('12) 13 Cr. L. J. 848 (848) : 17 I. C. 720 (Bom), *In re Keshav Narayan*. ('08) 8 Cr. L. J. 435 (437) : 35 Cal 909, *Hem Chandra v. Atal Behari*.
10. ('14) AIR 1914 Mad 143 (143) : 15 Cr. L. J. 568, *Pedda Balliah v. Venkataswami*. (In view of the suit being a summary one, proceedings were stayed.)
11. ('37) AIR 1937 Pat 8 (9) : 38 Cri L Jour 264, *Molhu Rai v. Emperor*. (Civil suit based on handnote—Defendant alleging that handnote was outcome of fraud on him—Complaint by defendant against plaintiff—Plaintiff applying for stay of criminal proceedings till decision of civil suit—Stay held should be granted.) ('35) AIR 1935 Rang 487 (488) : 37 Cr. L. J. 261, *U Tha Zan v. U Pyant*. (Cases in which stay is granted are usually those where the criminal proceedings arise directly out of the proceedings in the Civil Court such as for instance prosecutions for perjury or forgery in relation to documents put in evidence in the Civil Court.) ('27) AIR 1927 Lah 744 (745) : 28 Cr. L. J. 326, *Linton v. Emperor*. ('05) 2 Cr. L. J. 798 (800) : 2 A L J 747 : 1905 A W N 254, *Mathura Kunwar v. Durga Kunwar*. (Where the decision of the civil suit will not be evidence in the criminal case, stay should be refused.) ('35) AIR 1935 Cal 182 (183), *Srikrishna Beriwalla v. Emperor*. (Issues in criminal case likely to be included in issues in civil suit which is ripe for the hearing—Criminal case to be stayed—Even a prosecution launched by police can be stayed under such circumstances.) ('35) AIR 1935 Sind 187 (188) : 36 Cri L Jour 1350, *Faiz Muhammad v. Abbas Jafferli*. (Disputes in criminal proceeding and civil suit intimately connected—Civil suit prior in time—Common issue capable of being decided more properly in civil suit—Held, criminal case should be stayed.) ('17) AIR 1917 Pat 621 (622) : 18 Cri L Jour 771, *Khobhari Rai v. Bhagwat Rai*. (Property subject-matter of suit—It is just and proper to stay criminal trial.) ('27) AIR 1927 Lah 669 (670) : 28 Cri L Jour 778, *Kalu Mal v. Emperor*. (Pro-nouncing of judgment in criminal case stayed pending decision in appeal in civil case out of which criminal case had arisen.)

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- (4) Where the civil suit is filed *after* the criminal case and there is no possibility of its being decided soon, a stay should not be ordinarily granted.¹²
- (5) Where the criminal prosecution in no way arises out of the civil suit and the decision in the Civil Court will not necessarily affect the decision of the Criminal Court, it will be unreasonable and speculative to order stay of proceeding in the Criminal Court.^{12a}
- (6) Where the subject-matters of the dispute in the criminal and civil cases are not *identical* or have no bearing on one another, a stay will not be granted.¹³
- (7) In cases of disputed title to land where it is difficult to draw the line between a *bona fide* claim and a criminal trespass, a stay can be granted.¹⁴
- (8) Although it is not illegal to have two separate criminal proceedings in respect of accusations arising out of the same facts, such a course is obviously inconvenient and it is desirable that both the proceedings should be held in a Court having jurisdiction to conduct both.^{14a} See also Note 12 and section 190 Note 17.

There is no provision in the Code enabling a District Magistrate to stay proceedings in the Criminal Courts subordinate to him.¹⁵ Nor

(135) AIR 1935 Sind 81 (83) : 36 Cri L Jour 881, *Kalumal Gelomal v. Kissumal Issardas*. (Statement made in affidavit filed in Court false — Complaint under S. 500 filed before civil suit is over—There is no infraction of law, patent on face of record to justify quashing of proceedings — But it is expedient that hearing of complaint should be stayed till disposal of civil suit.)

12. ('20) AIR 1920 Lah 198 (198) : 21 Cri L Jour 399, *Shib Dayal v. Hans Raj*. (If however the cause of action did not arise till after the filing of the criminal complaint, the criminal proceedings should be stayed.)

('10) 11 Cri L Jour 4 (6) : 4 Ind Cas 485 (Cal), *Brajobashi Panda v. Emperor*.

('10) 11 Cr. L. J. 291 (292) : 6 I. C. 181 (Cal), *Hari Pada Pal v. Jotish Chandra*.

('33) AIR 1933 Lah 37 (39) : 34 Cri L Jour 96, *Bashesarnath v. Ratanchand*. (Civil suit likely to be delayed—*Held*, that question of staying criminal case was properly refused to be considered till the evidence for the prosecution had been recorded.)

12a. ('35) AIR 1935 Rang 487 (488) : 37 Cr. L. J. 261, *U Tha Zan v. U Pyant*. See also S. 439 Note 27.

13. ('21) AIR 1921 Pat 484 (484), *Jodhi Singh v. Emperor*. (Issue in civil suit not identical with issue in criminal case.)

('21) AIR 1921 Lah 386 (388) : 23 Cr. L. J. 700, *Taj-ud-din v. Taj Mahammad Nasir*. (Criminal proceeding need not be stayed where questions are different though allied and arising out of the same transaction.)

[See also ('33) AIR 1933 Sind 358 (359) : 27 Sind L. R 219 : 35 Cri L Jour 517, *Emperor v. Dinal Shah*. (Decision in civil suit not likely to conclude question before criminal Court — Stay not necessary.)]

14. [See ('27) AIR 1927 Mad 778 (778) : 50 Mad 839 : 28 Cri L Jour 812, *Ramiah v. Ramiah*. (Obiter.)]

('23) 24 Cri L Jour 245 (247) : 71 I. C. 789 (Pesh), *Khemchand v. Emperor*. (Object of criminal proceedings to obtain an adjudication on question of title—Civil suit pending—Criminal proceeding quashed.)]

14a. ('33) AIR 1933 Nag 78 (80) : 29 Nag L. R 201 : 34 Cr. L. J. 519, *Kanhaiyalal v. Baijnath Maheshri*.

15. ('23) AIR 1923 Mad 688 (688) : 25 Cr. L. J. 277, *Krishna Rao v. Seshasubramania Iyer*.

('31) AIR 1931 Pat 411 (414) : 33 Cri L Jour 147, *Jagannath Acharya Goswami v. Rajagopalachari*. (Deputy Commissioner had no jurisdiction either as a Revenue Court or as a District Magistrate to stay criminal proceedings pending before the sub-divisional Magistrate.)

is there any provision enabling a Sessions Judge to stay a civil suit pending the decision of a criminal case.¹⁶

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A Magistrate who has directed an inquiry by a subordinate Magistrate under S. 202, can stay proceedings,¹⁷ and where there are two counter-complaints the Magistrate will be justified in staying proceedings in one pending the disposal of the other.¹⁸ See also Note 12 and the undermentioned case.¹⁹

12. Adjournment of one of two cross-cases. — Where there is a case and a counter-case, and the Court decides not to try them simultaneously, but one after the other, it has power under this section to adjourn the one and take up the other for trial.¹ As to whether a simultaneous trial can be held of two cross-cases, see S. 239 and the undermentioned cases.²

13. Power of High Court to set aside order of adjournment. — An improper order of adjournment can be set aside by the High Court in revision.¹ Ordinarily, however, where the Court has exercised a judicial discretion in the matter, the High Court will not interfere.²

14. Power of Sessions Judge or District Magistrate to stay criminal proceedings pending before subordinate Magistrate. — See Note 11.

[But see ('23) AIR 1923 Mad 595 (595) : 25 Cr.L.J. 230, *Nambia Pillay v. Sudalai-muthu Nadan*. (Magistrate has wide powers to stay, for reasons of expediency trial pending before subordinate Courts.)] See also S. 17 Note 9.

16. ('87) 1887 All W N 102 (103), *Empress v. Unkar Das*.

17. ('34) AIR 1934 Sind 143 (144) : 36 Cri L Jour 94, *Rewatmal v. Sajanmal*.
See also S. 202 Note 13.

18. ('30) AIR 1930 Pat 30 (32) : 30 Cri L Jour 554, *Parmanand v. Emperor*.

('22) AIR 1922 Pat 618 (618) : 24 Cri L Jour 120, *Lalji Singh v. Naurangi Lal*.

19. ('04) 8 Cal W N xxxi (xxxii), *In the matter of Beni Madhub Chatterjee*. (Order for criminal prosecution by civil Court — Application for stay of proceedings in criminal Court to be made to Bench in charge of criminal business.)

Note 12

1. ('29) AIR 1929 Cal 281 (283) : 31 Cri L Jour 262, *Ram Golam Singh v. Sarat Chandra Ganguly*. (Magistrate has jurisdiction to postpone his enquiry even apart from this section under inherent jurisdiction.)

('35) AIR 1935 Pat 214 (216) : 36 Cr.L.J. 714 (716) (S B), *Ram Singh v. Emperor*. (But the Court is not bound to grant adjournment.)

2. ('33) AIR 1933 Lah 852 (853) : 14 Lah 820 : 35 Cri L Jour 171, *Dhanwantri Durga Das v. Emperor*. (No legal bar to Courts of concurrent jurisdiction trying same offence simultaneously.)

('23) AIR 1923 Cal 644 (645) : 24 Cri L Jour 940, *Sheikh Samir v. Beni Madhab Gope*. (Simultaneous trials in different Courts of both cases is undesirable — Proper course is for same Court to try both cases one after the other.)

Note 13

1. ('72) 17 Suth W R Cr 55 (56) : 9 Beng L R 354, *Mathura Nath Chuckerbutty v. Heera Lal Doss*. (Case under the Code of 1861.)

2. ('27) AIR 1927 Mad 778 (779) : 50 Mad 839 : 28 Cr. L. J. 812, *Ramiah v. Ramiah*. (1862) 1 Mad H C R Cr 66 (67) : 2 Weir 248, *Ex Parte P. Varadarajulu Naidu*. (No mandamus will be issued to compel Magistrate to proceed with the case.)

('22) AIR 1922 Pat 618 (618) : 24 Cr. L. J. 120, *Lalji v. Naurangi*. (Process issued in one case and the counter-case postponed till after the disposal of the former.)

('25) AIR 1925 Sind 315 (316) : 26 Cri L Jour 958, *Ali Sher v. Mir Mahomed*. (Reasonable cause for remand is not in itself sufficient to satisfy the requirements of this section.)

[See also ('37) AIR 1937 Pat 8 (9) : 38 Cri L Jour 264, *Molhu Rai v. Emperor*. (High Court's power to interfere with discretion of lower Court in regard to stay of proceedings pending civil suit.)]

Section 344
Note 15

15. "On such terms as it thinks fit" — Costs. — These words empower the Court postponing or adjourning a criminal case to impose such terms as it thinks fit. This will include an order for the payment of costs,¹ though such an order will be made only where the circumstances are exceptional and where, for some reason or other, the ordinary everyday method of conducting criminal cases has to be departed from owing to the conduct of a party.^{1a} Thus, a complainant who is solely to blame for an adjournment can be ordered to pay costs.² Similarly, an informant to the police in a police case who, though a witness, is virtually conducting the prosecution by engaging a vakil and who asks for time, may be ordered to pay costs as a condition of the adjournment.³ So also an accused person can be ordered to pay costs as a condition of an adjournment.⁴ But this power should not be exercised in such a manner as to place obstacles in the way of the accused properly defending himself.^{4a} But where in a police case the Police Sub-Inspector was responsible for securing the attendance of absent witnesses, the complainant was held not to be liable for costs.⁵ Nor will the complainant be liable for costs when an adjournment becomes necessary owing to the absence of the accused⁶ or even where he is himself absent when the case is a non-compoundable warrant-case and his position after charge is reduced to that of a witness.⁷ In the undermentioned case,^{7a} where only some of the accused persons attended, and it was found that the complainant had not accompanied the process-server, the Magistrate ordered the complainant to pay the costs of the accused persons who were present. It was held by the High Court in revision that the order for costs was not a proper one.

Note 15

1. ('05) 2 Cr. L. J. 803 (801); 28 All 207; 1905 A W N 256; 2 A L J 831, *Mathura Prasad v. Dasant Lal*. (Day fixed for cross-examination of prosecution witnesses — Prosecutor failing to put in appearance—Order for costs was made.)
- (18) AIR 1918 Mad 538 (538, 540); 18 Cr. L. J. 612 (612); 40 Mad 1130, *Sunnasi Kudumban v. Sirasubramania Kone*.
- (05) 28 All 209n (209n); 1905 A W N 257n, *Ram Dayal v. Karan Singh*.
- (18) AIR 1918 Pat 656 (657); 19 Cr. L. J. 6, *Raghunandan Prasad v. Ramadhin Singh*. (Passing of such order does not disclose any prejudice on part of Magistrate and is not valid ground for transfer of case to another Magistrate.)
- (04) 1 Cr. L. J. 1095 (1097); 1904 Pun Re No. 20 Cr, *Emperor v. Shuldham*.
- (05) 2 Cri L Jour 1 (7, 8); 9 C W N 18, *Sew Prasad v. Corporation of Calcutta*.
- (12) 13 Cri L Jour 268 (269); 14 Ind Cas 652 (All), *Gulzari Lal v. Gunga Ram*.
- 1a. ('18) AIR 1918 Bom 253 (253); 42 Bom 251; 19 Cr. L. J. 326, *In re Abdul Rahiman*. (Because everyday practice which is in accordance with intentions of Code does not contemplate an order as to costs.)
2. ('22) AIR 1922 Bom 239 (239); 23 Cri L Jour 338, *Emperor v. Laxman Nath*. (Police prosecution—Complainant should not be saddled with adjournment costs.)
3. ('18) AIR 1918 Mad 538 (540); 18 Cr. L. J. 612 (614); 40 Mad 1130, *Sunnasi Kudumban v. Sirasubramania Kone*.
4. ('37) AIR 1937 Pat 131 (133); 38 Cr. L. J. 484, *Ishar Singh v. Shama Dusadh*.
- (05) 2 Cri L Jour 1 (7, 8); 9 C W N 18, *Sew Prasad v. Corporation of Calcutta*.
- (32) AIR 1932 Bom 470 (472); 56 Bom 536; 33 Cr. L. J. 802, *Sorabji M. Shroff v. Erachshaw B. Katrak*.
- 4a. ('37) AIR 1937 Pat 131 (133); 38 Cr. L. J. 484, *Ishar Singh v. Shama Dusadh*.
5. ('22) AIR 1922 Bom 239 (239); 23 Cri L Jour 338, *Emperor v. Laxman Nath*.
6. ('26) AIR 1926 Lah 407 (408); 27 Cri L Jour 572, *Bishambar v. Ram Chand*.
7. ('24) AIR 1924 Lah 327 (327); 25 Cri L Jour 87, *Nabi Baksh v. In*.
- 7a. ('33) AIR 1933 Lah 720 (721); 35 Cri L Jour 457, *Kazam Khan v. Emperor*.

Where the accused is absent, and the case has perforce to be adjourned, no costs can be ordered against him.⁸

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Notes 15-16

The power to order costs does not extend to previous adjournments granted without conditions.⁹

No costs of adjournment can be awarded in criminal appeals¹⁰ or criminal revisions¹¹ as the section does not apply to such proceedings.

15a. Adjournment for cross-examination of prosecution witnesses in trials of warrant-cases — Power to impose terms on accused. — In trials of warrant-cases, the accused has a statutory right to the re-call of prosecution witnesses for cross-examination after the charge is framed and he cannot be ordered to pay the expenses of the witnesses in such cases. See Notes under S. 256. But this right applies only to the first re-call of the witnesses. Where once the witnesses are re-called but the accused asks for an adjournment of the case on the ground of the absence of his pleader, the Court can, under this section, grant him the adjournment on condition of his paying *bhatta* to the prosecution witnesses.¹

16. Remand. — A remand is a re-committal to custody of a person who has been brought up in custody.¹ The scheme of the Code as to the detention of the accused persons in custody is as follows —

A person arrested *without warrant* should be brought before a Magistrate without unnecessary delay (Ss. 59 and 60), the maximum period of police custody allowed being twenty-four hours (S. 61). A person arrested under a warrant is similarly to be brought before a Magistrate without unnecessary delay (S. 81). On the arrested person being so brought before the Magistrate, the Magistrate may, from time to time, authorize the detention of the accused either in police custody or in the judicial lock-up, as he thinks fit, for a term not exceeding fifteen days *on the whole* (S. 167). If within that period the investigation shows that there is not sufficient evidence or reasonable ground of suspicion against the accused, he should be released by the investigating officer on taking security for appearance before the Magistrate if and when he is required (S. 169). If within that period

8. ('06) 4 Cri L Jour 78 (79) : 1906 Pun Re No 6 Cr, *Browne v. Chanda Singh*.

('22) AIR 1922 All 184 (184) : 23 Cri L Jour 243, *Beedha v. Emperor*.

('34) AIR 1934 Lah 441 (442) : 36 Cri L Jour 101, *Gulab Singh v. Indar Singh*.

(A fortiori no costs can be ordered in such cases against the co-accused who is present but applies for adjournment.)

9. ('32) AIR 1932 Bom 470 (472) : 56 Bom 536 : 33 Cr. L. J. 802, *Sorabji Shroff v. Erachshaw*. (Application for transfer—No order for costs should be made.)

See also S. 526 Note 19.

10. ('02) 1902 All W N 59 (60), *King-Emperor v. Chhabraj Singh*.

('33) 1933 Mad W N 878 (879), *Rajanna v. Emperor*. (Refusal to hear appeal for non-payment of costs is not proper.)

11. ('36) AIR 1936 Sind 235 (236) : 38 Cr. L. J. 119 : 30 S. L. R. 357, *Jethanand v. Tahilram*.

Note 15a

1. ('34) 1934 Mad W N 100 (102), *Papi Naidu v. Gangu Naidu*.
See also S. 256 Note 11.

Note 16

1. ('67) 2 Weir 409 (409), (Prisoner must be present at the time of recommitment.)
[See ('24) AIR 1924 Cal 614 (615, 616) : 26 Cr. L. J. 68, *Bholanath Das v. Emperor*.]

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Notes 16-17

the investigation shows that there *is* such evidence or if the period expires without the investigation having been completed, the accused must be forwarded, subject to the provisions as to bail, to the Magistrate *empowered to take cognizance of the offence upon a police-report* (S. 170). If the latter also receives along with the accused a police-report under S. 173, he can take cognizance of the offence on such report and if necessary remand the accused to custody for fifteen days *at a time* for the purpose of obtaining further evidence or for other reasonable cause (S. 311). If owing to the investigation not having been completed a final report is not sent with the accused under S. 173, the Magistrate should release the accused. He cannot order a remand in such a case.² The High Court of Allahabad has, however, in the undermentioned case,³ held that S. 170 applies only to cases where the investigation has not been completed and further, that even where the accused is sent up under that section *without any report* under S. 173, the Magistrate can order a remand of the accused under this section and is not bound to release him. It is submitted that this view cannot be accepted as correct. This section clearly applies only where the Magistrate has *taken cognizance* of the offence and this he could do only on a police-report or in the other modes referred to in S. 190. In the absence, therefore, of a police-report or the other things referred to in S. 190 the Magistrate could not act, and there being no subsisting order for detention, the accused must be released.

17. Distinction between detention under section 167 and under section 344.

- (1) Section 167 applies to detention of accused persons during police investigation. This section applies to detention after police investigation and before or pending inquiry or trial.¹ Thus, where a Magistrate, having ordered the accused to be detained for a period of less than fifteen days, thinks no further detention is necessary and sends him to a Magistrate having jurisdiction, a remand by the latter Magistrate will be one under this section and not under section 167.^{1a}
- (2) The maximum period of detention under S. 167 can be only fifteen days. The period of detention under this section cannot exceed fifteen days *at a time* though the *sum total* of the periods of detention may exceed fifteen days.²

2. ('24) AIR 1924 Cal 476 (478): 51 Cal 402: 25 Cr.L.J. 732, *Nagendra v. Emperor*. [See also ('88) 11 Mad 98 (102): 2 Weir 142, *Queen-Empress v. Engadu*.]

3. ('31) AIR 1931 All 617 (619, 620): 53 All 729: 32 Cr.L.J. 1045, *Emperor v. Sooba*.

Note 17

1. ('31) AIR 1931 All 617 (620): 53 All 729: 32 Cr. L.J. 1045, *Emperor v. Sooba*.

1a. ('37) AIR 1937 Sind 251 (252, 253): 31 S L R 494: 39 Cr L J 10, *Dhaman Hiranand v. Emperor*.

2. ('24) AIR 1924 Cal 476 (478): 51 Cal 402: 25 Cr. L. J. 732, *Nagendra v. Emperor*.

('31) AIR 1931 Lah 99(100, 101): 12 Lah 435: 33 Cr.L.J. 180, *Bal Krishna v. Emperor*.

('68) 5 Bom H C R Cr 31 (33), *Reg v. Surkya*.

('88) 11 Mad 98 (101): 2 Weir 142, *Queen-Empress v. Engadu*.

('24) AIR 1924 Cal 614 (616): 26 Cri L Jour 68, *Bholanath v. Emperor*.

('09) 9 Cr. L. J. 375 (377): 36 Cal 166: 1 I. C. 738, *Narendra Lal v. Emperor*.

See also Note 20.

(3) A detention under section 167 may be either in police custody or in judicial lock-up. A detention under this section can only be in a judicial lock-up.³

(4) A Magistrate acting under S. 167 need not be one who has jurisdiction to try or commit the case. A Magistrate acting under this section must, however, be one who has such jurisdiction.⁴

See also Note 7 to section 167.

18. Grounds of remand. — The words “may by a warrant remand” show that the Magistrate has a discretion in the matter of granting a remand.¹ The discretion, must, however, be a judicial one to be exercised in accordance with legal principles. The detention of an accused is not intended to be penal: its object is only to secure the attendance of the accused at the trial.² The Magistrate cannot, when an accused is brought before him in custody, further detain him in custody by remand without some reason made manifest to him either in the shape of sworn testimony given before him, or in some other form which can be put upon the record and which is sufficient to justify him in sending the prisoner to prison, there to be detained for a period not exceeding fifteen days.³ In *Emperor v. Sooba*,⁴ Kendall, J., of the High Court of Allahabad, observed as follows :

“Two considerations that should influence the Court in deciding whether a remand should be granted are —

1. whether sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence and it appears likely that further evidence may be obtained by a remand, and

2. whether the time asked by the police for the remand is, in the circumstances of the case, reasonable or not.”

A mere expectation that after sometime by dint of enquiry some evidence might be obtained is not a sufficient cause for remand. It is only *after sufficient evidence* has been obtained to raise a suspicion that the accused may have committed an offence, that a likelihood of

3. ('37) AIR 1937 Sind 251 (253) : 31 S L R 494 : 39 Cr. L. J. 10, *Dhaman v. Emperor*. ('02) 4 Bom L R 878 (879), *In re Rama Khandu*.

('97) 23 Bom 32 (34), *In re Krishnaji Pandurang*.

('31) AIR 1931 Lah 99 (100, 101) : 12 Lah 435 : 33 Cr. L. J. 180, *Bal Krishna v. Emperor*.

('31) AIR 1931 Lah 353 (355, 356) : 12 Lah 604 : 32 Cr. L. J. 785, *Kundan v. Emperor*.

('26) AIR 1926 Cal 1121 (1130) : 54 Cal 218 : 27 Cr. L. J. 1201 (FB), *Muhammad Suleman v. Emperor*.

4. ('24) AIR 1924 Cal 476 (478) : 51 Cal 402 : 25 Cr. L. J. 732, *Nagendra v. Emperor*.

('24) AIR 1924 Cal 614 (616) : 26 Cri L Jour 68, *Bholanath v. Emperor*.

Note 18

1. ('31) AIR 1931 All 617 (620) : 53 All 729 : 32 Cr. L. J. 1045, *Emperor v. Sooba*.

2. ('09) 9 Cr. L. J. 409 (412) : 36 Cal 174 : 1 I C 910, *Jamini Mullick v. Emperor*.

('27) AIR 1927 Nag 53 (55) : 27 Cri L Jour 1063, *Tularam v. Emperor*.

3. ('73) 20 Suth W R Cr 23 (30) : 11 Beng L R App 8, *Abdul Kadir Khan v. Magistrate of Purneah*.

('87) 11 Mad 98 (102, 103) : 2 Weir 142, *Queen-Empress v. Engadu*.

('35) AIR 1935 Lah 230 (243) : 35 Cri L Jour 1180, *Jahangiri Lal v. Emperor*.
(Duty to allow time for counsel to appear and argue matter before him.)

4. ('31) AIR 1931 All 617 (621) : 53 All 729 : 32 Cr. L. J. 1045.

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Notes 18-19

obtaining further evidence will be a reasonable cause for remand.⁵ Where some evidence was available but it appeared to the Magistrate necessary to defer the examination so that the inquiry might be continuous, a further remand was held justified.⁶ Similarly, where it was proved by an affidavit that there was a conspiracy and it was also proved by sufficient evidence that the accused were members of that conspiracy, it was held that the Magistrate was justified in keeping them in custody for such period as appeared to him to be reasonable.⁷ But where the complainant and his witnesses were not validly bound over to appear and did not appear on the date of the enquiry, it was held that a detention of the accused was not justified.⁸ A remand for the purpose of getting a confession from the accused is most improper.⁹

Where, after one remand the accused is brought up and a further remand is asked for, some *direct evidence* of his guilt should be required to justify his further detention, and with each remand the necessity for producing such evidence increases.¹⁰

In the undermentioned case¹¹ it was held by the High Court of Calcutta that the language of sub-s.(1) shows that where the Magistrate properly directs a postponement, he has *unfettered* discretion to remand the accused to custody. It was further held that even assuming that there must be reasonable cause, not only for the order of postponement but for the order of remand, the explanation to the section describes only one type of reasonable cause and there may be reasonable cause for a remand even though the circumstances do not fall under the terms of the explanation.

19. Remand in absence of accused. — A remand cannot be granted in the absence of the prisoner. As has been seen already, the use of the word 'remand' shows that a prisoner is brought up under custody and is re-committed to custody.¹

5. ('76) 25 Suth W R Cr 8 (8), *In re Zuhuruddeen Hossein*. (17 Suth W R Cr 55, followed.)

('72) 1872 Pun Re No. 17 Cr, p. 21 (23), *Khuda Bakhsh v. Crown*.

6. ('83) 6 Mad 63 (67), *Manickam Mudali v. Queen*. (Reasonable ground not supported by sworn testimony is sufficient for remand.)

7. ('33) AIR 1933 Cal 752 (753) : 34 Cr. L. J. 1194, *Sundar Ram v. Emperor*. (Magistrate properly directing postponement has unfettered discretion to remand accused to custody.)

8. ('69) 11 Suth W R Cr 47 (48), *Queen v. Pooran Jalaha*.
See also S. 170 Note 6.

9. ('86) 2 Weir 414 (415).

10. ('15) AIR 1915 Nag 28 (29) : 16 Cri L Jour 705: 11 Nag L R 162, *Ahamadali v. Emperor*.

('83) 6 Mad 69 (70), *Ponnuswami Chetty v. Queen*.
See also S. 497 Note 5.

11. ('33) AIR 1933 Cal 752 (753) : 34 Cri L Jour 1194, *Sundar Ram v. Emperor*. (For instance, a remand would be proper, where there is a strong *prima facie* case against the accused, but it is impossible to proceed with the inquiry owing to the unavoidable absence of a witness though the explanation may not cover such a case.)

Note 19

1. ('67) 2 Weir 409 (409).

('67) 1867 Pun Re No. 39 Cr, p. 72 (76), *Crown v. Shcra*.

20. Period of detention. — There is no limit set to the total period of a series of orders of remand under this section¹ provided no single order of remand exceeds fifteen days *at a time*.² An accused is entitled to have the evidence against him recorded as early as possible³ and the fact that there may be a large body of evidence forthcoming against him is not a good ground for detention for an inordinate period.⁴

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Where no evidence of an incriminating nature was forthcoming even after the remand for six weeks, a further detention was held not justified.⁵ But in a conspiracy case where considerable time is required to collect evidence, detention for a period of three months was held good.⁶

21. "By a warrant." — A warrant for further detention of an accused should be a warrant of commitment directed to some jailor or other person having authority to receive and keep prisoners. The warrant must state that the prisoner is charged with some particular offence.¹

22. Magistrate's liability for unreasonable detention. — A Magistrate who, without reasonable cause and without good faith delays proceeding with the trial of persons whom he keeps in jail, will be liable to an action in damages notwithstanding the Judicial Officers' Protection Act, XVII of 1850.¹

Compounding offences. 345. *(1) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following

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* Code of 1898, original S. 345.

Compounding offences. 345. (1) The offences punishable under the sections

Note 20

1. ('31) AIR 1931 All 617 (620):53 All 729:32 Cri L Jour 1045, *Emperor v. Sooba*.
2. ('21) 22 Cri L Jour 669 (671) : 63 I. C. 461 (Lah), *Wadhawa v. Emperor*. ('68) 5 Bom H C R Cr 31 (33), *Reg. v. Surkya*.
See also Note 17.
3. ('24) AIR 1924 Cal 476 (478):51 Cal 402:25 Cr. L. J. 732, *Nagendra v. Emperor*. [See ('02) 26 Bom 552 (557) : 4 Bom L R 276, *In the matter of Lakshman Govind*. (Complainant by omitting to take out summons cannot keep case hanging over a man for indefinite time.)]
4. ('83) 6 Mad 63 (67), *Manickam Mudali v. Queen*.
5. ('08) 9 Cr. L. J. 409 (412) : 36 Cal 174 : 1 I. C. 910, *Jamini Mullick v. Emperor*. ('70) 13 Suth W R Cr 27 (32) : 5 Beng L R 274, *Queen v. Surendro Nath*.
6. ('24) AIR 1924 Cal 476 (479) : 51 Cal 402:25 Cr. L. J. 732, *Nagendra v. Emperor*.
6. ('31) AIR 1931 All 617 (621):53 All 729:32 Cri L Jour 1045, *Emperor v. Sooba*.

Note 21

1. ('70) 13 Suth W R Cr 1(5):4 Beng LR App 1, *In the matter of Mohesh Chunder*.

Note 22

1. ('69) 11 Suth W R Cr 19 (20), *Queen v. Sahoo*.

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may be compounded by the persons mentioned in

of the Indian Penal Code described in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table :—

Offence.	Sections of I.P.C. applicable.	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person	341, 342	The person restrained or confined.
Assault or use of criminal force ...	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour ...	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon.
House-trespass	448	
Criminal breach of contract of service ...	490, 491, 492	The person with whom the offender has contracted.
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with a criminal intent a married woman	498	
Defamation	500	The person defamed.
Printing or engraving matter knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years	506	The person intimidated.

(2) The offences of causing hurt and grievous hurt, punishable under S. 324, S. 325, S. 335, S. 337 or S. 338 of the Indian Penal Code, may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is a minor, an idiot or a lunatic, any person competent to contract on his behalf may compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused.

(7) No offence shall be compounded except as provided by this section.

1882 : S. 345; 1872 : S. 188; 1861—Nil.

the third column of that table:—

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Offence.	Sections of I.P.C. applicable.	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person	298	The person whose religious feelings are intended to be wounded.
Causing hurt ...	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person	341, 342	The person restrained or confined.
Assault or use of criminal force ...	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour ...	374	The person compelled to labour.
Mischief when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused.
Criminal trespass ...	447	The person in possession of the property trespassed upon.
House trespass ...	448	
Criminal breach of contract of service	490, 491, 492	The person with whom the offender has contracted.
Adultery ...	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman	498	
Defamation ...	500	The person defamed.
Printing or engraving matter, knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace	504	The person insulted.
Criminal intimidation except when the offence is punishable with imprisonment for seven years	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure	508	The person against whom the offence was committed.

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table:—

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Offence.	Sections of I.P.C. applicable.	Persons by whom offence may be compounded.
Voluntarily causing hurt by dangerous weapons or means	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt...	325	Ditto.
Voluntarily causing grievous hurt on grave and sudden provocation	335	Ditto.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Ditto.
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	338	Ditto.
Wrongfully confining a person for three days or more	343	The person confined.
Wrongfully confining a person in secret	346	Ditto.
Assault or criminal force in attempting wrongfully to confine a person	357	The person assaulted or to whom the force was used.
Dishonest misappropriation of property	403	The owner of the property misappropriated.
Cheating	417	The person cheated.
Cheating a person whose interest the offender was bound, by law or by legal contract, to protect	418	Ditto.
Cheating by personation ...	419	Ditto.
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security	420	Ditto.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	The person to whom the loss or damage is caused.
House-trespass to commit an offence (other than theft) punishable with imprisonment	451	The person in possession of the house trespassed upon.
Using a false trade or property mark	482	The person to whom loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another	483	The person whose trade or property mark is counterfeited.
Knowingly selling, or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark	486	Ditto.
Marrying again during the lifetime of a husband or wife	494	The husband or wife of the persons so marrying.

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Offence.	Sections of I.P.C. applicable.	Persons by whom offence may be compounded.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman	509	The woman whom it is intended to insult or whose privacy is intruded upon.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(5A) A High Court acting in the exercise of its powers of revision under section 439 may allow any person to compound any offence which he is competent to compound under this section.

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(7) No offence shall be compounded except as provided by this section.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and principle. 3. Withdrawal and composition compared. 4. What amounts to composition. 5. The offence must be compoundable. 6. Consideration. 7. Free will is necessary. 8. Compoundable offences. 9. Who can compound. 10. Minor. 11. Composition under sub-section (1). | <ol style="list-style-type: none"> 12. Compositions under sub-section (2). 13. Proof of composition. 14. Stage at which a compounding may be effected. 15. Composition after committal or conviction. 16. High Court's powers in revision. 17. Rescission of compromise. 18. Effect of compromise. 19. Sub-section (7). 20. Civil suit. 21. Procedure in non-compoundable cases where injured party declines to prosecute. |
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Section 345 Note 1

Other Topics (miscellaneous)

- Accused sent up by police. See Note 11.
 All circumstances to be considered before sanction. See Note 12.
 Arbitration — when composition. See Note 4.
 Compensation to complainant. See Notes 12 and 18.
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 Composition — What is. See Note 4.
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 "Compound" — Meaning. See Note 3.
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 Non-compoundable offence changed into compoundable one on appeal. See Note 5.
 Offence under S. 143, I. P. C., and another offence. See Note 8.
 Offence under S. 147, I. P. C. See Note 8.
 Offence under S. 24, Cattle Trespass Act, and offence under S. 323, I. P. C. See Note 8.
 Onus of proof of composition. See Note 13.
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 Record of reasons for sanction. See Note 12.
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 Section complete in itself. See Notes 2, 19 and 5.
 Settlement in future — Not composition. See Note 4.
 Settlement of non-compoundable case. See Notes 5 and 18.
 Stifling prosecution. See Notes 2 and 5.
 Substance and not form of petition. See Note 3.

1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

The Code of 1861 contained no provision such as that found in this section and it was not settled whether there might be a compromise in a criminal case.¹

Section 188 of the Code of 1872 provided that in the case of offences *which may lawfully be compounded*, injured persons may compound the offences out of Court or in Court with the permission of the Court. What those offences were "which may lawfully be compounded," were not mentioned in the section; for that information one had to refer to the exception to S. 214, Penal Code.

Difference between the Codes of 1872 and 1882 —

Section 345 of the Code of 1882 gave a tabulated list that was intended to be exhaustive of the offences that were compoundable. The Code also, for the first time, introduced a distinction between offences

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1. ('12) 40 Cal 113 (117) : 15 Ind Cas 259 (259), *Majibar Rahman v. Muktashed*.

compoundable with the permission of the Court and those compoundable without such permission. In keeping with this amendment to the Procedure Code and almost simultaneously with it, an amendment was made to S. 214, Penal Code, by Act VIII of 1882, substituting for the original exception, referred to above, the exception that now finds place in the section, reading thus: "The provisions of Ss. 213 and 214 do not extend to any case in which the offence may lawfully be compounded."

Changes introduced in 1898 —

Sub-section (5) was newly added.

Amendments introduced by Act XVIII of 1923 —

- (1) Section 503, Penal Code, was added to the list of offences compoundable without leave of Court.
- (2) The present sub-s. (2) was substituted for the original sub-section thus enlarging the list of offences compoundable with the leave of Court under sub-s. (2).
- (3) Sub-section (4) was amended by substituting the words "under the age of eighteen years or is" for the words "a minor," thus making it clear that the age of majority is eighteen years. (There was a doubt regarding this before — See Note 10.) The leave of the Court in the case of composition on behalf of persons under disability has also been made a necessary condition.
- (4) Sub-section (5A) was newly added. (See Note 16.)
- (5) Sub-section (6) has been amended by adding the words "with whom the offence has been compounded" at the end so as to make it clear that the effect of a composition is to acquit only the accused with whom the offence has been compounded thereby setting at rest the controversy on this point also. See Note 18.

2. Scope and principle. — The law makes a difference between various classes of offences and allows compromise in some and no compromise in others.¹ Competence to accept satisfaction for wrong done to oneself which follows from the general rule of freedom of transactions is subject to limitations, those limitations corresponding generally with classes of wrongs in which, though a personal injury is sustained, a civil suit is not allowed, or is allowed only after the public interest has been satisfied. In such a case, the institution of a prosecution is a duty which cannot be neglected in consideration of any private advantage.²

The principle of English law is that the composition of an offence is illegal if the offence is one of public concern, but lawful if the offence is of a private nature and for which damages may be recovered in a civil action. This principle was adopted in this country also, but there was, before the Code of 1882, an uncertainty as to what exactly were the cases which were compoundable.³

Note 2

1. ('98) 3 Cal W N 5 (5), *Amir Khan v. Amirjan*.
2. ('76) 1 Bom 147 (151) (FB), *Reg. v. Rahimat*.
3. ('76) 1 Bom 147 (148, 149) (FB), *Reg. v. Rahimat*.

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The tabulation of offences in this section now removes all uncertainty⁴ and must be taken as a complete guide and test on the matter.^{4a} The policy of the Legislature adopted in this section is that in the case of certain minor offences, where the interests of the public are not vitally affected, the complainant should be permitted to come to terms with the party against whom he complains, the offences being specified in the section.⁵ Where an offence with which a particular person is charged is compoundable, he is at liberty to come to a settlement with the prosecution and the settlement so arrived at cannot be considered to be one, the consideration for which is illegal.⁶ Where a case has once been brought to Court and the parties have adjusted the matter between themselves lawfully, it cannot be said that they are hushing up the matter.⁷

The provisions of the section are not limited to cases wherein the accused *pleads guilty*. Such a view would limit the scope of the section to those comparatively few cases in which the accused is advised that defence would be hopeless.⁸

The section does not apply to offences punishable under laws *other than the Penal Code*.⁹

3. Withdrawal and composition compared. — An act of compounding is different from the withdrawal of a complaint made to a Magistrate. A withdrawal must be by intimation to the Magistrate and the complainant is required to satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw it.¹ A withdrawal is permissible in all summons-cases. Composition is only permitted in respect of specified offences some of which are summons-cases and others not, the offences being mentioned in this section. Again, withdrawal is the act of one party to the proceeding, *viz.*, the complainant, whereas the composition of an offence obviously requires the co-operation of both parties. Permission is necessary in the case of withdrawal, because it is the act of one party alone. Complainants otherwise would be at liberty to bring frivolous and vexatious complaints and withdraw them calmly when they have caused the accused enough of annoyance and degradation. There is no such abuse of process to be guarded against in a composition, it being the act of both the parties.² Withdrawals

4. ('12) 8 Nag L R 97 (105): 16 Ind Cas 555 (559), *Kishan Lal v. Aman Singh*.

4a. ('13) 14 Cr.L.J. 292 (293): 6 Sind L R 284: 19 I C 948, *Imperator v. Mulo*.

('94) 1894 Rat 699 (699, 700), *Queen-Empress v. Naran*.

('04) 28 Bom 326 (328): 6 Bom L R 73, *Dalsukhram v. Charles De Bretton*.

5. ('21) AIR 1921 Bom 166 (166, 167): 45 Bom 346: 22 Cri L Jour 55, *Emperor v. Alibhai Abdul*. (Several accused—Composition with only one is legal—Case can proceed against the others.)

6. ('30) AIR 1930 Oudh 196 (198): 4 Luck 669, *Saktay Sah v. Mahadin*.

7. ('29) AIR 1929 Pat 512 (512): 31 Cr.L.J. 607, *Singheswar Prasad v. Ali Hasan*.

8. ('09) 10 Cr. L. J. 228 (228, 229): 2 Sind L R 16, *Emperor v. Lilaram*.

9. ('84) Oudh Sel Cas No. 78, *Queen-Empress v. Gunbar*.

Note 3

1. ('94) 21 Cal 103 (113), *Murray v. Empress*.

2. ('88) 1888 Pun Re No. 19 Cr, p. 35 (36), *Empress v. Khushali Ram*.

('24) AIR 1924 Lah 595 (596): 5 Lah 239: 25 Cr.L.J. 629, *Anantia v. Emperor*.

('16) AIR 1916 Pat 200 (201): 18 Cri L Jour 107 (109), *Bayan Ali v. Emperor*.

are confined to summons-cases; warrant-cases cannot be withdrawn.³ A complaint can be withdrawn only by the complainant, who may not necessarily be the person injured.⁴ The word "compound" means to withdraw for a consideration, and not merely to withdraw.⁵ See also section 248 Note 3.

Whether a petition is one for withdrawal or compromise, is to be judged from the fact whether the accused consented to it or not. The substance and not merely the form of the petition should be considered.⁶ When the complainant put in a petition before the Court not asking for permission to withdraw but saying that he did withdraw against one of the accused as there had been an apology, and he wished the case to proceed only against the other accused, it was held that it was not a case of mere withdrawal but was one of composition;⁷ and where the complainant wrote out and gave to the accused a document as follows: "This is to say that Mr. John came to me and offered an unconditional apology; I beg to withdraw the case against him", the document was held to mean that the offence was compounded and not merely withdrawn.⁸ It is open to the Magistrate to question the complainant to satisfy himself whether an application is in fact one for composition or for withdrawal.⁹

4. What amounts to composition. — A composition is an arrangement or settlement of differences between the injured party and the person against whom the complaint is made.¹ A mere application by the complainant for permission to withdraw the case because his witnesses had turned round is not a composition of the offence.²

The compounding of an offence supposes an arrangement whereby the parties have *settled* their differences and not a mere arrangement to settle their disputes *in future* as the result of some action either by themselves or third parties.³ An incomplete arrangement will not amount to an actual acquittal within the meaning of the law.⁴

Pending a criminal case, the parties entered into an agreement referring their disputes to arbitration. No arbitration took place, but it was argued that the very signing of the *muchlika* for reference to arbitrators amounted to a composition. It was held, however, that the *muchlika* was only one step towards the composition and that there

3. ('89) 1889 Rat 461 (461), *Queen-Empress v. Lilladhur*.

('27) AIR 1927 Bom 410 (411) : 51 Bom 512 : 28 Cri L Jour 581, *Dajiba Ramji v. Emperor*.

('24) AIR 1924 Lah 595 (596) : 5 Lah 239 : 25 Cr.L.J. 629, *Anantia v. Emperor*.

4. ('78) 2 Bom 653 (653), *In re Muse Ali Adam*.

5. ('92-96) 1 Upp Bur Rul 219 (220), *Queen-Empress v. Nga Po Gaung*.

6. ('24) AIR 1924 Lah 595 (598) : 5 Lah 239 : 25 Cr.L.J. 629, *Anantia v. Emperor*.

7. ('24) AIR 1924 Lah 595 (597,598) : 5 Lah 239 : 25 Cr.L.J. 629, *Anantia v. Emperor*.

8. ('23) AIR 1923 All 474 (476) : 45 All 145 : 24 Cr. L. J. 758, *John v. Emperor*.

9. ('16) AIR 1916 Pat 200 (201, 202) : 18 Cr.L.J. 107 (109), *Bayan Ali v. Emperor*.

Note 4

1. ('21) AIR 1921 Bom 166 (167) : 45 Bom 346 : 22 Cr.L.J. 55, *Emperor v. Alibhai*.

2. ('02) 4 Bom L R 718 (720), *Emperor v. Asmal Hasan*.

3. ('25) AIR 1925 Mad 1211 (1212) : 26 Cr.L.J. 1594, *Ramalinga v. Varadarajulu*.

4. ('19) AIR 1919 Mad 879 (881) : 41 Mad 685 : 19 Cri L Jour 359, *Kumarasamy Chetty v. Kuppusami Chetty*.

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would have been a composition only if the *muchlika* had been carried out and an award had been arrived at according to its terms.⁵

A Magistrate is not bound to recognise a reference to arbitration and wait for the award, but it will be reasonable for him to do so. If he, however, chooses to wait and there is an award, the award may amount to a composition.⁶ Where parties entered into a sort of compromise previously before a muktear to whom the case had been sent for local inquiry, but on the records being sent to the Magistrate both parties resiled from the agreement, and then on the Magistrate's summoning the accused the latter sought to have the so-called compromise recognised, it was held that he could not take advantage of the compromise previously entered into before the local enquiry officer.⁷

As to the effect of an agreement to be bound by the evidence on oath of a certain witness, see the undermentioned case.⁸

5. The offence must be compoundable. — It is against public policy to compound a non-compoundable offence.¹ The Legislature has laid down in this section the test for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interests of the State, and Courts of law cannot go beyond that test and substitute for it one of their own.² It is the duty of a criminal Court to refuse to allow the withdrawal of the prosecution if the case is non-compoundable.³

A Magistrate should consider all the circumstances and make up his mind that only a compoundable offence is proved before he allows a compounding.⁴ Where the evidence taken by a Magistrate clearly disclosed a non-compoundable offence, it was held that he had no authority to allow the offence to be compounded and in doing so had usurped jurisdiction not vested in him.⁵ See also the undermentioned

5. ('25) AIR 1925 Mad 1211(1211):26 Cr.L.J. 1594, *Ramalinga v. Varadarajulu*. [See also ('26) AIR 1926 Cal 266 (267) : 26 Cri L Jour 1584, *Srish Chandra v. Abani Nath*. (Agreement to refer disputes to arbitration is not final settlement which the Court is bound to accept.)]
6. ('25) AIR 1925 Mad 1211 (1212):26 Cr.L.J. 1594, *Ramalinga v. Varadarajulu*. [See however ('29) AIR 1929 Lah 394 (395), *Malika v. Sardar*. (A criminal complaint cannot be referred to arbitration and therefore the award following it cannot be made a rule of a civil Court.)]
7. ('18) 22 Cal W N clxxii (clxxii), *Ananda Chandra v. Chandra Mohan*.
8. ('88) 13 Bom 389 (391), *Queen-Empress v. Murarji Gokuldas*. (Procedure under Oaths Act, Ss. 8 to 11 does not apply to criminal proceedings, the reason being that in such proceedings the complainant or the accused is not a party within the meaning of S. 8 of the said Act.)

Note 5

1. ('26) AIR 1926 Cal 59 (63) : 53 Cal 51, *Dwijendranath v. Gopiram*.
- ('28) AIR 1928 Bom 305 (305):52 Bom 693, *Ahmad Hassan v. Hassan Mahomed*.
- ('18) 22 Cal W N clxxii (clxxii), *Ananda Chandra v. Chandra Mohan*.
- ('29) AIR 1929 All 456 (458), *Sadho Kandu v. Mt. Jinka Kuer*.
- ('12) 40 Cal 113 (117, 118) : 15 Ind Cas 259(260), *Nujebar Rahman v. Muktashed*.
2. ('04) 28 Bom 326 (328) : 6 Bom L R 73, *Dalsukhram v. Charles De Bretton*.
3. ('14) AIR 1914 Oudh 278 (279) : 17 Oudh Cas 213, *Lachman Das v. Narain*.
4. ('94) 1894 Rat 699 (700), *Queen-Empress v. Naran*.
- ('03) 16 C P L R 178 (179), *Sitaram v. Hiralal*.
- (1900-02) 1 Low Bur Rul 349 (349), *Crown v. Konoo*.
5. ('02) 4 Bom L R 718 (720), *Emperor v. Asmal Hasan*.
- (1900) 2 Weir 151 (151), *In re Abdul Ally Sahib*.

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Note 5

cases.⁶ The withdrawal from the prosecution in a case in which the offence charged is non-compoundable has not the effect of an acquittal;⁷ and an agreement entered into between the complainant and the accused for the refund of money embezzled by the latter was not allowed to be pleaded as a bar of prosecution for the offence.⁸

To determine whether a case is compoundable or not, the offence with the commission of which the accused were charged in the complaint or with which the Court charged them should be looked into.⁹ Where the offence, so far as was then known, believed and alleged, was punishable under section 323, it was held that the composition was legal.¹⁰ If a complaint alleges circumstances constituting a compoundable offence, as also other circumstances alleging a non-compoundable offence, it has to be seen what are the essential circumstances.¹¹

The question of a case being compoundable or not must be decided with reference to the state of facts existing at the date of the application to compound. It is not possible for the Court to see what the ultimate result of the case will be.¹² Where a Magistrate allowed the non-compoundable offence of rioting to be compounded upon a mere surmise, based on no evidence, that the case might in the end turn out to be one of a compoundable offence, it was held that he had no such power.¹³

Though the complainant accuses a person of a compoundable as well as of a non-compoundable offence, if the Magistrate issues a summons to the accused for the compoundable offence alone, a composition may be effected.¹⁴ Conversely, if in the trial of a compoundable offence, an offence which is not compoundable is by oversight mentioned in the summons, it does not deprive the parties of their right to compound.¹⁵

Where a person was convicted of a non-compoundable offence but on appeal was acquitted of that but the appellate Court considered that he should be convicted of a compoundable offence of which he had not been tried by the Magistrate, it was held that he should be allowed an opportunity of compounding the offence, if he could, before

6. ('87) 1887 Rat 331 (332), *Queen-Empress v. Dhondhi*.
- (79) 1879 Pun Re No. 30 Cr, p. 82 (82), *Empress v. Rahim Bakhsh*.
- (71-74) 7 Mad H C R App xxxiv (xxxiv.)
- (19) AIR 1919 Pat 545 (546) : 20 Cri L Jour 552, *Guru Prasad v. Ajodhya Nath*.
- (13) 14 Cr. L. J. 77 (78); 18 L. C. 413; 37 Bom 369, *Emperor v. Ranchhod Bavla*.
7. ('88) 1888 Rat 391 (392), *Queen-Empress v. Moti Das*. (Order permitting withdrawal amounts to an order of discharge.)
- (75) 1 Bom 64 (66), *Reg. v. Devama*. (Do.)
- (93-1900) 1893-1900 Low Bur Rul 240, *Queen-Empress v. Po Ba*.
8. ('86) 1 Weir 462 (463), *In re Ponnambalam Pillai*.
- (83) 1 Weir 465 (465), *Zamindar of Yettiyapuram v. Ramaswami Nandan*.
9. ('30) AIR 1930 Oudh 196 (198) : 4 Luck 669, *Saktay Sah v. Mahadin*.
10. ('84) 1884 All W N 13 (14), *Empress v. Unkar*.
11. ('29) AIR 1929 All 456 (458), *Sadho Kandhu v. Mt. Jhinka Kuer*.
12. ('25) AIR 1925 Nag 395 (395) : 26 Cr. L. J. 1428, *Mt. Rani v. Mt. Jaiwanti*.
13. ('07) 6 Cr. L. J. 336 (336, 337) : 1907 Pun Re No. 11 Cr, *Emperor v. Hira Singh*.
14. ('16) AIR 1916 Cal 917 (917, 918), *Mahomed Ismail v. Samad Ali*.
15. ('21) AIR 1921 Pat 75 (75) : 22 Cri L Jour 493, *Kadir Akram v. Emperor*.

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being convicted of the same.¹⁶ Where this opportunity was not allowed, the High Court allowed it in revision.¹⁷

6. Consideration. — The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution.¹

The composition spoken of in this section is in the nature of a contract, but monetary consideration is not necessary.² It has even been suggested that a lawful composition may be effected within the scope of this section without the passing of any consideration, the only essential thing required being that some arrangement should have been arrived at between the parties, which settles their differences.³ The Court is not concerned with the nature or value of the consideration. If the complainant considers that his grievance is redressed by the mere fact of respectable persons having intervened, though he has received no money payment or even a direct apology from the accused, he is, nevertheless, at full liberty to compound the prosecution.⁴ For instance, where a mere apology was the consideration, see the undermentioned case.⁵

7. Free will is necessary. — Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which a Court requires for the proof of any agreement which is in issue, and unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition.¹

8. Compoundable offences. — Under s. 188 of the Code of 1872, which did not give a list of compoundable offences, it was held that the test for determining whether an offence was compoundable or not was that wherever a word such as "voluntarily," "intentionally," "fraudulently," etc., was an essential part of the definition of the offence, it was not compoundable, but that where the offence was one irrespective of the intention and for which a civil action might be brought at the option of the persons injured, instead of criminal proceedings, it was compoundable.¹

16. (1900) 3 Oudh Cas 314 (315), *Girwar Singh v. Queen-Empress*.

17. ('10) 11 Cri L Jour 496 (497) : 7 I. C. 539 : 13 Oudh Cas 161, *Ram Sarup v. Emperor*.

Note 6

1. ('94) 21 Cal 103 (112, 115), *Murray v. Empress*.

('24) AIR 1924 Lah 595 (598) : 5 Lah 239 : 25 Cr. L. J. 629, *Anantia v. Emperor*. (Consideration — Apology.)

2. ('16) AIR 1916 Mad 854 (855) : 16 Cr. L. J. 803 (804) : 39 Mad 946, *Mahomed Kanni v. Inayatulla Sahib*. (Consideration — To refrain from pursuing other case pending in which the other party was the accused.)

3. ('96) 1896 Pun Re No. 9 Cr, p. 21 (23), *Haidayat Ali v. Empress*.

4. ('09) 10 Cri L Jour 228 (229) : 2 Sind L R 16, *Emperor v. Lilaram*.

5. ('23) AIR 1923 All 474 (476) : 45 All 145 : 24 Cr. L. J. 758, *John v. Emperor*.

Note 7

1. ('94) 21 Cal 103 (115), *Murray v. Empress*.

Note 8

1. ('76) 1 Bom 147 (154) (FB), *Reg. v. Rahimat*.

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Note 8

The essence of an offence under S. 143 is the combination of several persons united in the purpose of committing a criminal offence and such a combination in itself constitutes an offence distinct from the criminal offence which these persons agree to commit. So, though the law may allow the latter offence to be compounded, the effect of such composition is not to annul the common object charged, and the prosecution under S. 143 will not fall to the ground but may be proceeded with.²

The offence of rioting under S. 147 of the Penal Code, being an offence against the public tranquillity, primarily concerns the State more than the individual, and that is probably one reason why that offence is not included by the Legislature in the category of compoundable offences.³

The offences of extortion and fabricating false evidence are not private disputes and neither of these offences is compoundable.⁴

An offence under S. 21 of the Cattle Trespass Act is not compoundable. But where that offence was charged along with an offence under S. 323, Penal Code, and the parties effected a compromise in respect of the latter offence, it was held that the Magistrate, if he thought fit to do so, was entitled to deal with the compromise as a withdrawal of the complaint in respect of the offence under the Cattle Trespass Act, because a case in respect of such offence being a summons-case would result in an acquittal if no evidence were adduced.⁵

See also the undermentioned cases.⁶

Cases where offence was held to be not compoundable:

- ('76) 1 Bom 147 (157) (FB), *Reg. v. Rahimat*. (Grievous hurt.)
- ('74) 6 N W P H C R 302 (305), *Reg. v. Mudan Mohan*. (Do.)
- ('93-1900) 1893-1900 Low Bur Rul 210, *Queen-Empress v. Po Ba*. (Do.)
- ('80) 6 Cal L R 392 (392), *In the matter of Reference from the Chief Presidency Magistrate*. (Criminal breach of trust.)
- ('74) 7 Mad H C R App xxxiv (xxxiv). (Offence under S. 401.)
- ('76) 1 Mad 191 (192), *Reg. v. Muthavan*. (Enticing away a married woman.)
- ('80) 3 All 233 (284, 285), *Raunak Husain v. Harbans Singh*. (Offences under Ss. 417, 419, 465 and 468.)

Cases where offences were held to be compoundable:

- ('74) 22 Suth W R Cr 26 (27), *Queen v. Gopee Mohun*. (Kidnapping.)
- ('84) Oudh Sel Cas No. 74, *Queen-Empress v. Sidha*. (Offences under S. 335 or S. 338, Penal Code.)
- (1865) 4 Suth W R Cr 31 (31), *Queen v. Smith*. (Adultery.)
- ('73) 10 Bom H C R 68 (68), *Reg. v. Jetha Bhala*. (Voluntarily causing hurt — See however ('76) 1 Bom 147 (157) (FB), *Reg. v. Rahimat*.)
- 2. ('23) AIR 1923 Mad 592 (592):46 Mad 257:24 Cr. L. J. 114, *Venkanna v. Emperor*. [See however ('13) 14 Cr. L. J. 458 (459):20 I. C. 618 (Cal), *Basireddi v. Khayrat Ali*. (This case should be read carefully; there is no real conflict between this and AIR 1923 Mad 592.)]
- 3. ('07) 6 Cr. L. J. 336 (337):1907 Pun Re No. 11 Cr, *Emperor v. Hira Singh*. ('18) AIR 1918 Mad 494 (495):18 Cri L Jour 329 (330), *In re Koyassan Kutty*.
- 4. ('36) AIR 1936 Sind 146 (147):37 Cr. L. J. 1086:30 S. L. R. 217, *Virumal Mangammal v. Muhammad Khan*.
- 5. ('19) AIR 1919 All 31 (31):42 All 202:21 Cr. L. J. 305, *Emperor v. Julua*.
- 6. ('87) 1887 Rat 330 (330), *Empress v. Vithoba*. (S. 506, latter part — Offence not compoundable.)
- ('13) 14 Cr. L. J. 462 (463):20 I. C. 622 (L B), *Sarma Iyer v. Emperor*. (S. 452, Penal Code — Not compoundable.)
- ('01) 28 Cal 652 (663):5 C W N 457 (FB), *Dwarkanath v. Beni Madhab*. (Offence of criminal breach of trust, not compoundable.)
- ('12) 16 Cal W N cexlvi (cexlvi), *Sasadhar Sanyal v. Soshee Bhushan*. (Do.)

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Note 9

9. Who can compound. — Any person may set the criminal law in motion, but it is only the person specified in S. 345 who can compound the offence.¹ Hence, a husband may be a complainant when the offence is defamation of his wife by the imputation of unchastity to her but it is only the wife who is entitled to compound the offence.² Similarly, in the case of the offence of abduction, though the complaint may have been preferred by another person, *e. g.*, the father of the girl in whose custody the girl may have been at the time of the abduction, still it is only the husband who is competent to compound the offence.³

The offence of hurt can be compounded only by the person to whom the hurt is caused, and neither his heirs nor any other person can compound the offence.⁴ The offence of criminal trespass can be compounded by the person in whose possession the property was,⁵ the offence of wrongful restraint by the person restrained⁶ and the offence of wrongful confinement by the person confined.⁷

But where a person sends another man to the Court to represent him in filing a complaint, the Court is perfectly justified in accepting the latter's statement that he desires to compound the offence with the assumption that he is authorized by the former to compound it, and under the circumstances, it is not incumbent on the Court, before allowing the case to be compounded and acquitting the accused, to make any inquiry into his authority.⁸

(24) AIR 1924 All 209 (209) : 46 All 91 : 25 Cr. L. J. 1005, *Brij Behari Lal v. Emperor*. (S. 420, Penal Code—Compoundable.)

(97) 22 Bom 889 (890), *In re Motiram*. (Mischief, when loss or damage is caused to person—Compoundable.)

(14) AIR 1914 Oudh 264 (264) : 17 Oudh Cas 18 : 15 Cr. L. J. 230, *Ramphal v. Emperor*. (Offence under S. 211, Penal Code, cannot be lawfully compounded.)

Note 9

1. ('37) AIR 1937 Nag 72 (73) : 38 Cr. L. J. 334 : I L R (1937) Nag 286, *In re Khilawan Singh*. (Wrongful confinement—Offence can be compounded only by person confined.)

(27) AIR 1927 Bom 410 (411) : 51 Bom 512 : 28 Cr. L. J. 581, *Dajiba Ramji v. Emperor*. (Complaint by wife for cheating husband—Composition by her—Composition not valid so as to bar complaint by husband.)

2. ('91) 14 Mad 379 (381) : 2 Weir 230 : 1 M L J 242, *Chellam v. Ramaswami*. (1872-92) 1872-92 Low Bur Rul 617, *Queen-Empress v. Nga Pau Gale*.

3. ('22) AIR 1922 Lah 177 (178) : 23 Cr. L. J. 690, *Mir Alam v. Emperor*.

(24) AIR 1924 Lah 330 (331) : 24 Cr. L. J. 780, *Mahbub Ali Khan v. Emperor*.

4. ('15) AIR 1915 All 443 (443) : 37 All 419 : 16 Cr. L. J. 586, *Emperor v. Rahmat*. (Widow of the person hurt.)

(92) 2 Weir 418 (418), *In re Gangamma Dorayya*. (Do.)

(15) AIR 1915 Mad 635 (635) : 37 Mad 385, *Mottai Reddy v. Thanappa Reddy*.

(17) AIR 1917 All 377 (378) : 18 Cr. L. J. 729, *Lala v. Emperor*. (Compromise cannot be accepted when some of the persons hurt are no parties to it.)

(09) 10 Cr. L. J. 473 (474) : 31 All 606 : 4 I. C. 24, *Emperor v. Sultan Singh*. (Hurt caused to three persons—One dying—Survivors not competent to compromise the offence as regards the deceased.)

5. ('95) 22 Cal 123 (130), *Chandi Pershad v. Evans*.

(24) AIR 1924 Mad 40 (40) : 24 Cr. L. J. 824, *Avudayappa Mudaliar v. Emperor*. (Offence committed within the Court compound is not criminal trespass.)

6. ('27) AIR 1927 All 375 (376) : 49 All 484 : 28 Cr. L. J. 495, *Mrs. F. M. Torpey v. Emperor*.

7. ('37) AIR 1937 Nag 72 (73) : 38 Cr. L. J. 334 : I L R (1937) Nag 286, *In re Khilawan Singh*. (Accused charged for wrongful confinement of two persons—One person compounding his case—Acquittal of accused is illegal.)

8. ('24) AIR 1924 All 778 (779) : 26 Cr. L. J. 98, *Harbans v. Emperor*.

10. Minor.— Sub-section (4) clearly implies that a person under eighteen years of age cannot compound an offence. Previous to the amendment of the sub-section in 1923, the word used in the section was a "minor" and no reference was made to the age limit. It was held that the age of majority contemplated by this section was not to be regulated by the personal law of the party concerned and that the effect of this section read with S. 3 of the Indian Majority Act was that a person under eighteen years of age could not lawfully compound the offences declared to be compoundable by this section.¹ This view has been given effect to by the amendment.

A husband committed the offence of hurt against his wife, a minor. She, at the suggestion of her father with whom she was living, filed a complaint against her husband. It was held that the father of the girl was competent to compound the offence on her behalf.² Where an offence is compounded on behalf of a minor under sub-s. (4), the permission of the Court is necessary for such composition.³

11. Composition under sub-section (1).— In cases falling under sub-s. (1), no leave of the Court is necessary for compounding¹ and in such cases the Magistrate has no option but is bound to allow the compromise.² Parties are entitled to compound such offences unconditionally and when a *razinama* is filed by them, it is not for the Magistrate to inquire whether the complaint was frivolous or vexatious.³ The mere fact that the accused has been sent up by the police does not prevent the person mentioned in the third column of the table from compounding the offence.⁴

Where the offence is compoundable by parties without the leave of the Court, and it is so compounded, and a deed of composition is filed by all the parties present in Court, the only verification necessary is to see whether the parties signed it and understood its contents; the Magistrate should not adjourn the case for verification or call for further proof of the compromise but should, without unnecessary delay, acquit the accused.⁵

[See however ('23) 24 Cr. L. J. 120 (123) : 71 I. C. 248 (250) (Pesh), *Harnam Das v. Sain Dass*. (It is not mentioned in this case whether the prosecution by the complainant was on behalf of herself or on behalf of the husband of the girl abducted.)]

Note 10

1. ('91) 1891 Pun Re No. 17 Cr, p. 55 (59), *Shib Singh v. Empress*.
2. ('29) AIR 1929 Nag 278 (278,279) : 30 Cri L Jour 960, *Emperor v. Bhaiyalal*.
3. ('37) AIR 1937 Mad 825 (826) : 39 Cr. L. J. 133, *In re Ponnuswamy Ayyar*.

Note 11

1. ('37) AIR 1937 Mad 825 (826) : 39 Cr. L. J. 133, *In re Ponnuswamy Ayyar*. (Composition under S. 345 (1) is an act of parties.)
- ('21) AIR 1921 Cal 403 (404) : 22 Cr.L.J.301, *Hem Chandra v. Girindra Chandra*.
2. ('86) 1886 All W N 167(167), *Empress v. Ramgopal*. (Voluntarily causing hurt.)
- ('84) 1884 All W N 256 (256), *Empress v. Corrie*. (Do.)
- ('93-1900) 1893-1900 Low Bur Rul 484, *Queen-Empress v. Nga San Hla*.
- ('10) 11 Cri L Jour 638 (639) : 8 I. C. 387 : 1910 Pun Re No. 30 Cr, *Emperor v. Sundar Singh*. (Criminal trespass and causing hurt.)
- ('97-01) 1 Upp Bur Rul 350 (351), *Emperor v. Dhera Mal*. (House trespass.)
3. ('09) 9 Cri L Jour 186 (187):10 Bom L R 1056, *In re Harkisan Das Haridas*.
4. ('84) 10 Cal 551 (553), *Queen-Empress v. Nawabjan*.
5. ('30) AIR 1930 All 409 (410):52 All 254:31 Cr.L.J. 1215, *Jhangtoo v. Emperor*.

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Where the Court has drawn up a charge of an offence compoundable without the sanction of the Court and after this charge has been read and explained to the accused and pleaded to, a petition of composition is presented to it, the Court should at once accept the petition and acquit the accused; it has no power at that stage to alter the charge; the composition has the effect of an acquittal and is complete immediately the complainant puts it forward in Court.⁶ Where a Magistrate records a compromise, he becomes *functus officio*, and an order stating that the parties should again appear on another date is of no effect.⁷

In cases falling under sub-s. (1) in the absence of any express provision to the contrary, the natural interpretation is that the composition is not limited to acts done in Court or to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court.⁸ So far at least as offences falling under sub-s. (1) are concerned, there is no necessity for the composition to be effected in Court in criminal trials any more than in civil suits.⁹

12. Compositions under sub-section (2). — In cases governed by sub-s. (2), no effect can be given to a compromise as a plea in bar of conviction unless the Court has sanctioned the compromise. Without the sanction the so-called compromise arrived at between the parties is of no effect. The jurisdiction of the Court to try the offence is unaffected and there is no rule of law which would enable the Court in a case falling under sub-s. (2) to order an enquiry into the factum of compromise alleged by one party and denied by the other.¹

An agreement to compound an offence falling within this sub-section can only be effected with the Court's permission after the institution of criminal proceedings.^{1a} Where an agreement to compound has been arrived at, the operation of a composition is suspended till the Court sanctions it. But where the composition has been made out of Court and at a certain stage in the proceedings the Court gives its sanction thereto, the composition is not bad.²

(199) 3 Cal W N 322 (323), *Kusum Bewa v. Bechu Bewa*.

(14) AIR 1914 Bom 258 (259) : 16 Cri L Jour 88, *Emperor v. Gana Krishna*.

(199) 3 Cal W N 548 (550), *Mahomed Ismail v. Faizuddi*.

6. (14) AIR 1914 Lah 561 (563) : 1914 Pun Re No. 29 Cr : 16 Cr. L. J. 81 (FB), *Hasta v. Emperor*.

7. (21) AIR 1921 Pat 290 (291) : 22 Cri L Jour 675, *Amar Ali v. Emperor*.

8. (16) AIR 1916 Mad 854 (855) : 16 Cri L Jour 803 (804) : 39 Mad 946, *Mad. Kanni Rowther v. P. Inayathulla*.

9. (13) 14 Cr. L. J. 292 (293) : 6 Sind L R 284 : 191. C.948, *Imperator v. Mulo*.

Note 12

1. (37) AIR 1937 Mad 825 (826) : 39 Cri L Jour 133, *In re Ponnuswamy Ayyar*.

(28) AIR 1928 Lah 232 (234) : 9 Lah 400 : 29 Cr. L. J. 585, *Naurang v. Kidar*.

1a. (38) AIR 1938 Nag 37 (38) : 39 Cri L Jour 59 : 1 L R (1940) Nag 195, *Harwarup Baburam v. Emperor*. (Offence under S. 420, Penal Code — Agreement to compound the case before it came to Court is ineffective.)

(37) AIR 1937 Mad 825 (826) : 39 Cri L Jour 133, *In re Ponnuswamy Ayyar*. (Any act of parties before prosecution is begun is not a composition under sub-s. (2) and has no effect on the trial.)

(12) 8 Nag L R 97 (105) : 16 Ind Cas 555 (559), *Kishan Lal v. Aman Singh*.

2. (19) AIR 1919 Mad 879 (881, 882) : 41 Mad 685 : 19 Cr. L. J. 359, *Kumaraswami Chetty v. Kuppaswami Chetty*.

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Note 12

The only Court which has power under S. 345, sub-s. (2), is the Court before which the prosecution is pending.³ A police-officer is not competent to entertain an application for withdrawal of a complaint, as permitting the withdrawal of a complaint is a judicial act the exercise of which is vested in the Magistrate by Ss. 218 and 215, and the police have no authority to interfere in such matters.⁴

The judicial officer charged with the duty of determining judicially matters which come before him should himself decide the petition for withdrawal of a complaint or petition for a compromise and should not refer it to the District Magistrate or the police for their opinion.⁵ It is the duty of the Magistrate in each case, which is compoundable with his permission, to decide whether or not he should allow the compromise, and the responsibility rests with him.⁶

In granting permission, the Court should exercise a sound and reasonable discretion. Permission is not to be granted as a matter of course.⁷ A Magistrate is bound to consider all facts before acceding to a sanction; he ought not to permit an offence to be compounded until

3. ('37) AIR 1937 Nag 114 (115): 38 Cri L Jour 689: I L R (1937) Nag 183, *Partap Singh v. Emperor*.

('93-1900) 1893-1900 Low Bur Rul 392, *Tayya v. Maung Ba Hlaing*.

4. ('75) 1875 Rat 91 (91).

('92-96) 1 Upp Bur Rul 42 (42).

5. ('38) AIR 1938 Nag 39 (40): 39 Cri L Jour 120, *In re Har Prasad*. (Magistrate should use his own discretion after hearing parties in open Court — Magistrate though willing to allow compounding, refusing to do so on opinion of police as disclosed in communication—Procedure disapproved.)

('37) AIR 1937 Nag 114 (115): 38 Cri L Jour 689: I L R (1937) Nag 183, *Partap Singh v. Emperor*. (The Magistrate himself must determine the question. *A fortiori* the Court is not permitted to refer the question to any outside agency much less to the District Superintendent of Police.)

('26) AIR 1926 Cal 590 (591): 27 Cri L Jour 515, *Azizur Rahman v. Emperor*. (Magistrate should not refer petition for withdrawal by complainant to Superintendent of Police.)

('30) AIR 1930 Lah 272 (272): 32 Cr. L. J. 20, *Partap Singh v. Emperor*. (District Magistrate.)

('32) 1932 Mad W N 1088 (1089), *Subba Rao v. Ahmad Darsi*. (Court is not entitled to substitute the discretion of the police-officer conducting the prosecution for his own in the matter of allowing composition.)

('35) AIR 1935 Lah 226 (227): 35 Cr. L. J. 1372, *Sultan v. Emperor*. (Reference to District Magistrate for instructions is improper.)

[See however ('39) AIR 1939 Pat 141 (142): 40 Cri L Jour 460, *Dharichhan Singh v. Emperor*. (Observations in this case suggest that the Magistrate can act on the opinion of the police in granting or withholding permission but it is remarked that the proper course is not to send the file itself to the police but to ask the Public Prosecutor to ascertain the views of the Crown.)

('38) AIR 1938 Nag 37 (38): 39 Cr. L. J. 59: I L R (1940) Nag 195, *Harswarup Baburam v. Emperor*. (Permission for composition—Matter referred to police for opinion—Magistrate, after reply, hearing arguments and exercising his own judgment—Action of calling upon police opinion is not illegal.)

6. ('37) AIR 1937 Nag 114 (115): 38 Cr. L. J. 689: I L R (1937) Nag 183, *Partap Singh v. Emperor*. (A Magistrate cannot refer the question whether an offence should be compounded or not to the superior Court.)

('22) AIR 1922 Lah 138 (138): 23 Cri L Jour 85, *Seva Singh v. Emperor*. (Compounding at early stage of proceeding—Offence not serious—Compounding must be allowed.)

7. ('93-1900) 1893-1900 Low Bur Rul 392, *Tayya v. Maung Ba Hlaing*.

('01) 1 Upp Bur Rul 83 (83), *Queen-Empress v. Nga Tun Mya*. (Accused absconded for two years to evade process of law — Magistrate's order granting permission to compound held improper.)

stances were not considered, the compromise was set aside by the High Court in revision.¹⁹

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In allowing a compromise, a Magistrate may impose a condition as to payment of some compensation to the injured man.²⁰

The mere fact that a petition for compromise is filed in Court (but is not allowed) is no ground for the reduction of a sentence.²¹

13. Proof of composition. — Where an accused person alleges that the offence of which he is charged has been compounded, the onus is on him to show that there has been a real and valid composition with the person entitled to compound.¹ Before a composition can be allowed, the Court must be satisfied that it is legal and valid in law.² Where a compromise is alleged by one party and denied by the other, the Magistrate must try the issue.³ An order of the Magistrate, acquitting the accused without inquiry into the truth of the alleged compromise, is bad in law and may be set aside.⁴

14. Stage at which a compounding may be effected. — An offence, which is compoundable without the permission of the Court, may be compounded even before the filing of a complaint.¹ A case may be compounded at any time before judgment is pronounced.² The fact that the prosecution evidence has been closed and that a charge has been framed is no bar to the composition as the offence can be compounded at any time before the passing of the sentence.³ After conviction, however, there can be no composition except with the leave of the appellate Court.⁴ Where an order is made by a District Magistrate under S. 435, calling for the record and proceeding before a Magistrate with a view to withdrawing the case and transferring it to another Magistrate, the jurisdiction of the former Magistrate is suspended and he is not, therefore, entitled to record a composition of

19. ('14) AIR 1914 Sind 134 (134): 7 Sind L R 200: 15 Cr. L. J. 553, *Emperor v. Ramzan Bachal*.

20. ('22) AIR 1922 Lah 138 (138): 23 Cri L Jour 85, *Sewa Singh v. Emperor*.

21. ('11) 12 Cri L Jour 243 (243): 10 Ind Cas 773 (LB), *Emperor v. Mya Din*.

Note 13

1. ('93) 21 Cal 103 (112, 115) *Murray v. Empress*.

('27) AIR 1927 Bom 410 (411): 51 Bom 512: 28 Cr. L. J. 581, *Dajiba Ramji v. Emperor*.

2. ('29) AIR 1929 Bom 375 (376): 31 Cr.L.J. 353, *Hanmant Srinivas v. Emperor*.

3. ('19) AIR 1919 Mad 879 (880): 41 Mad 685: 19 Cr. L. J. 359, *Kumaraswamy Chetty v. Kuppuswamy Chetty*.

('31) AIR 1931 Lah 402 (402): 32 Cri L Jour 1034, *Madari v. Emperor*.

('16) AIR 1916 Mad 854 (855): 16 Cr. L. J. 803 (804): 39 Mad 946, *Mad. Kannu Rowther v. P. Inayatulla*.

('13) 14 Cr. L. J. 292 (293): 6 Sind L R 284: 19 I C 948, *Imperator v. Mulo*.

4. ('32) AIR 1932 Sind 7 (8): 25 Sind L R 341: 33 Cr.L.J. 109, *Abduljabar v. Emperor*.

Note 14

1. ('19) AIR 1919 Mad 879 (881, 882): 41 Mad 685: 19 Cri L Jour 359, *Kumaraswamy Chetty v. Kuppuswamy Chetty*.

('27) AIR 1927 All 375 (376): 49 All 484: 28 Cr.L.J. 495, *F. M. Torpey v. Emperor*.

[See also ('37) AIR 1937 Mad 825 (826): 39 Cri L Jour 133, *In re Ponnuswamy Ayyar*. (Composition under S. 345 (1) may be made at any time.)]

2. ('18) AIR 1918 Cal 238 (238): 45 Cal 816: 19 Cr.L.J. 752, *Aslam Mea v. Emperor*.

3. ('28) 29 Cr.L.J. 1058 (1059): 112 I.C. 562 (Lah), *Muhammad Ali v. Emperor*.

4. See Note 15.

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the offence and acquit the accused, though at that time the case has not actually been transferred from his file.⁵

15. Composition after committal or conviction.—A committal once made by a Magistrate cannot be annulled by his allowing the prosecutor to file a compromise.¹ After conviction a composition can be effected only with the leave of the appellate Court.²

Where an accused is tried and convicted of an offence which is compoundable, but on appeal the conviction is set aside and a re-trial ordered, it is open to the complainant and accused to compound the case in the same manner as they might have done prior to the conviction, and no leave of the appellate Court is necessary.³

A compromise entered into after the hearing of the appeal is too late and does not come within S. 345.⁴

16. High Court's powers in revision.—Before the introduction of sub-s. (5A) by Act XVIII of 1923, divergent views were held as to whether a High Court had power to apply the powers granted in S. 345 to cases in revision; some cases holding that the High Court had no such power¹ and other cases taking the opposite view.² The introduction of

5. ('25) AIR 1925 Bom 247 (247) : 49 Bom 533 : 26 Cr. L. J. 996, *In re Maruthi Vithu*.

Note 15

1. (1865) 2 Suth W R Cr 57 (57), *Queen v. Salim Sheikh*.

See also S. 213 Note 5 and S. 215 Note 7.

2. ('20) AIR 1920 Mad 245 (245) : 20 Cr. L. J. 832, *In re Pedakanti Chinna Naidu*. ('15) AIR 1915 All 8 (9) : 37 All 127 : 16 Cr. L. J. 247, *Ramchandra v. Emperor*.

[See ('34) AIR 1934 Sind 122 (122) : 28 Sind L R 109 : 36 Cri L Jour 210, *Jumo Sherkhan v. Emperor*. (Court will be reluctant to grant leave where the conviction or committal is considered right.)]

[But see ('79) 2 All 339 (340), *Empress of India v. Thomson*. (Case under Code of 1872 which did not contain a provision corresponding to the present sub-s. (5).)]

3. ('06) 4 Cr. L. J. 35 (35) : 3 A L J 523 : 1906 A W N 200, *Umrai v. Makbulan*.

4. ('33) AIR 1933 All 434 (436) : 34 Cri L Jour 926, *Emperor v. J. M. Chatterji*. ("Court before which the appeal is to be heard" in sub-s. (5) indicates that compromise should not be after appeal is heard.)

[See however ('25) AIR 1925 Cal 14 (17) : 26 Cri L Jour 401 : 52 Cal 347, *T. C. S. Marlindale v. Emperor*. (Leave granted by High Court in appeal on date of judgment—Provisions of sub-s. (5) not adverted to.)]

Note 16

1. ('16) AIR 1916 Mad 483 (484) : 16 Cr. L. J. 750 : 39 Mad 604, *Sankar Rangayya v. Sankar Ramayya*.

('15) AIR 1915 All 8 (9) : 37 All 127 : 16 Cr. L. J. 247, *Ramchandra v. Emperor*.

('20) AIR 1920 All 169 (169) : 42 All 474 : 21 Cri L Jour 447, *Ram Baran Singh v. Emperor*.

('17) AIR 1917 All 377 (378) : 18 Cri L Jour 729, *Lala v. Emperor*.

('17) AIR 1917 Cal 705 (706) : 17 Cri L Jour 339 : 43 Cal 1143, *Akshoy Singh v. Rameshwar*.

('14) AIR 1914 Cal 901 (901) : 15 Cr. L. J. 728, *Adhar Chandra v. Subodh Chandra*.

('19) AIR 1919 Lah 471 (472) : 1919 Pun Re No. 35 Cr : 20 Cr. L. J. 87, *Emperor v. Harnam Singh*.

('23) AIR 1923 Pat 89 (90) : 23 Cri L Jour 80, *Audhi Rai v. Emperor*.

2. ('10) 11 Cr. L. J. 203 (203) : 32 All 153 : 5 I. C. 696, *Ram Piyari v. Emperor*.

('22) AIR 1922 All 488 (488) : 45 All 17 : 24 Cri L Jour 854, *Shibbo v. Emperor*.

('13) 14 Cr. L. J. 46 (46) : 18 I. C. 270 (All), *Naqi Ahmad v. Emperor*. (Power of revision Court doubted ; but on the authority of 11 Cri L Jour 203 compromise allowed.)

('22) AIR 1922 Lah 138 (138) : 23 Cri L Jour 85, *Sewa Singh v. Emperor*.

('14) AIR 1914 Oudh 167 (167) : 17 Oudh Cas 92 : 15 Cr. L. J. 567, *Lalla v. Emperor*.

('24) AIR 1924 Oudh 260 (261) : 24 Cri L Jour 590, *Chhotai Singh v. Emperor*.

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sub-s.(5A) leaves the position free from doubt and explicitly confers on the High Court, acting in the exercise of its powers of revision under S. 439, power to allow any person to compound offences which may lawfully be compounded.³ One of the objects of the Legislature in enacting sub-s.(5A) was, in suitable circumstances, to allow the parties to compromise their disputes even after the cases in which they were concerned had been heard and determined by the Courts competent to try them.⁴ But the sub-section should be interpreted very strictly and the discretion conferred upon the High Court should be exercised very sparingly and only in suitable cases.⁵ The sub-section has to be read subject to the preceding sub-sections of S. 345 especially sub-ss.(1) and (2), and so read it is clear that sub-s.(5A) merely confers jurisdiction on the High Court in the exercise of its powers of revision under S. 439 to allow the aggrieved persons mentioned in column three of the tables attached to sub-ss.(1) and (2) to compound the various offences mentioned in those sub-sections. Thus, it would follow that ordinarily the party who seeks to invoke the jurisdiction of the High Court under sub-s.(5A) must be the person aggrieved by the offence which has been committed and not an accused person or a person who has been convicted in respect of that offence.⁶

It will not be competent for the High Court to allow a compromise to be recorded under sub-s.(5A) unless the aggrieved persons were actually before the High Court and had expressly recorded their consent to such a compromise being recorded.⁷

It has also been held that where the proceedings before the lower Courts disclose no irregularity or impropriety, the exceptional power conferred on the High Court under sub-s.(5A) should not ordinarily be used except in a case in which the record indicates that the parties made some attempt to compromise their differences while the matter

(104) 1 Cri L Jour 509 (511) (Lah), *Nidhan Singh v. Emperor*.

(110) 11 Cri L Jour 496 (497) : 13 O. C. 161 : 7 I. C. 539, *Ram Sarup v. Emperor*.

3. ('24) AIR 1924 All 209 (209) : 46 All 91 : 25 Cr. L. J. 1005, *Brij Behari Lal v. Emperor*.

(129) AIR 1929 Nag 278 (279) : 30 Cri L Jour 960, *Emperor v. Bhaiyalal*.

(130) AIR 1930 Lah 272 (272) : 32 Cri L Jour 20, *Partap Singh v. Emperor*.

(125) AIR 1925 Pat 583 (584) : 26 Cri L Jour 1345, *Nehal Ahmad v. Emperor*.

(129) AIR 1929 Pat 512 (512) : 31 Cr. L. J. 607, *Singheswar Prasad v. Ali Hasan*.

(126) 27 Pun L R 231 (231), *Nizam Din v. Emperor*.

(129) AIR 1929 Cal 96 (96) : 55 Cal 1190 : 30 Cr. L. J. 484, *Titan Paramanick v. Ghintan Paramanick*.

(134) AIR 1934 Lah 317 (317) : 35 Cr. L. J. 579, *Hakim Ali v. Emperor*. (High Court can permit composition even in cases where Courts below have refused permission.)

(134) AIR 1934 Sind 122 (122) : 28 Sind L R 109 : 36 Cr. L. J. 210, *Jumo Sher Khan v. Emperor*. (Where there has been a conviction and that conviction has been upheld in appeal, High Court will be slow to allow a compromise.)

4. ('39) AIR 1939 Cal 728 (730) : 41 Cr. L. J. 125 : ILR (1939) 1 Cal 567, *Babur Ali v. Kala Chand*.

5. ('39) AIR 1939 Cal 728 (730) : 41 Cr. L. J. 125 : ILR (1939) 1 Cal 567, *Babur Ali v. Kala Chand*.

6. ('39) AIR 1939 Cal 728 (730) : 41 Cr. L. J. 125 : ILR (1939) 1 Cal 567, *Babur Ali v. Kala Chand*.

7. ('39) AIR 1939 Cal 728 (730) : 41 Cr. L. J. 125 : ILR (1939) 1 Cal 567, *Babur Ali v. Kala Chand*.

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was still before the trial Court and before that Court passed final orders in the case.⁸

17. Rescission of compromise. — A composition once effected cannot be withdrawn.¹ It is entirely immaterial whether the terms of the compromise have been carried out or not, the sole question being whether there was a composition or not; a breach of the agreement might give rise to other remedies.² Since the compromise has the immediate effect of acquittal (see Note 18) so as to deprive the Magistrate of his jurisdiction to try the case, the subsequent withdrawal from it by any party can neither affect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case.³

18. Effect of compromise. — When a case is compounded, it results not merely in a *discharge* but in an *acquittal* and until such order of acquittal is properly set aside, the accused cannot be prosecuted again for the same offence¹ or for any other offence (which is not distinct) for which a different charge from that which was compounded might have been framed on the same facts.² Where at the time of compromise of the offence it was believed that the offence fell under S. 323, it was held that the discovery later that it fell under S. 325 would not enable the Magistrate to re-open the prosecution for that offence.³ The composition of one offence will not, however, bar a prosecution for a distinct offence of which the accused might have been charged

8. ('39) AIR 1939 Cal 728 (730) : 41 Cr. L. J. 125 : ILR (1939) 1 Cal 567, *Babur Ali v. Kala Chand.*

Note 17

1. ('40) AIR 1940 Nag 181 (182) : 41 Cr. L. J. 287, *Mt. Rambai v. Mt. Chandrakumari*. (If it is proved that the parties signed the document and understood its contents it is incompetent for any party to it to withdraw from it.)

2. ('30) AIR 1930 All 409 (410) : 52 All 254 : 31 Cr. L. J. 1215, *Jhangtoo Barai v. Emperor*. (In criminal matters it is of highest importance that there should be finality.)

('19) AIR 1919 Mad 879 (880, 882) : 41 Mad 685 : 19 Cr. L. J. 359, *Kumara-swamy v. Kuppusamy*.

('99) 3 Cal W N 322 (323), *Kusum Bewa v. Bechu Bewa*.

('13) 14 Cr. L. J. 458 (459) : 20 Ind Cas 618 (Cal), *Basireddi v. Khayrat Ali*.

('25) AIR 1925 Lah 159 (160) : 25 Cri L Jour 810, *Ram Richpal v. Mata Din*.

[But see (04) 1 Cri L Jour 705 (706) (Lah), *Ghulam Haidar v. Rukan Abdulla*.]

3. ('40) AIR 1940 Nag 181 (182) : 41 Cr. L. J. 287, *Mt. Rambai v. Mt. Chandra Kumari*.

('39) AIR 1939 Pat 141 (142) : 40 Cr. L. J. 460, *Dharichhan Singh v. Emperor*.

('21) AIR 1921 Cal 403 (405) : 22 Cr. L. J. 301, *Hemchandra v. Girindra Chandra*. (Compromise has effect of acquittal though one of the parties later on resiles from the compromise. AIR 1916 Mad 854, followed.)

Note 18

1. ('24) AIR 1924 All 778 (779) : 26 Cri L Jour 98, *Harbans v. Emperor*.

('93) 21 Cal 103 (112), *Murray v. Queen-Empress*.

('10) 11 Cri L Jour 366 (368) : 6 Ind Cas 497 (Lah), *Emperor v. Harnam Singh*.

('07) 6 Cri L Jour 336 (337) : 1907 Pun Re No. 11 Cr, *Emperor v. Hira Singh*.

('13) 14 Cri L Jour 292 (293) : 19 Ind Cas 948 : 6 S. L. R. 284, *Imperator v. Mulo*.

('34) AIR 1934 Lah 317 (317) : 35 Cri L Jour 579, *Hakim Ali v. Emperor*.

See also S. 403 Note 8.

2. ('90) 1890 Rat 519 (520), *Queen-Empress v. Wali Asmal*. (Compounding of offence under S. 324, Penal Code—Retrial on same facts on a charge under S. 323 held improper.)

3. ('84) 1884 All W N 13 (14), *Empress v. Unkar*.

on the same facts under S. 235(1).⁴ Moreover, a composition has the effect of an acquittal only in respect of the offence which has been compounded and not of the other offences of which the accused is charged in the case⁵ and only as between the person who is entitled to compound and the accused with whom the composition takes place.⁶ There was a doubt prior to the amendment of the Code in 1923 as to whether in the case of several accused the compounding of the offence against one or some of them alone affects the case against the others — some cases holding that it did not⁷ and others that it did.⁸ The controversy has been set at rest by the amendment of sub-s.(6).⁹

If a non-compoundable case is dismissed on the parties coming to an amicable settlement, the dismissal does not amount to an acquittal but only to a discharge and does not bar the revival of the prosecution.¹⁰ Where an order of acquittal has been passed on an invalid composition, it may be set aside in revision.¹¹ A Magistrate is not competent to award compensation to the accused where an offence is compounded under S. 345.¹² The reason is that section 250 only applies where the Magistrate discharges or acquits the accused whereas under this section the acquittal takes place automatically on the composition of an offence.

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Note 18.

4. ('29) AIR 1929 Bom 283 (285) : 53 Bom 604 : 30 Cr. L. J. 1059, *Manjubhai Gordhandas v. Emperor*. (Compounding of offence under S. 324, Penal Code, does not bar prosecution under S. 19 (e), Arms Act.)
5. ('30) AIR 1930 All 92 (93) : 30 Cri L Jour 1149, *Hukum Singh v. Emperor*. ('25) AIR 1925 Lah 464 (464) : 26 Cr. L. J. 686, *Emperor v. Jarnally*. (Charges under Ss. 325 and 147, Penal Code — Compromise in respect of charge under S. 325—Prosecution under S. 147 not barred.)
6. ('38) AIR 1938 Lah 739 (740) : 40 Cr.L.J. 131, *Mt. Harbans Kaur v. Lahari Ram*. (Defamatory allegations against minor daughter affecting father — Father and daughter can file separate complaints — Compromise and consequent acquittal of accused in father's complaint do not affect complaint by daughter.)
- ('37) AIR 1937 Nag 72 (73) : 38 Cri L Jour 334 : I L R (1937) Nag 286, *In re Khilawan Singh*. (Accused charged for wrongful confinement of two persons — One person compounding his case — Magistrate acquitting accused — Acquittal is illegal.)
- ('30) 1930 Mad W N 692 (694), *Venkataswami Naidu v. Narappa Naicken*.
- ('23) AIR 1923 Cal 168 (169) : 24 Cri L Jour 578, *Shib Chandra v. Rubbani*.
7. ('21) AIR 1921 All 35 (35) : 43 All 483 : 22 Cr. L. J. 353, *Chandan v. Emperor*.
- ('21) AIR 1921 Bom 166 (167) : 45 Bom 346 : 22 Cr. L. J. 55, *Emperor v. Alibhai*.
- ('20) AIR 1920 Lah 108 (108) : 1 Lah 169 : 21 Cr.L.J. 437, *Ram Kishen v. Emperor*.
- ('21) AIR 1921 Sind 101 (101) : 16 Sind L R 149 : 26 Cr. L. J. 238, *Emperor v. Abdul Hakim*.
- ('18) AIR 1918 Mad 413 (413) : 41 Mad 323 : 19 Cr.L.J. 176, *Muthia v. Emperor*.
8. ('03) 7 Cal W N 176 (176), *Chandrakumar v. Emperor*.
- ('20) AIR 1920 Pat 828 (828) : 20 Cri L Jour 824, *Shyam Behari v. Sagar Singh*.
- ('23) AIR 1923 Pat 348 (348) : 23 Cri L Jour 432, *Sarajkumar v. Emperor*.
9. ('26) AIR 1926 Lah 424 (424) : 7 Lah 344 : 27 Cr. L. J. 576, *Emperor v. Mohna*.
- ('24) AIR 1924 Lah 595 (596) : 5 Lah 239 : 25 Cr. L. J. 629, *Anantia v. Emperor*.
- ('33) 1933 Mad W N 222 (222), *Thirumalai Naicken v. Emperor*.
10. ('75) 1 Bom 64 (66), *Reg. v. Devama*.
11. ('23) 24 Cr. L. J. 120 (122) : 71 I. C. 248 (250) (Pesh), *Harnam v. Sain Dass*.
12. ('92) 7 C P L R Cr 2 (3), *Alopi v. Bhura*.
- ('94) 1894 Rat 700 (700), *Queen-Empress v. Raoji*.
- ('98) 1898 Rat 957 (957), *Empress v. Sangappa*.
- ('09) 9 Cri L Jour 186 (187) : 10 Bom L R 1056, *In re Harkisandas Hari Das*.
- ('10) 11 Cri L Jour 638 (639) : 8 I. C. 387 : 1910 Pun Re No. 30 Cr, *Emperor v. Sunder Singh*
- ('88) 1888 Pun Re No. 19 Cr, p. 35 (37), *Empress v. Khushali Ram*.
- [But see ('83) 1883 Pun Re No. 24 Cr, p. 57 (57), *Himmat Singh v. Bukhtawar*. (Dissented from in 1888 Pun Re No. 19 Cr, p. 35.)

Section 345
Notes 18-20

But though the Magistrate cannot allow compensation, if the complaint is wholly false, he may consider whether a criminal prosecution for making a false complaint is desirable in the interests of justice.¹³ In the case of a dispute between two brothers wherein the prosecution for theft was found to be false, it was held that the parties being brothers, the prosecution of the complainant under S. 182 should not have been instituted.¹⁴

If a case is compounded, the composition does not prevent the complainant being charged under S. 211 if the complaint was false.¹⁵

Where a compromise has been entered into, orders passed in connexion with the compromise by the Magistrate before whom the case was pending must be deemed to have been passed by him in his judicial capacity.¹⁶

Where an offence under S. 324, Penal Code, committed by a person who has executed a security bond under S. 107 to keep the peace is compounded, the composition has the effect of acquittal of the accused and unless there is any other evidence on the record to show that he committed the breach of the peace, the bond cannot be forfeited.¹⁷

19. Sub-section (7). — The provisions of sub-s. (7) seem to be perfectly general and govern the composition of offences whether any steps have been taken or not to prosecute the offender.¹

Section 345 contains provisions with regard to : (a) persons who may compound ; (b) the nature of offences which may be compounded ; (c) the stage at which composition is sought to be made and (d) permission of Court in certain cases. Sub-section (7) must be taken to mean that no offences shall be compounded except where the provisions of S. 345 are satisfied as to all these matters.²

20. Civil suit. — Where the offences were compoundable and the complainant had already sued the accused on the same cause of action and obtained adequate damages, it was held that, in the circumstances of the case, it was not necessary in the ends of justice that he should again be put to trial in a criminal Court for the same offence.¹ The effect of the compounding of an offence which is compoundable, apart from the acquittal of the accused, would be that

13. ('94) 1894 Rat 700 (700), *Queen-Empress v. Raoji*.

See also S. 250 Note 7.

14. ('18) AIR 1918 All 100 (100) : 19 Cri L Jour 730, *Chaitan Lal v. Emperor*.

15. ('84) 11 Cal 79 (81), *Empress v. Atar Ali*. (Offence under S. 347, Penal Code.)

[See however ('88) 1888 Pun ReNo. 19 Cr, p. 35 (37, 38), *Empress v. Khushali Ram*.

(The decision in 11 Cal 79 cited above only applies to non-compoundable offences.)]

16. See ('33) AIR 1933 Cal 344 (345), *In re H, a pleader*.

17. ('40) AIR 1940 Lah 32 (32) : 41 Cri L Jour 359, *Chanda Singh v. Emperor*.

(It is however open to a Magistrate to take independent evidence to show that the accused committed the breach of the peace.)

Note 19

1. ('18) AIR 1918 Nag 181 (183), *Warisali v. Mohammad Azimulla Khan*.

2. ('17) AIR 1917 Cal 705 (706) : 43 Cal 1143 : 17 Cri L Jour 339, *Akshoy Singh v. Rameshwar Bagdi*.

('16) AIR 1916 Mad 483(485):39 Mad 604:16 Cr.L.J. 750, *Rangayya v. Ramayya*.

Note 20

1. ('24) AIR 1924 Mad 31 (31) : 25 Cr. L. J. 138, *Tiruvangadachariar v. Chockalingam Chetty*.

a suit for damages on the facts constituting the original offence would not lie.²

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Notes 20-21

21. Procedure in non-compoundable cases where injured party declines to prosecute. — Once the criminal law is set in motion by the issue of process in a non-compoundable case, the Magistrate must require the complainant to carry his prosecution through to the end.¹ The Legislature has not left it to the will of a Magistrate to proceed or not, as he thinks fit, with cases which cannot be legally compounded. It requires him, when once the complaint for such an offence is before him, to make a complete inquiry and to see that the accused who is guilty is brought to punishment.²

In non-compoundable cases, once action has been taken the case will normally proceed and it is nowhere provided that a desire on the part of the complainant to refrain from further pursuing the case shall justify the arrest of further proceedings. The final responsibility of such cases, whether instituted on complaint or otherwise, rests with the State.³

346.* (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which

Section 346

Procedure of Provincial Magistrate in cases which he cannot dispose of.

* Code of 1882 : S. 346 — Same.
Code of 1872 : S. 45, paras. 1 and 2.

Procedure of Magistrate in cases beyond his jurisdiction.

45. If, in the course of a proceeding before a Magistrate, the evidence appears to him to warrant a presumption that the accused person has been guilty of an offence which such Magistrate is not competent to try, or for which he is not competent to commit the accused person for trial; he shall stay proceedings and submit the case to any Magistrate to whom he is subordinate or to such other Magistrate having jurisdiction, as the Magistrate of the district directs.

The Magistrate to whom the case is submitted shall either try the case himself, or refer it to any officer subordinate to him having jurisdiction; or he may commit the accused person for trial.

Code of 1861 : S. 276

276. If, in the course of a trial before a subordinate Magistrate, the evidence shall appear to him to warrant a presumption that the accused person has been guilty of an offence which such Magistrate is not competent to try, or for which he is not competent to commit the accused person for trial before the Court of Session, he shall stay proceedings and shall submit the case to the Magistrate to whom he is subordinate. The Magistrate to whom the case is submitted shall either try the case himself or refer it to any officer subordinate to him having jurisdiction, or he may commit the accused person for trial before the Court of Session. In any such case, such Magistrate or other officer as aforesaid shall examine the parties and witnesses, and shall proceed in all respects as if no proceedings had been held in any other Court.

2. ('33) AIR 1933 Bom 413 (414) : 57 Bom 678, *Sayamma v. Punamchand*.

Note 21

1. ('81) 3 All 283 (286), *Ramul Husain v. Harban*.

2. ('74) 22 Suth W R Cr 83 (85), *Queen v. Duddraj Dusaah*.

3. ('27) AIR 1927 Rang 174 (174, 175) : 5 Rang 136 : 28 Cri L Jour 649, *Maung Thu Daw v. U Po Nyun*.

Section 346
Note 1

should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and applicability of the section. 3. Duty of the inferior Courts. 4. To whom the case should be submitted. 5. Trial must be de novo—Sub-s. (2). | <ol style="list-style-type: none"> 6. Sub-section (2) — Reference to any sub-Magistrate having jurisdiction. 7. Commitment to sessions. See Note 5. 8. "Inquiry," "evidence," meaning of. |
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Other Topics (miscellaneous)

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|---|--|
| <p>Applicability to European British subject. See Note 2.</p> <p>Committal on evidence taken by another Magistrate. See Note 5.</p> <p>Grounds for action. See Notes 2 and 3.</p> <p>Ignoring evidence and circumstances. See Note 3.</p> <p>Inquiry and evidence under S. 202. See Note 8.</p> <p>No waiver to <i>de novo</i> trial. See Note 5.</p> <p>Non-observance — Not void. See Note 3.</p> | <p>Reference back to same Magistrate. See Note 6.</p> <p>Sections 347 to 349—Effect. See Note 2.</p> <p>Sections 349 and 350 and this section. See Note 5.</p> <p>Stage at which action can be taken. See Note 3.</p> <p>Transfer to Magistrate with no jurisdiction. See Note 4.</p> <p>Want of sanction under Ss. 195 and 476. See Note 3.</p> |
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1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

- (1) Section 276 of the Code of 1861 contemplated reference only by a "subordinate Magistrate." The subsequent Codes have omitted the qualifying word "subordinate," so that now a reference may be made by any Magistrate.
- (2) Under the Code of 1861 a submission of a case could be made only to the Magistrate to whom the Magistrate submitting the same was subordinate. From the Code of 1872 onwards the section has been altered so as to allow a reference to "such other Magistrate having jurisdiction, as the Magistrate of the district (District Magistrate) directs."
- (3) There was a specific provision in the Code of 1861 requiring that the Magistrate to whom a case was submitted, or the officer subordinate to him, to whom it may be referred, shall *examine the parties and witnesses* and proceed in all respects as if no proceedings had been held in any other Court. The later Codes have omitted this specific provision. As to the effect of this, see Note 5.

Difference between the Codes of 1872, 1882 and 1898 —

- (1) Both the Codes of 1861 and 1872 restricted the application of the

section to cases which the Magistrate *was not competent to try or commit for trial*. Section 346 of the Code of 1882 and the present section have removed such restriction. See Note 2.

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Notes 1-2

- (2) Section 45 of the Code of 1872 applied even to Magistrates within the presidency towns. The Codes of 1882 and 1898 have restricted the application of the section to trials before Magistrates *outside* the presidency towns.

2. Scope and applicability of the section. — This section enacts the procedure to be followed by Provincial Magistrates where, in the course of an enquiry or a trial, the evidence appears to warrant a presumption that the case is one —

- (1) which should be *tried* by some other Magistrate in the district, or
(2) which should be *committed* for trial by some other Magistrate in the district.

The words “should be tried or committed for trial by some other Magistrate” do not necessarily mean that the Magistrate who is to take action under this section has no *jurisdiction* to try the case himself. Even if he has such jurisdiction he may still be of opinion that it “should be tried” by some other Magistrate on grounds such as complexity of facts, convenience of parties, etc.

The provisions of this section should be construed so as not to overlap or conflict with Ss. 347, 348 and 349 which are specific provisions providing for particular classes of cases. Where, therefore, a case falls under S. 347, S. 348 or S. 349, the Court should only act under that section and not under S. 346. Thus, where a person is accused of an offence punishable with imprisonment for three years or upwards under Ch. XII or Ch. XVII of the Penal Code and by reason of previous convictions for similar offences would be liable for enhanced punishment in the event of his conviction, for the present offence, the proper procedure is under S. 348 and this section is irrelevant in this connexion.² Similarly, where the Magistrate is of opinion that the case is one which ought to be tried by a Court of Session and he is himself empowered to commit

Section 346 — Note 2

1. ('94) 1894 A W N 200 (200), *Empress v. Chandra Ballab Joshi*. (In this case the fact that the accused had previous convictions on account of which he would be liable for enhanced punishment in the event of conviction was held sufficient ground for referring the case under this section—It should be presumed that this was not a case which came within the terms of S. 348.)

- ('90) 1890 Rat 499 (499), *Queen-Empress v. Fakira*. (In this case, it was held that the fact that the Magistrate thought that whipping would be a proper punishment and that he himself could not award such punishment were sufficient grounds for submission of the case under this section — It must be noted that this does not seem to be a case under S. 349, as the Magistrate's action was apparently not taken after taking the evidence for the prosecution and the accused as required by that section.)

[See ('19) AIR 1919 Mad 907 (910) : 42 Mad 83 : 19 Cr. L. J. 997, *Crown Prosecutor v. Bhagvalhi*. (Case under S. 347 where the words “ought to be tried” have been given a similar interpretation.)]

2. ('05) 2 Cri L Jour 820 (822, 823) : 1 Nag L R 187, *Ladya v. Emperor*.
[But see ('94) 1894 All W N 200 (200), *Empress v. Chandra Ballab Joshi*. (In this case, the fact that there were previous convictions was held to be sufficient ground for reference under this Section — But it is not clear whether the facts were such as to make S. 348 applicable.)]

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Notes 2-3

the same to such Court, he should act under S. 347 and not under this section.³

This section is not inapplicable to cases where the accused is a European British subject.⁴

3. Duty of the inferior Courts. — A Magistrate who finds that he has no jurisdiction to try a case cannot *discharge* an accused on that ground but should proceed under this section.¹ Nor can he clutch at jurisdiction by trying the accused for such offences only as he is competent to try even though other offences are disclosed during the trial which he is not competent to try.² Where, therefore, in the course of a trial for an offence which he is competent to try, the evidence discloses also an offence beyond his jurisdiction, he cannot ignore the latter and try the accused for the former offence only.³ Similarly, where the evidence discloses circumstances of aggravation which make the offence cognizable by a higher Court, he cannot ignore such circumstances and try the accused for the minor offence only.⁴ Where,

3. ('03) 7 Cal W N 457 (460), *Amirkhan v. King-Emperor*. (Magistrate cannot send case to Magistrate empowered under S. 30.)

4. ('11) 12 Cri L Jour 436 (437) : 11 I. C. 620 : 7 Nag L R 93, *Emperor v. F. M. C. Nully*.

Note 3

1. ('81) 2 Weir 323 (323, 324), *In re Munisami*.

2. ('81) 2 Weir 420 (421).

(1865) 3 Suth W R Cr 28 (28), *Queen v. Shamsundur Ghosal*. (Wrongful confinement and extortion.)

('66) 5 Suth W R Cr 65 (65), *Queen v. Ramtahal Singh*. (Magistrates are not at liberty to pass over material parts of evidence in cases before them and so to withdraw cases from the cognizance of proper tribunals.)

3. ('86) 1886 Pun Re No 30 Cr, page 73 (74), *Kaka v. Empress*.

('97-1901) 1 Upp Bur Rul 84 (84), *Queen-Empress v. Nga Lu*. (Magistrate must be careful to avoid taking cognizance of a major offence as a minor.)

See also S. 347 Note 4.

4. ('35) AIR 1935 Sind 221 (221) : 29 S. L. R. 428 : 37 Cri L Jour 80, *Shamboo Ram v. Emperor*. (Magistrate should not usurp jurisdiction by trying the accused for an offence of robbery when the evidence discloses an offence of extortion.)

('25) AIR 1925 Mad 367 (367) : 25 Cr. L. J. 1193, *Rangayya v. Somappa*. (Offence under S. 420, Penal Code, tried by second class Magistrate on the ground that there is no distinction between S. 417 and S. 420, Penal Code—Conviction should be set aside in revision. 2 Weir 2, Relied on.)

('89) 13 Bom 502 (505), *Queen-Empress v. Gundya*. (High Court did not interfere in the absence of prejudice but accepted the principle.)

('27) AIR 1927 Mad 307 (308) : 28 Cri L Jour 164, *Kattuva Rowther v. Suppan Asari*. (Magistrate deliberately ignoring facts ousting his jurisdiction — High Court will interfere in revision.)

('95) 19 Bom 340 (348), *In re Nagarji Trikamji*. (It is an evasion of law to treat an aggravated offence as an ordinary offence.)

('66) 6 Suth W R Cr 39 (40) : Beng Sup Vol 488 (FB), *Queen v. Ramcharan Kairee*. (Splitting of one single aggravated offence into separate minor offences so as to give oneself jurisdiction is bad.)

('11) 12 Cri L Jour 20 (20) : 8 Ind Cas 1103 (Mad), *Jamal Mahomed Rowther v. K. Moideensa Rowther*. (Magistrate tried case under Ss. 193, 196, Penal Code, which really was a case of forgery of a valuable security under S. 467, Penal Code — Magistrate ought to have acted under this section.)

('92-96) 1 Upp Bur Rul 231 (231), *Queen-Empress v. Nga Nyein*. (Magistrates should not give themselves jurisdiction by trying cases under S. 354 which properly fall under Ss. 376 and 511, Penal Code.)

(1900) 5 Cal W N 372 (373), *Otaruddi Manjhi v. Katiluddi Manjhi*. (Magistrate cannot, in order to acquire competence to try, split up a grave offence into smaller ones which, when combined constitute a major offence beyond his jurisdiction.)

however, the graver offence disclosed was one for the trial of which sanction was necessary to be obtained, and such sanction had been refused, it was held that the trial for the lesser offence was not incompetent.⁵

But the fact that the Magistrate ignores the circumstances disclosing a graver offence for which he is not competent to try, and tries for the lesser offence, will not render the proceeding *void*, the reason being that the Magistrate is *competent* to try for the lesser offence.⁶ The proceedings, therefore, will not be quashed where the accused is not prejudiced by such procedure and the sentence is not inadequate.⁷

A Magistrate is at liberty to stay proceedings at any time during the inquiry and submit it to the Magistrate to whom he is subordinate.⁸

This section requires that when in the *course* of an inquiry or trial it is found that the offence is beyond the competence of the Magistrate to try or inquire into, the latter should stay the proceeding and refer it to a superior Magistrate. *A fortiori*, where even at the outset, the offence disclosed on the allegations is beyond his competence to try or inquire into, he cannot ignore aggravating circumstances and proceed in respect of such offence as is within his jurisdiction.⁹

The provisions of this section imply, however, that a subordinate Magistrate can legally enquire into a serious offence up to the stage at which the question of charge or discharge has to be decided. The mere fact, therefore, that in order to make his case more serious a complainant alleges the commission of an offence which could not be tried by a junior Magistrate will not render the proceedings of that Magistrate illegal if he goes on to try that case and decide it holding

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Note 3

(197-01) 1 Upp Bur Rul 327 (327), *Queen-Empress v. Nga Mya*. (When evidence discloses possible commission of graver offence Magistrate should not attempt to dispose of the case on the chance of offence being confined within his own jurisdiction.)

[See (1931) AIR 1931 Mad 702 (703) : 54 Mad 1018 : 32 Cr. L. J. 1215, *Daolliah v. Sub-Inspector of Police, Wellington Station*.]

5. (1908) 7 Cri L Jour 6 (7) : 31 Mad 43 : 17 M L J 559 : 3 M L T 113, *Krishna Pillai v. Krishna Konan*.

6. (189) 13 Bom 502 (505), *Queen-Empress v. Gundya*.

(1927) AIR 1927 Mad 307 (307) : 28 Cr. L. J. 164, *Kattuwa Rowther v. Suppanasari*. (But where Magistrate even after his attention has been drawn deliberately ignores facts ousting his jurisdiction, the High Court will interfere in revision.)

(1971) 7 Mad H C R App v (vi).

(1901) 24 Mad 675 (677, 678) : 2 Weir 699, *King-Emperor v. Ayyan*.

7. (1915) AIR 1915 Mad 9 (10) : 14 Cr. L. J. 640 (640), *In re Mohiddin Batcha*.

(189) 13 Bom 502 (505, 506), *Queen-Empress v. Gundya*.

(1931) AIR 1931 Mad 494 (495) : 32 Cr. L. J. 971, *Picha Kudumban v. Servaikara*. (1968) 2 Weir 20 (21).

(1908) 7 Cr. L. J. 215 (216) : 2 M L T 495, *Narayana v. Tahsildar of Conjeevaram*. [See (1998) 2 Weir 482 (483), *In re Kannachampet*. (Held, that the procedure of the appellate Court in acquitting the accused was wrong.)]

See also S. 530 Note 5.

8. (197-01) 1 Upp Bur Rul 85 (85), *King-Emperor v. Nga At*.

9. (1925) AIR 1925 All 290 (291) : 47 All 64 : 26 Cr. L. J. 586, *Raghunandan Prasad v. Emperor*. (Complainant's statement determines jurisdiction, unless it has been clear at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress.)

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Notes 3-5

that the facts disclosed show that it is the lesser offence which he is competent to try.¹⁰

See also section 28 Note 1 and section 207 Note 3.

Where the trying Magistrate finds that the offence disclosed can only be tried by a Magistrate of a higher class, an order of the District Magistrate cannot confer jurisdiction on him.¹¹

4. To whom the case should be submitted. — A Magistrate may submit a case under this section to —

- (1) any Magistrate to whom he is subordinate,¹ or
- (2) such other Magistrate as the District Magistrate directs.

In either case it is essential that the Magistrate to whom the case is submitted should be one *having jurisdiction* over it.²

Pending inquiry into a charge of house-breaking, the second class Magistrate of B division was transferred to A division. The case was, therefore, transferred to his file by the District Magistrate. In the course of inquiry the second class Magistrate found that the offence committed was *robbery* which was not triable by him and therefore he submitted the case to the sub-divisional Magistrate of A. It was held that the order of the District Magistrate transferring the case to the second class Magistrate at A did not give any jurisdiction to the sub-divisional Magistrate of A over the case (which arose in the territorial jurisdiction of the Court at B) and that the submission being thus not to a Magistrate "having jurisdiction" was bad.³

5. Trial must be de novo — Sub-section (2). — It is a general principle of criminal law that it is only an authority who has heard all the evidence that is competent to decide whether the accused is innocent or guilty.¹ The Criminal Procedure Code has, however, made exceptions to this general rule in ss. 349 and 350. The exception enacted in the latter section is almost a general rule by itself in that it provides

10. ('39) AIR 1939 Lah 122 (123) : 40 Cri L Jour 515 : I L R (1938) Lah 619, *Painda v. Mt. Gulab Khatun*.

11. ('26) AIR 1926 Cal 590 (592) : 27 Cr. L. J. 545, *Azizur Rahman v. Emperor*. (Administratively such procedure might have been convenient but such convenience cannot give jurisdiction to a Magistrate.)

Note 4

1. For subordination of Magistrate, see S. 17.

('68) 5 Bom H C R Cr 47 (47), *Reg. v. Bhagu Shabaji*. (Magistrate F. P. with power to hear appeal is not thereby placed in the position of a District Magistrate to whom alone cases should be submitted under this section and not to Magistrates F. P.)

[See also ('66) 4 Bom H C R Cr 34 (34, 35), *Reg. v. Bagu*. (A subordinate Magistrate has no jurisdiction to refer a case which he has not himself jurisdiction to try to a Magistrate F. P.)]

2. ('82) 4 Mad 327 (328) : 2 Weir 419, *Queen v. Adappa Venkanna*.

3. ('82) 4 Mad 327 (329) : 2 Weir 419, *Queen v. Adappa Venkanna*.

Note 5

1. ('24) AIR 1924 Nag 37 (37) : 22 Nag L R 166 : 24 Cr. L. J. 738, *Baba v. Emperor*. ('23) AIR 1923 Mad 327 (327) : 24 Cri L Jour 413, *In re China Venku Naidu*.

(Evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so.)

('33) AIR 1933 Sind 191 (191) : 27 Sind L R 266 : 34 Cri L Jour 749, *Sher Khan Emperor*. (Case stayed under S. 346 — Magistrate to whom case is submitted must try case de novo.)

that whenever any Magistrate ceases to exercise jurisdiction in a case and is succeeded by another [and under sub-s. (3)—this applies to cases transferred from one Magistrate to another], the latter can act on the evidence recorded by his predecessor, but the accused can claim a trial *de novo* and the High Court or the District Magistrate, as the case may be, may also, where the accused has been prejudiced by a conviction on such evidence, order a new trial or inquiry. Sub-s. (2) of that section expressly excepts proceedings under this section from the operation thereof.² The reason is that S. 350 contemplates cases where, at the time the evidence is recorded, the Magistrate recording it *has jurisdiction* to do so, while in cases of submission under this section on the ground that the Magistrate is not competent to try the case, the evidence is recorded by a Magistrate who is *not competent* to try the case.³

The general principle of law, namely, that a Magistrate cannot decide a case, who has not heard all the evidence, therefore applies to proceedings under this section and consequently, the Magistrate to whom a case is submitted under sub-s. (1) of this section cannot act on the evidence recorded by the submitting Magistrate but must, if he tries the case, try it *de novo*.⁴ If he refers the case to a subordinate Magistrate for trial, the latter must also, on the same principle, try it *de novo*.⁵ The accused has no power to waive his right to such a trial.^{5a}

(‘05) 2 Cri L Jour 369 (370) : 1905 Pun Re No. 25 Cr, *Muhammad v. Emperor*. (Case submitted to District Magistrate under S. 346, who asked accused whether they wanted to recall witnesses and on their replying ‘no’ convicted them—Conviction is illegal—Illegality cannot be cured even by consent.)

(‘16) AIR 1916 Nag 115 (116) : 12 Nag L R 146 : 18 Cri L Jour 35, *Emperor v. Ram Prasad*.

See also S. 349 Note 2.

2. (‘33) AIR 1933 Sind 191 (191) : 27 Sind L R 266 : 34 Cri L Jour 749, *Sher Khan v. Emperor*.

3. (‘18) AIR 1918 Pat 676 (677, 678) : 19 Cr. L. J. 625, *Ambika Singh v. Emperor*.

4. (‘38) AIR 1938 Cal 415 (416) : 39 Cri L Jour 606, *Sashti Gopal v. Haridas Bagdi*. (The ordinary rule is that the Magistrate, who tries the case, is to record the evidence and, unless an exception is definitely provided for by some statute, that ordinary provision should prevail.)

(‘33) AIR 1933 Sind 191 (191) : 27 Sind L R 266 : 34 Cri L Jour 749, *Sher Khan v. Emperor*. (Failure to do so vitiates the whole trial.)

(‘97-01) 1 Upp Bur Rul 85 (85) *King-Emperor v. Nga At*.

(‘05) 2 Cri L Jour 689 (690) (Lah), *Inayat Husain v. Emperor*.

(‘23) AIR 1923 Mad 327 (327) : 24 Cri L Jour 413, *In re China Venku Naidu*.

(‘28) AIR 1928 Cal 183 (183) : 55 Cal 65 : 29 Cri L Jour 464, *Budhu Tatua v. Emperor*. (Where part of evidence in a case is recorded by Magistrate not having jurisdiction and part of it by Magistrate having jurisdiction conviction is illegal and retrial is necessary.)

[See (‘70) 14 Suth W R Cr 3 (3), *Kopil Nath v. Koneeram*.]

See also S. 350 Note 16.

5. (‘38) AIR 1938 Cal 415 (416) : 39 Cri L Jour 606, *Sasthigopal v. Haridas*.

(‘18) AIR 1918 Pat 676 (678) : 19 Cr L J 625, *Ambika Singh v. Emperor*.

5a. (‘18) AIR 1918 Pat 676 (677, 678) : 19 Cr. L. J. 625, *Ambika Singh v. Emperor*. (While under S. 350, accused has got option to have a trial *de novo* or not.)

(‘04) 1 Cri L Jour 1056 (1057) : 17 C P L R Cr 159, *Emperor v. Gokal*.

(‘05) 2 Cri L Jour 369 (370) : 1905 Pun Re No. 25 Cr, *Muhammad v. Emperor*. (Illegality cannot be cured even by consent.)

(‘23) AIR 1923 Mad 327 (327) : 24 Cri L Jour 413, *In re China Venku Naidu*. (Consent of parties will not exempt the Magistrate from holding a *de novo* trial.)

Section 346
Notes 5-6

As regards the power of the superior Magistrate acting under sub-s. (2) to *commit* the case to the sessions, acting on the evidence recorded by the submitting Magistrate, it has been held that such a procedure is not illegal.⁶ No reasons have been given for such a view, but it may be supported on the ground that the general rule prohibits only *decisions* by Magistrates who have not heard all the evidence, and that in *committing* the accused, there is no *decision* of the case.⁷ The High Court of Bombay has also held that such commitment is not illegal.⁸ But the reason given therefor, based on the assumption that s. 350 applies, but that only the proviso thereto does not apply, to determinations under sub-s. (2) of this section, is obviously incorrect in view of sub-s. (2) of s. 350 which clearly enacts that "nothing *in this section* applies to cases in which proceedings have been stayed under section 346."

6. Sub-section (2) — Reference to any sub-Magistrate having jurisdiction. — Where a sub-divisional Magistrate in Burma proceeding under sub-s. (2) of this section transferred a case for trial to the township Magistrate of P, the offence having been committed in the township of H, it was held that there was nothing illegal in doing so, inasmuch as a township is not recognized by the Code as a local area for purposes of territorial jurisdiction, and under s. 12, sub-section (2), except as otherwise provided, the jurisdiction and powers of Magistrates extend throughout the district in which they are appointed.¹

It has been held by a Full Bench of the High Court of Madras² that the Magistrate to whom proceedings are submitted under this section can, in a proper case, refer the case back to the very Magistrate who made the submission. In that case eight persons were accused before a second class Magistrate of having committed dacoity and one of them, the fifth accused, was alleged to have been armed with a deadly weapon. The Magistrate acting under sub-section (1) of this section submitted the proceedings to the Magistrate to whom he was subordinate. The latter went into the case and, finding that there was no case against the fifth accused who was the only person charged with having a deadly weapon, dismissed the complaint against him, and referred the case back to the Magistrate who made the submission so far as the other accused were concerned. It was held that he was not incompetent to do so.

[But see ('70) 14 Suth W R Cr 3 (3), *Kopil Nath v. Konceram*. (Where the prisoners did not appeal or raise any objection at the trial on that ground, the High Court declined to interfere.)]

6. ('07) 6 Cr L J 429 (430, 431) : 12 C W N 136, *Kamini v. Fakirchand*.

('16) AIR 1916 Nag 115(115):18 Cr.L.J. 35: 12 NLR 146, *Emperor v. Ramprasad*.

7. ('16) AIR 1916 Nag 115 (116) : 18 Cr. L. J. 35 : 12 Nag L R 146, *Emperor v. Ramprasad*.

8. ('89) 1889 Rat 472 (472), *Queen-Empress v. Shesha*.

Note 6

1. ('02) 1 Low Bur Rul 308 (309), *Crown v. La Pyu*.

2. ('30) AIR 1930 Mad 765 (766) : 54 Mad 16 : 31 Cri L Jour 1010 (F B), *Polur Reddi v. Munusami Reddi*. (Explaining A I R 1923 Mad 51; 1891 Rat 554 and 1890 Rat 499.)

A District Magistrate is not competent to cancel or set aside an order of a sub-divisional Magistrate transferring a case referred to him under this section.³

Section 346
Notes 6-8

7. Commitment to sessions. — See Note 5.

8. "Inquiry," "evidence," meaning of. — The word "inquiry" is not restricted to proceedings after the Magistrate himself begins to take evidence. Nor is the word "evidence" restricted to evidence taken by the Magistrate himself. Where a Magistrate directs an inquiry by the police or another person under S. 202, he does so in the course of his own inquiry, and all facts and statements disclosed by such inquiry, including the report by the police or other person, are "evidence" on which a Magistrate can act under this section.¹

347.* (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall *** commit the accused under the provisions hereinbefore contained.

Section 347

Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

Synopsis

- | | |
|-------------------------------|---|
| 1. Legislative changes. | 4. "Ought to be tried." |
| 2. Scope. | 5. "Under the provisions hereinbefore contained." |
| 3. "Before signing judgment." | |

Other Topics (miscellaneous)

- | | |
|---|--|
| Chapter XVIII—Procedure laid in. See Note 5. | Reference to superior Magistrate. See Note 2. |
| Commitment—Reasons for. See Note 4. | |
| Cross-examination and witnesses — Right of. See Note 5. | The stage at which committal can be ordered. See Note 3. |

1. Legislative changes. — Section 256 of the Code of 1861 and S. 221 of the Code of 1872 which correspond to S. 347 of the present Code found a place in the chapter relating to the trial of warrant-cases, and the wording of these was such as to make them seem to be confined to "trial."

The Code of 1892 for the first time removed the section to the chapter dealing with general provisions as to inquiries and trials and

* 1882 : S. 347; 1872 : Ss. 46, 221, 436; 1861 : S. 256.

3. ('36) AIR 1936 Nag 220 (221) : 38 Cr. L. J. 15 : ILR (1937) Nag 135, *Emperor v. Ganpat*.

Note 8

1. ('27) AIR 1927 Mad 591 (591, 592) : 28 Cr. L. J. 384, *Balakrishna v. Emperor*.

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Section 347
Notes 1-2

by the insertion of the words, "in any inquiry" made it clear that the section applied not only to trials but also to inquiries. The reason for the change was possibly that according to some decisions a trial of a warrant-case did not begin till the accused had been charged and his plea taken, and in order to avoid all possible question as to the applicability of the provision to any stage of the proceedings before a Magistrate the Legislature inserted the words "in any inquiry."¹

The corresponding sections of the Codes of 1861 and 1872 provided that the Magistrate shall stop further proceedings "under this chapter" (namely the chapter relating to trial of warrant-cases) and commit under the provisions "hereinbefore contained." With the removal of the section from the chapter relating to trial of warrant-cases and its insertion in its present place, the reference to the chapter became inappropriate and was therefore omitted in the Code of 1882. But it has been held that the omission was not intended to make any difference or to dispense with obligation of the Magistrate to follow the provisions of chapter XVIII, the words "stop further proceedings" meaning only proceedings in the trial or enquiry in which the Magistrate is engaged.²

The Code of 1872 restricted the discretion of the Magistrate to such cases as the Magistrate could not or ought not to make over to a Magistrate specially empowered under S. 36. This restriction has been removed by the Code of 1882.

The Code of 1898 has made no change in the section.

The words "stop further proceedings and" after the words "he shall" in sub-s. (1) have been omitted by the amending Act XVIII of 1923 and the omission sets at rest the conflict as to whether the section is or is not subject to the provisions of chapter XVIII.³

2. Scope. — This section is supplementary to chapter XVIII and refers to a case which a Magistrate has first taken up with a view to disposing it himself, but which, he later finds, is one which ought to be tried by the Court of Session or the High Court. This section lays down the procedure to be followed when such a position arises.¹

The section does not apply to a case where a Magistrate thinks from the first that the case ought to be tried by the Court of Session. In such a case the Magistrate must conform to the provisions of S. 208 from the start.²

Section 347 — Note 1

1. ('12) 13 Cr. L. J. 877 (881) : 17 I. C. 813:6 Low Bur Rul 129 (FB), *Emperor v. Channing Arnold*.
2. ('12) 13 Cr. L. J. 877 (882) : 17 I. C. 813:6 Low Bur Rul 129 (FB), *Emperor v. Channing Arnold*.
3. See Note 5.

Note 2

1. ('12) 13 Cr. L. J. 877 (885):17 I. C. 813 : 6 Low Bur Rul 129 (FB), *Emperor v. Channing Arnold*.
2. ('12) 13 Cr. L. J. 877 (883):17 I. C. 813 : 6 Low Bur Rul 129 (FB), *Emperor v. Channing Arnold*. (Robinson, J., dissenting.)

In the application of this section there is no distinction made between summons and warrant cases.³

Sections 346, 347 and 349. — A Magistrate taking up a case may try it himself if he has jurisdiction, or he may, if he thinks he cannot inflict an adequate sentence, act under S. 346 or S. 349 and send it to a higher Magistrate, or he may, if he thinks that it is a proper case for a Court of Session, commit the accused under S. 347; or if he has no power to commit, send it under S. 346 to another Magistrate for the purpose of commitment.⁴

3. "Before signing judgment." — A Magistrate has power at any stage of the proceedings to decide that the case is one which he ought not to try and which ought to be committed to sessions.¹ The discretion given to him by this section is not taken away even though a charge may have been drawn up² or because the Magistrate has issued summons to the defence witnesses.³ In a case where the Magistrate had as yet passed no order of discharge, he was held competent to commit to sessions.⁴ But once *judgment is pronounced*, the Magistrate cannot commit the case to the sessions because S. 403 would be a bar to further proceedings as was held in the undermentioned case⁵ decided with reference to S. 348 and, as S. 369 prevents a Court from altering or reviewing its judgment after it has signed it, except where such review or alteration is specially provided for.⁶

4. "Ought to be tried." — If the evidence discloses an offence triable only by a Sessions Court, the Magistrate must commit the case to the sessions.¹ But where the evidence discloses both an offence exclusively triable by a Sessions Court and an offence which the

3. ('20) AIR 1920 Sind 55 (57) : 14 Sind L R 85 : 21 Cr. L. J. 791, *Ghani Yakub v. Emperor*.

[But see ('06) 3 Cri L Jour 94 (95) (All), *Emperor v. Dharam Singh*. (Case under Ss. 352, 447, Penal Code — Summons case — Commitment quashed.)]

4. ('19) AIR 1919 Mad 907 (910) : 42 Mad 83 : 19 Cr. L. J. 997, *Crown Prosecutor v. Bhagavathi*.

[See ('38) AIR 1938 Mad 529 (530) : 39 Cri L Jour 715, *In re Ramasubbayya*. (Calendar cases triable by first class Magistrate cannot be transferred to second class Magistrate with a direction to treat them as sessions cases, the cases being counter to preliminary registered cases and complicated — He should proceed under S. 347.)]

Note 3

1. ('30) AIR 1930 Cal 666 (667) : 32 Cri L Jour 243, *Panchanan v. Emperor*. ('98) 1898 Rat 975 (975), *In re Clive Durant*.

2. ('78) 3 Cal 495 (496, 497) : 2 C L R 2, *Empress v. Kudrutoollah*.

3. ('15) AIR 1915 Mad 947 (948) : 15 Cr. L. J. 704, *In re Sessions Judge, Madura*.

4. ('20) AIR 1920 Mad 94 (95) : 43 Mad 330 : 21 Cr. L. J. 91, *In re Gandhi Apparaju*.

5. ('14) AIR 1914 Mad 149 (149) : 38 Mad 552 : 15 Cr. L. J. 188, *In re Kora Sellandi*. See also S. 403 Note 9.

6. See Section 369 and Notes thereto.

Note 4

1. ('26) 27 Cr. L. J. 871 (872) : 96 I. C. 119 (Cal), *Hara Mohan Das v. Emperor*. (Where facts found show that offence committed falls under S. 471, Penal Code, Magistrate should not convict accused under S. 196, but should commit him to sessions for trial under S. 471.)

('89) 1889 Rat 476 (477), *Queen-Empress v. Jobania*. (Magistrate not to clutch at jurisdiction by ignoring aggravating circumstances.)

See also S. 206 Note 5.

Section 347
Note 4 . .

Magistrate himself can try, a trial and conviction by the Magistrate in respect of the latter offence is not illegal.²

If the offence is one which is not exclusively triable by a Court of Session, the Magistrate can commit the accused to the Court of Session only if he be of opinion that the case is one which *ought to be tried* by that Court.³ The Magistrate must use his discretion in determining whether a particular case should be committed or not,⁴ and every circumstance of aggravation must be carefully weighed.⁵ The discretion given to the Magistrate by this section being a judicial one, it should be exercised with care and on some proper ground. The order of committal being a judicial order, the Magistrate should state his grounds for committing in order to enable the Court of Session or the High Court to judge whether the committal is a sound exercise of discretionary power.⁶ The reasons given should be not only for not discharging the accused, but also for *committing* him to sessions Court when the case is not exclusively triable by the latter.⁷ Failure to give reasons for committal as required by S. 213 may be only an irregularity where the case is one which plainly ought to be tried by Sessions Court, but where it is not exclusively triable by Sessions Court the failure amounts to an illegality.⁸ If no reasons are given or if the reasons given are bad in law, the committal may be quashed.⁹

There is a conflict of opinions as to whether the only grounds on which a Magistrate could commit are want of jurisdiction in himself, or his inability to punish adequately. Decisions which have been in

2. ('21) AIR 1921 Cal 114 (115) : 22 Cri L Jour 666, *Kalicharan v. Emperor*. (Offence under S. 477A, Penal Code, disclosed—Conviction by Magistrate in respect of offence under S. 408 not bad where such offence also appears to have been committed.)
[See also ('04) 1 Cri L Jour 637 (638) : 1904 A W N 165 : 27 All 69, *Emperor v. Ishtiaq Ahmad*. (Magistrate not bound to commit to sessions merely because evidence disclosed another offence exclusively triable by Sessions Court where there was evidence to convict for the offence within his jurisdiction.)]
3. ('28) AIR 1928 Pat 551 (552) : 29 Cri L Jour 612, *Emperor v. Deo Narain*.
See also S. 207 Note 1.
4. See ('67) 8 Suth W R Cr 46 (46), *Queen v. Doonda Bhooia*. (It appearing to be convenient that Sessions Court should try—High Court declined to interfere.)
5. ('66) 2 Weir 19 (20). (In cases of theft the amount of property stolen is one very proper point for consideration in determining this question.)
6. ('30) AIR 1930 Lah 312 (313) : 31 Cri L Jour 178, *Emperor v. Karam Singh*. ('28) AIR 1928 Pat 551 (552) : 29 Cri L Jour 612, *Emperor v. Deo Narain*. ('09) 9 Cri L Jour 163 (164) : 1 Ind Cas 104 (Bom), *Emperor v. Mahamad Khan*. [But see ('19) AIR 1919 Mad 907 (908) : 42 Mad 83 : 19 Cri L Jour 997, *Crown Prosecutor v. Bhagavathi*. (This Section does not say that the Magistrate is bound to put his reasons on record for entertaining his opinion to commit.)]
7. ('14) AIR 1914 Bom 237 (238) : 38 Bom 114 : 14 Cr. L. J. 609, *Emperor v. Nanji*.
See also S. 213 Note 4.
8. ('14) AIR 1914 Bom 237 (238) : 38 Bom 114 : 14 Cr. L. J. 609, *Emperor v. Nanji*.
See also S. 537 Note 18.
9. ('26) AIR 1926 Bom 251 (252) : 27 Cr. L. J. 479, *Emperor v. Achaldas*. (Committal is improper if made in pursuance of request by accused or because the case created sensation in accused's community or on ground that amount involved in offence is large.)
('17) AIR 1917 Bom 33 (34) : 42 Bom 172 (173) : 19 Cri L Jour 342, *Emperor v. Bhimaji*. (Grounds not good in law.)
('24) AIR 1924 Sind 61 (64) : 17 S.L. R. 188 : 26 Cr. L. J. 148, *Utilibai v. Emperor*. ('14) AIR 1914 Bom 237 (238) : 38 Bom 114 : 14 Cr. L. J. 609, *Emperor v. Nanji Samal*. (No reasons given.)

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Note 4

favour of restricting the discretion of the Magistrate to these two grounds are based on the view that S. 347 is controlled by S. 254 which lays down that in the trial of a warrant-case where there is ground for presuming that the accused has committed an offence which the Magistrate is competent to try and which in his opinion could be adequately punished by him, he shall frame a charge against the accused.¹⁰ The opposite view is that S. 347 is not controlled by S. 254 and that want of jurisdiction in the Magistrate or his inability to punish adequately are not the only grounds on which he may commit a case to the sessions; the section is wide enough to include other grounds.¹¹ Thus, a Magistrate, though having power to try the case himself, may commit it to sessions if he thinks the gravity of the case requires that it be tried by such Court.¹²

There is nothing anywhere which compels a Magistrate to frame that charge which, on the most heinous view of the circumstances indicated by the evidence, is the gravest possible charge. It is left to the Magistrate to take a broad and commonsense view of the facts and

10. ('38) AIR 1938 Sind 79 (79) : 39 Cri L Jour 507, *Emperor v. Waroo*.
(29) AIR 1929 Cal 777 (777) : 56 Cal 785 : 31 Cri L Jour 184, *Emperor v. Girish Chandra*. (Offence under S. 103, Presidency Towns Insolvency Act — Warrant-case which Magistrate is competent to try and can be adequately punished by him—Commitment illegal.)
- (24) AIR 1924 All 185 (185) : 25 Cr. L. J. 665, *Emperor v. Ram Jatan*.
(06) 3 Cri L Jour 94 (95, 96) : 1906 A W N 28 : 3 All L J 14, *King-Emperor v. Dharam Singh*. (Summons-cases—Commitment not legal.)
- (97) 24 Cal 429 (431, 432) : 1 C W N 414, *Queen-Empress v. Kayemullah Mandal*.
(19) AIR 1919 All 366 (366) : 41 All 454 : 20 Cr. L. J. 273, *Empress v. Bindeshri*.
(02) 4 Bom L R 85 (86), *King-Emperor v. Pema Ranchod*.
(18) AIR 1918 Nag 141 (142) : 20 Cri L Jour 97, *Emperor v. Hanuman*.
(14) AIR 1914 Sind 94 (95) : 8 S. L. R. 23 : 15 Cr. L. J. 664, *Diwanichand v. Emperor*.
(18) AIR 1918 Sind 60 (61) : 11 S. L. R. 79 : 19 Cr. L. J. 319, *Emperor v. Ismail*.
[See also ('40) AIR 1940 Oudh 15 (15) : 40 Cr. L. J. 903, *Sheo Mangal v. Emperor*.
(32) AIR 1932 Lah 163 (169) : 33 Cri L Jour 255, *Emperor v. Nathu*.
(32) AIR 1932 Lah 263 (264) : 33 Cri L Jour 680, *Kesar v. Emperor*. (Magistrate competent to dispose of case — Unnecessary commitment — Order is liable to be quashed.)]
11. ('30) AIR 1930 Sind 145 (146) : 24 S. L. R. 157 : 31 Cri L Jour 596, *Emperor v. Allahabad*.
(19) AIR 1919 Mad 907 (908, 910) : 42 Mad 83 : 19 Cri L Jour 997, *Crown Prosecutor v. Bhagavathi*. (Magistrate having power to sentence adequately may still commit on such grounds as complicated questions of law or case being fit one to be tried by jury or with aid of assessors.)
(76) 1 Mad 289 (290) (FB), *In the matter of Chinnimarigadu*.
(29) AIR 1929 Bom 313 (319) : 53 Bom 611 : 30 Cri L Jour 1090, *Krishnaji Prabhakar v. Emperor*. (Offence under S. 124A, Penal Code—Accused editor of widely circulated newspaper—Seriousness of offence and large circulation of the newspaper held proper grounds for committal to High Court sessions.)
(26) AIR 1926 Bom 251 (251) : 27 Cri L Jour 479, *Emperor v. Achaldas*. (Question left open.)
(25) AIR 1925 Rang 207 (208) : 3 Rang 42 : 26 Cr. L. J. 1389, *Emperor v. Ishahat*.
(17) AIR 1917 Lah 251 (251, 252) : 18 Cr. L. J. 524 (525) : 1917 Pun Re No. 13 Cr, *Emperor v. Ali*.
(20) AIR 1920 Sind 55 (56, 57) : 14 S. L. R. 85 : 21 Cr. L. J. 791, *Ghani Yacub v. Emperor*. (Commitment for offence triable as summons-case along with other accused triable by Sessions Judge — Magistrate can adequately punish is no ground against commitment if otherwise fit.)
[See also ('33) AIR 1933 Lah 500 (501) : 34 Cri L Jour 314, *Emperor v. Ujagar Singh*. (Committal order justified on the ground of convenience.)]
12. ('28) AIR 1928 Pat 551 (552) : 29 Cri L Jour 612, *Emperor v. Deo Narain*.

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Note 4

determine whether the correct charge to be framed is or is not one which necessitates a trial by a Court of Session.¹³ A committal made under a misapprehension of the correct offence may be quashed.¹⁴ On the other hand, a Magistrate should not ignore aggravating circumstances and himself try a case which, taking a reasonable view of the depositions, must be regarded as involving the trial of the accused for a grave offence¹⁵ or one in which complicated or difficult questions of law or fact arise which he is neither by training nor experience qualified to try.¹⁶

To decide whether he shall or shall not commit the case to the Court of Session, a Magistrate has to consider the gravity of the offence, the punishment with which, in his opinion, it ought to be met and the section under which he charges the accused person. He may also consider special difficulties in the case or its peculiar importance and other matters might enter into his consideration.¹⁷

13. ('23) AIR 1923 Cal 108 (111) : 24 Cri L Jour 674, *Emperor v. Hari Das*.

('09) 9 Cri L Jour 163 (165) : 1 I. C. 104 (Bom), *Emperor v. Muhammad Khan*. (Offence under S. 409, Penal Code — Offence under S. 477A, Penal Code, triable exclusively by Sessions Court, added to it without any evidence for the mere purpose of committing it to that Court — Procedure is illegal.)

14. ('10) 11 Cri L Jour 54 (54, 55) : 4 Ind Cas 812 (All), *Emperor v. Jagmohan*. (Accused gave false information to police that certain person had committed murder — Held that offence fell under first paragraph of S. 211, Penal Code — Held further that commitment to sessions on ground that the offence fell under second paragraph of that section was bad because the offence was triable by the Magistrate.)

15. ('35) AIR 1935 Sind 221 (221) : 29 S L R 428 : 37 Cr. L. J. 80, *Shamboo Ram v. Emperor*. (A Magistrate trying an offender charged with offences under Ss. 388 and 392 only framed a charge under S. 392 and tried and convicted the accused though in fact he should have framed a charge under S. 388 and should have committed the accused to the Court of Session under S. 347 — It was held that he should not have done so.)

('20) AIR 1920 Cal 40 (42) : 21 Cr. L. J. 10, *Moze Ali v. Emperor*.

('68) 9 Suth W R Cr 5 (5), *Puran Telee v. Bhuttoo Dome*. (Where it was evident that offence was not theft but lurking house-trespass by night with aggravating circumstances, held accused ought to have been committed on latter charge and not convicted of theft.)

('67) 7 Suth W R Cr 11 (11), *Madhub Ghose v. Bullye Metea*.

('66) 5 Suth W R Cr 65 (65), *Queen v. Ramtahal Singh*. (Where bone-fractures have been caused in addition to other injuries, offence is grievous hurt triable by Court of Session and not hurt cognizable by Magistrate.)

('01) 24 Mad 675 (677) : 2 Weir 699, *King-Emperor v. Ayyar*.

('89) 13 Bom 502 (505), *Queen-Empress v. Gundya*.

('88) 1888 Rat 382 (383), *Queen-Empress v. Rupaya*.

('97-01) 1 Upp Bur Rul 328 (328), *King-Emperor v. Nga Po San*.

('97-01) 1 Upp Bur Rul 327 (327), *Queen-Empress v. Nga Mya*.

('86) 1886 Pun Re No. 30 Cr, p. 73 (74), *Kaka v. Empress*. (Conviction of offence under S. 363, Penal Code — Prima facie case against accused of offence under S. 366, Penal Code, cognizable by Court of Sessions — Magistrate ought to have submitted record to District Magistrate under S. 346 or committed to Sessions under S. 347, Cr. P. C.)

[See ('84) 10 Cal 85 (86) : 13 C L R 375, *Empress v. Paramanand*. (An officer invested with special powers under S. 34, Cr. P. C., should rarely, if ever, try a case himself where the accused might have been charged with an offence beyond jurisdiction.)]

See also S. 346 Note 3.

16. ('32) AIR 1932 Rang 193 (194) : 10 Rang 495 : 34 Cr. L. J. 187, *Emperor v. Maung Chit Sen*.

17. ('17) AIR 1917 Bom 33 (34) : 42 Bom 172 : 19 Cri L Jour 342, *Emperor v. Bhimaji Venkaji*. (But Magistrate must not determine whether he is to commit

The following have been held to be good grounds for committal :

Section 347
Note 4

- (1) Desirability that the case be tried by jury, or the gravity of the case.¹⁸
- (2) The Magistrate having put himself in the position of a witness by a local investigation.¹⁹
- (3) The fact that in respect of the same transaction another party of accused is being tried by sessions,²⁰ or that the facts constituting the offence form part of the same transaction with another offence triable by sessions.²¹ The Lahore High Court has, however, held in the undermentioned cases²² that an apparent connexion of one case with another is no ground for committal. The Madras High Court has also held that while the fact that some connected matter

the case or try it himself, solely by the wish of the parties and the terms of a Government resolution.)

(‘32) AIR 1932 Bom 63 (63, 64) : 56 Bom 61 : 33 Cr. L. J. 262, *Hari Moreshwar v. Emperor*.

18. (‘29) AIR 1929 Bom 313 (316) : 53 Bom 611 : 30 Cr. L. J. 1090, *Krishnaji Prabhakar v. Emperor*. (Offence under S. 124 A, Penal Code—Accused, editor of widely circulated daily — Magistrate held justified in committing case to High Court Sessions.)

(‘12) 13 Cr. L. J. 443 (444) : 15 Ind Cas 75 (All), *Durga Datt v. King-Emperor*. (Criminal breach of trust in respect of Rs. 46,805—Cases should be tried by Sessions Court and not by Magistrate.)

(1900-02) 1 Low Bur Rul 259 (260), *Crown v. San Pe*. (Where there is any doubt whether the intention or knowledge of the accused was such that the offence would be culpable homicide the case should not be tried by any Magistrate, but should be committed to Sessions.)

(‘82) 5 C P L R Cr 7 (7), *Empress v. Perman*.

(‘75) 24 Suth W R Cr 24 (24), *In re Narayan Pasi*.

(‘69) 12 Suth W R Cr 7 (9), *Queen v. Poonai Fattemah*. (Death resulting from injuries inflicted — Committing is proper.)

(‘66) 6 Suth W R Cr 2 (2), *Queen v. Sohay Dome*. (Abduction of child for stealing ornaments.)

(1864) 1864 Rat 2 (2), *Reg. v. Bapu*. (Cheating when case appears to be of a serious nature, it should be sent to Sessions Court.)

[See (‘30) AIR 1930 Sind 145 (146) : 24 S L R 157 : 31 Cr. L. J. 596, *Emperor v. Allahabad*. (There is no reason to commit to the sessions cases where the Magistrate can adequately deal with the offence himself, even if the death of a person is involved therein.)

(‘81) 1 Weir 288 (289). (Injury resulting in death—Violence — When there is not sufficient evidence to warrant commitment, Magistrate is not justified in committing.)]

[See however (‘38) AIR 1938 Bom 430 (431) : 39 Cr. L. J. 928, *Emperor v. Ismail Umar*. (It cannot be said that nose-cutting cases should, as a matter of course, be committed to the Court of Session for trial, although the Magistrate should always consider whether he ought not to commit.)]

19. (‘12) 13 Cr. L. J. 688 (688) : 16 Ind Cas 336 (Cal), *Fazar Ali v. Mazharulla*.

[See however (‘24) AIR 1924 All 185 (186) : 25 Cri L Jour 665, *Emperor v. Ram Jatan*. (Magistrate having been a witness to the identification proceedings is no ground for commitment—In such a case the proper course is to refer the matter to the District Magistrate for transfer of the case to another Magistrate.)]

20. (‘17) AIR 1917 Lah 251 (251) : 18 Cr. L. J. 524 (525) : 1917 Pun Re No. 13 Cr, *Emperor v. Ali*.

21. (‘20) AIR 1920 Sind 55 (57) : 14 S L R 85 : 21 Cr. L. J. 791, *Ghani v. Emperor*.

22. (‘32) AIR 1932 Lah 168 (169) : 33 Cr. L. J. 255, *Emperor v. Nathu*. (Apparent connection of case under S. 326, Penal Code, with case under S. 304 is no ground for committing when offence involved can be adequately punished by Magistrate.)

(‘30) AIR 1930 Lah 312 (313) : 31 Cr. L. J. 178, *Emperor v. Karam Singh*. (Theft case connected with murder case — Murder case pending in Sessions Court — Theft case also committed—Commitment quashed.)

[See however (‘33) AIR 1933 Lah 500 (501) : 34 Cr. L. J. 314, *Emperor v. Ujagar Singh*.)]

Section 347
Note 4

is already before the Court of Session may be a good ground for committing a case to the sessions,²³ it is not an absolute rule that all charges and counter-charges must be tried by the same Court.²⁴ The Bombay High Court also has held that the fact that a case is connected with another which has been committed to the sessions is no ground for committal when the connexion between the two cases is not such as would embarrass or prejudice the accused in the absence of such commitment.²⁵

The following have been held not to be sufficient grounds for committal :

- (1) The mere wish of parties²⁶ or the fact that the accused wants to have the benefit of a trial by jury.²⁷
 - (2) The mere fact that the case has caused a sensation in a particular community.²⁸
 - (3) The terms of a Government resolution.²⁹
- See also the cases cited below.³⁰

If a committal would result in an unwarrantable waste of time without advantage to anybody and the Magistrate is competent to try the case, he acts properly in not committing.³¹

It has been held in the undermentioned cases³² that where an offender appears to be deserving of a greater punishment than the

23. ('19) AIR 1919 Mad 907 (908) : 42 Mad 83 : 19 Cr. L. J. 997, *Crown Prosecutor v. Bhagavathi*.

24. ('32) AIR 1932 Mad 502 (504) : 33 Cri L Jour 765, *Lakshminarayana v. Suryanarayana*.

[See also ('40) 1940 Mad W N 530 (530), *Oonna Mudali v. Emperor*. (Where in a case the offences disclosed are triable by a second class Magistrate who can adequately deal with them, the mere fact that the case is counter to a preliminary register case which has to be committed to the sessions is not a sufficient reason for treating the former case also a preliminary register case.)

('32) 1932 Mad W N 692 (697), *Jaggunaidu v. Emperor*. (A Magistrate can never be justified in exposing any person to the anxiety and expense of a trial in the Sessions Court merely because he is the complainant or one of the prosecution party in a counter case in which the accused is committed to session for trial—Per Reilly, J.)]

25. ('13) 14 Cr. L. J. 657 (658) : 21 I. C. 897 (Bom), *Emperor v. Asha Bhatli*.

26. ('17) AIR 1917 Bom 33 (34) : 42 Bom 172 : 19 Cri L Jour 342, *Emperor v. Bhimaji Venkaji*.

('26) AIR 1926 Bom 251 (252) : 27 Cr. L. J. 479, *Emperor v. Achaldas*. (Request by accused.)

[See also ('09) 10 Cri L Jour 224 (225) : 2 S L R 9, *Emperor v. Tarumal*. (Case committed merely because of counsel's wish—Commitment was quashed.)]

27. ('32) AIR 1932 Bom 63 (64) : 56 Bom 61 : 33 Cr. L. J. 262 *Hari Moreskhar v. Emperor*.

28. ('26) AIR 1926 Bom 251 (252) : 27 Cr. L. J. 479, *Emperor v. Achaldas*.

29. ('17) AIR 1917 Bom 33 (34) : 42 Bom 172 : 19 Cri L Jour 342, *Emperor v. Bhimaji Venkaji*.

30. ('76) 1876 Rat 110 (110). (Mere facts that the Magistrate is going on leave, that the witnesses for the defence are not present and that his successor will find it inconvenient to try the case de novo are not sufficient grounds for committal.)

('72) 17 Suth W R Cr 14 (14), *In re Anunto Koyburt*. (That the accused has been committed to the sessions already for another offence is no ground for committing.)

31. ('25) AIR 1925 Pat 755 (759) : 27 Cr. L. J. 313, *B. N. Ry. Co. Ltd. v. Shaik Makbul*.

[See also ('08) 8 Cr. L. J. 360 (361) : 1 S. L. R. 103, *Emperor v. Ahmed Shah*. (Committing Magistrates are not to shirk their responsibilities of deciding cases by unnecessary committal to sessions.)

32. ('34) AIR 1934 Oudh 185 (185), *Emperor v. Unrai*.

('33) AIR 1933 Lah 500 (501) : 34 Cri L Jour 314, *Emperor v. Ujager Singh*.

Magistrate can inflict, he should commit the case. On the other hand, it has been pointed out that where the sub-Magistrate has no jurisdiction but the District Magistrate has, the former would be well advised to submit the case to the latter rather than to commit, so that the valuable time of the Sessions Court may be saved.³³ When two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one of them, the proper course is to commit both or all for trial before a Court of Session.³⁴

Section 347
Notes 4-5

5. "Under the provisions hereinbefore contained."— Before the amendment of this section, it contained the words "stop further proceedings." These words gave rise to a conflict of opinions, one view being that they permitted the Magistrate to disregard the provisions of chapter XVIII and commit the case to sessions immediately he formed the opinion that the case should be committed;¹ the other view was that s. 347 did not in any way override the provisions of chapter XVIII or dispense with the obligation of following them, and that the words "stop further proceedings" meant to stop proceeding with the case as a trial and to proceed to commit to sessions.² The conflict has been set at rest in favour of the latter view by the omission of the words in question.³ It is, therefore, settled law now, that this section is controlled by the provisions contained in chapter XVIII.^{3a} The Magistrate must, therefore, follow the procedure in chapter XVIII, for, it can scarcely be disputed that the words "under the provisions hereinbefore contained" must relate to those provisions in chapter XVIII which define the procedure to be followed in inquiries into cases triable by sessions.⁴

(13) 14 Cri L Jour 304 (304) : 19 Ind Cas 960 (All), *Emperor v. Baldeo*.

(87) 14 Cal 355 (356), *Queen-Empress v. Chandu Gowala*.

(86) 1886 A W N 256 (256), *Empress v. Behari*. (If Magistrate considers punishment he can award would be inadequate he can commit.)

(71) 15 Suth W R Cr 58 (60) (FB), *Queen v. Sheogolam Dass*.

(92) 16 Bom 580 (583, 586) : 1892 Rat 577, *Queen-Empress v. Abdul*.

(89) 11 All 393 (395) : 1889 A W N 152, *Queen-Empress v. Khalak*.

33. (1865) 2 Suth W R Cr L 19 (19).

34. (68) 1 Weir 448 (449).

Note 5

1. (98) 1898 Rat 975 (975), *In re Olive Durant*.

(09) 8 Cri L Jour 221 (223) : 1 Ind Cas 469 : 36 Cal 48, *Phanindra Nath v. Emperor*. (1898 Rat 975, followed.)

2. (12) 13 Cr. L. J. 877 (882) : 6 L. B. R. 129 : 17 Ind Cas 813 (FB), *Emperor v. Channing Arnold*. (Robinson, J., dissenting.)

(12) 13 Cr.L.J. 778 (780) : 36 Mad 321 : 17 I.C. 410, *Sessions Judge of Coimbatore v. Immudi Kumara*.

(14) AIR 1914 Mad 643 (644) : 15 Cr. L. J. 366, *In re Chinnavan*. (13 Cr. L. J. 877 (FB) (LB) followed.)

(81) AIR 1931 All 484 (435) : 53 All 692 : 32 Cr.L.J. 849, *Ram Ghulam v. Emperor*.

(24) AIR 1924 Sind 61 (61, 62) : 17 Sind L R 188 : 26 Cr. L. J. 148, *Utilibai v. Emperor*.

3. (36) AIR 1936 All 134 (136) : 37 Cr. L. J. 337 : 58 All 671 (FB), *Emperor v. Ashgar*. (A Magistrate is, after the amendment of 1923, not empowered to pass an order of commitment without following the provisions of Chapter XVIII.)

(32) AIR 1932 Mad 502 (503) : 33 Cr.L.J. 765, *Lakshminarayana v. Suryanarayana*.

(31) AIR 1931 Bom 517 (518) : 33 Cri L Jour 68, *K. R. Bhat v. Emperor*.

3a. (36) AIR 1936 All 134 (138) : 37 Cr. L. J. 337 : 58 All 671 (FB), *Emperor v. Asghar*.

4. (36) AIR 1936 All 134 (136) : 37 Cr.L.J. 337 : 58 All 671 (FB), *Emperor v. Asghar*.

(29) AIR 1929 Mad 862 (863) : 52 Mad 995 : 31 Cr.L.J. 273, *Damodaran v. Emperor*.

Section 347
Note 5

The Magistrate need not, however, re-commence the inquiry or take evidence *de novo*. It is only required that the further proceedings necessary for commitment shall be taken as directed in chapter XVIII.⁵ From the moment the Magistrate decides to commit, what has hitherto been a trial becomes an enquiry under chapter XVIII.⁶ The charge already framed must be set aside in order that the Magistrate may get back to the stage at which preliminary case proceedings may be applied.⁷

But it is only in respect of the offence for which the accused is to be committed that the proceedings are taken out of chapter XXI. The other proceedings must remain covered by that chapter. So, where a Magistrate, having taken cognizance of a case, frames charges, comes to the conclusion that so far as one of the charges is concerned the accused should be committed, and as regards the other, the offence is not proved, he is entitled under S. 347 to commit for the former charge, but this does not affect his obligation to acquit the accused of the latter charge.⁸

Though the Magistrate need not commence proceedings *de novo*, once he decides to commit, he must not deprive the accused of any right which he might have exercised under chapter XVIII, had the case been treated from the outset as a preliminary enquiry.⁹ Where the accused has had no opportunity of adducing evidence before the committal, the committal should be quashed.¹⁰ Also, where the evidence had not been read over to the witnesses as required by S. 208 read with S. 360, it was held that it was not a mere formal omission but one that may deprive the accused of the valuable right to contradict the witnesses during the sessions trial by reference to their prior statements.¹¹

5. ('40) AIR 1940 Lah 389 (391) : I L R (1940) Lah 151 (161), *Fazal v. Emperor*.
(36) AIR 1936 All 134 (137) : 37 Cr. L. J. 337 : 58 All 671 (FB), *Emperor v. Asghar*.
(31) AIR 1931 All 434 (435) : 53 All 692 : 32 Cr. L. J. 849, *Ram Ghulam v. Emperor*.
(The Magistrate must not deprive the accused of any right which he might have exercised under Chapter XVIII if the case had been treated as an enquiry under chapter from the outset.)

(30) 2 All 910 (912), *Empress of India v. Ilahi Baksh*.

(69) 1 N W P H R Cr 307 (311), *Government Prosecutor v. Ameer-ood-deen*.

See also S. 206 Note 5.

6. ('30) AIR 1930 Cal 666 (667) : 32 Cr. L. J. 243, *Panchanan Sarkar v. Emperor*.

(33) AIR 1933 Cal 354 (357) : 60 Cal 643 : 34 Cr. L. J. 611, *Sudhindra v. Emperor*.

(31) AIR 1931 All 434 (435) : 53 All 692 : 32 Cr. L. J. 849, *Ram Ghulam v. Emperor*.

7. ('32) AIR 1932 Mad 502 (504) : 33 Cri L Jour 765, *Lakshminarayana v. Suryanarayana*.

8. ('25) AIR 1925 Oudh 547 (548) : 26 Cr. L. J. 520, *Bishambar Nath v. Emperor*.

9. ('40) AIR 1940 Lah 389 (391) : I L R (1940) Lah 151 (161), *Fazal v. Emperor*.
(If the Magistrate commits the accused subject to the safeguards relating to the rights of the accused, any statement recorded by him in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chapter XVIII, and may, therefore, be transferred and treated as substantive evidence in the trial before the Sessions Court under S. 288.)

(36) AIR 1936 All 134 (137) : 37 Cr. L. J. 337 : 58 All 671 (FB), *Emperor v. Asghar*.

(31) AIR 1931 All 434 (435) : 53 All 692 : 32 Cr. L. J. 849, *Ram Ghulam v. Emperor*.

10. ('36) AIR 1936 All 134 (138, 139) : 37 Cr. L. J. 337 : 58 All 671 (FB), *Emperor v. Asghar*. (Magistrate committing accused to Sessions Court after examining only some prosecution witnesses—Committal should be quashed.)

(32) AIR 1932 Mad 502 (502, 503) : 33 Cri L Jour 765, *Lakshminarayana v. Suryanarayana*.

11. ('29) AIR 1929 Mad 862 (863) : 52 Mad 995 : 31 Cr. L. J. 273, *Damodaran v. Emperor*.

Section 347
Note 5

After the Magistrate has decided to commit the case, is the accused entitled to cross-examine the witness? If the accused has cross-examined the witnesses before the Magistrate decides to commit, he has no further right of cross-examination after the charge is amended. For, the amended charge is framed under S. 210 which does not allow the accused the right of further cross-examination.¹² In the undermentioned case,¹³ during the examination of the first witness for the prosecution the Magistrate intimated to the accused his intention of committing him to a Court of Session but the accused declined to cross-examine the witnesses and after the charge was framed he prayed that he might be allowed to do so, it was held that he was not entitled to do so. But it is surmised that if the accused, though having had the opportunity to cross-examine does not avail himself of it, because the enquiry having been originally under chapter XXI, he was led to believe that he would have the right of cross-examination after the charge is framed, the accused should not be prejudiced by the conversion of the trial into a preliminary enquiry and should be afforded an opportunity of cross-examination.¹⁴ When the application to cross-examine is made, before the Magistrate frames a charge and decides to commit the case, it must, of course, be granted.¹⁵ In the undermentioned case¹⁶ it was held that the accused would be allowed to cross-examine the witnesses if his application was made before the prosecution closed its case, but not if the application was made after. Referring to this decision, however, a recent Calcutta case has held that such a distinction did not exist.¹⁷

In order that a committal may be quashed on the ground that the provisions of chapter XVIII have not been followed, it must be shown that the accused has been *prejudiced* by the irregularity.¹⁸ But before the committal, the accused is entitled to claim that provisions relating to enquiries before the commitment shall be observed irrespective of any question as to prejudice.¹⁹

Since the effect of the Magistrate's decision to commit is to convert the proceedings into a preliminary enquiry, it follows that if there be a change of Magistrates before the actual committal, the accused will not be entitled to a *de novo* enquiry as proviso (a) of S. 350 (1) applies only to trials and not to enquiries.²⁰

12. ('31) AIR 1931 All 434 (435) : 53 All 692 : 32 Cr. L. J. 849, *Ram Ghulam v. Emperor*. (A I R 1924 All 665, to the contra, not approved.)

13. ('29) AIR 1929 Cal 593 (595) : 57 Cal 44 : 30 Cr. L. J. 1107, *G. V. Raman v. Emperor*.

14. ('29) AIR 1929 Cal 593 (596) : 57 Cal 44 : 30 Cr. L. J. 1107, *G. V. Raman v. Emperor*. ('32) AIR 1932 Mad 502 (504) : 33 Cri L Jour 765, *Lakshminarayana v. Suryanarayana*. (Obiter.)

15. ('24) AIR 1924 Cal 780 (780) : 51 Cal 442 : 26 Cr. L. J. 63, *Jyotsna Nath v. Emperor*.

16. ('12) 13 Cri L Jour 688 (688) : 16 I. C. 336 (Cal), *Fazar Ali v. Macharulla*. (In this case all prosecution witnesses but one were examined.)

17. ('29) AIR 1929 Cal 593 (597) : 57 Cal 44 : 30 Cr. L. J. 1107, *G. V. Raman v. Emperor*.

18. ('31) AIR 1931 Bom 517 (518) : 33 Cri L Jour 68, *K. R. Bhat v. Emperor*.

('14) AIR 1914 Mad 643 (644) : 15 Cri L Jour 366, *In re Chinnavan*.

19. ('29) AIR 1929 Mad 862 (864) : 52 Mad 995 : 31 Cr. L. J. 273, *Damodaran v. Emperor*.

20. ('30) AIR 1930 Cal 666 (668) : 32 Cr. L. J. 243, *Panchanan Sarkar v. Emperor*.

Section 348

348.* (1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused, be committed to the Court of Session or High Court, as the case may be, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted:

Provided that, if any Magistrate in the district has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session.

(2) When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed unless the Magistrate discharges such other person under section 209.

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of the section. 3. Previous conviction should have been under chapter XII or chapter XVII of the Penal Code. 4. "Having been convicted." 5. "Punishable under . . . of the Indian Penal Code." 6. "For a term of three years or upwards." | <ol style="list-style-type: none"> 7. "Shall be committed." 8. Magistrate cannot act under section 349. 9. "Unless he can himself pass an adequate sentence." 10. Transfer to Magistrate specially empowered. 11. Procedure before specially empowered Magistrate. |
|---|---|

*** Code of 1898, original S. 348.**

Trial of persons previously convicted of offences against coinage, stamp-law or property. 348. Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment, for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall be committed to the Court of Session or High Court, as the case may be, unless the Magistrate before whom the proceedings are pending is of opinion that he can himself pass an adequate sentence if the accused is convicted :

Provided that, if the District Magistrate has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session.

1882 : S. 348; 1872 : S. 315; 1861 — Nil.

Other Topics (miscellaneous)

Committal to the District Magistrate. See Note 11. Second offence should be after previous conviction. See Note 4.
 Discretion of Magistrate. See Note 7. When the Magistrate can commit. See Note 9.
 Magistrate cannot convict. See Note 7.

Section 348
Notes 1-2

1. Legislative changes. — The following changes were made in the section by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923:

- (1) The words "if the Magistrate before whom . . . committing the accused" in sub-s.(1) are new. The amendment has been made on the lines of S. 203.¹
- (2) In the same sub-section the words "is competent to try the case and" have been substituted for the words "before whom the proceedings are pending" in order "to make it clear that the section does not empower the Magistrate to pass a sentence in a case which he is not competent to try."²
- (3) The words "any Magistrate in the district" in the proviso to the same sub-section have been substituted for the words "the District Magistrate." By reason of the amendment a case of an old offender may now be transferred not only to a District Magistrate empowered under S. 30, but also to any *other* Magistrate in the district specially empowered under that section.
- (4) Sub-section (2) is new.

2. Scope of the section. — Section 75 of the Penal Code provides for enhanced punishment or punishment of a different kind for offences under chapter XII (offences relating to coin or Government stamp) and chapter XVII (offences against property) of the said Code where the accused has been previously convicted for a similar offence. There are also local or special laws which provide for enhanced punishment or punishment of a different kind on a second conviction for certain classes of offences specified therein. See for an illustration, S. 23 of the Criminal Tribes Act (VI of 1924).

This section specifies the tribunal to which old offenders in respect of the offences specified should be sent for trial by the Magistrates before whom they are charged. The object underlying the section is that the accused should be tried by a tribunal which could award him a punishment adequate to the circumstances of his case.

In order that this section may apply —

- (1) both the offences, namely, that for which the accused has been previously convicted and that for which he is being tried, must fall under one or other of the two chapters, namely chapter XII or chapter XVII of the Penal Code, and
- (2) both must have been offences punishable with imprisonment for a term of three years or upwards.

Section 348 — Note 1

1. Select Committee Report of 1916, clause 80.

2. Select Committee Report of 1922, clause 90.

Section 348
Notes 2-3

The above conditions are the same as those necessary for the applicability of s. 75¹ of the Penal Code and the cases bearing on the latter section have therefore been referred to in the following Notes as an aid to the interpretation of this section.

3. Previous conviction should have been under Chapter XII or Chapter XVII of the Penal Code. — As has been seen in Note 2 above, the previous conviction should have been one for an offence under chapter XII or chapter XVII of the Penal Code.¹ From this the following propositions follow :

- (1) An *attempt* (to commit an offence) punishable under s. 511 of the Penal Code not being an offence under chapter XII or chapter XVII of the Penal Code, a previous conviction therefor will not count for the purposes of this section.² Conversely, no previous conviction under chapter XII or chapter XVII of the Code can be reckoned against an accused when the *subsequent* offence with which he is charged is an *attempt* punishable under section 511.³
- (2) A previous conviction under any local or special law is not a conviction for an offence *under the Penal Code* and will not count

Note 2

1. Section 75 of the Penal Code is given below for facility of reference :

75.^a Whoever, having been convicted,—

Enhanced punishment for certain offences under Ch. XII or Ch. XVII after previous conviction. (a) by a Court in British India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, or

(b) by a Court or tribunal (in any Indian State acting under the general or special authority of the Central Government or of the Crown Representative),^b of an offence which would, if committed in British India, have been punishable under those Chapters of this Code with like imprisonment for the like term,

shall be guilty of any offence punishable under either of those Chapters with life imprisonment for the like term, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years.

a. Substituted by the Indian Penal Code Amendment Act, 1910 (III of 1910) for the original section.

b. Substituted by the A. O. for "in the territories of any Native Prince or State in India acting under the general or special authority of the G. G. in C. or of any L. G."

Note 3

1. ('23) AIR 1923 Lah 286 (286) : 24 Cri L Jour 944, *Fattu v. Crown*. (Conviction under S. 411, Penal Code—Previous conviction under S. 369 cannot be taken into account under S. 75, Penal Code.)

2. ('68) 1 Weir 36 (36).

('88) 1 Weir 37 (37), *In re Motawel Pakuran*.

('81) 3 All 773 (774) : 1881 A W N 69, *Empress of India v. Ramdayal*.

('93-1900) 1893-1900 Low Bur Rul 496, *Nga Pru Tun v. Queen-Empress*.

('95) 17 All 123 (125) : 1895 A W N 23, *Queen-Empress v. Barosa*. (3 All 773, approved.)

('95) 17 All 120 (123) : 1895 A W N 22, *Queen-Empress v. Ajudhia*.

('80) 5 Bom 140 (142), *Empress v. Nana Rahim*. (Per Westropp, C. J. and Kemball, J.; Melvill, J., dissenting.)

('07) 5 Cri L Jour 85 (85) : 1906 Pun Re No. 14 Cr, *Jhamman Lal v. Emperor*.

('87) 14 Cal 357 (357), *Queen-Empress v. Sricharan Bauri*.

('74) 21 Suth W R Cr 35 (35), *Queen v. Damu Haree*.

('84) 1884 Pun Re No. 34 Cr, p. 59 (60), *Empress v. Fattu*.

3. ('07) 5 Cri L Jour 85 (85) : 1906 Pun Re No. 14 Cr, *Jhamman Lal v. Emperor*.

for the purposes of this section.⁴ The Sind Judicial Commissioner's Court has, however, held that where an offender is dealt with under a special law which provides that certain offences punishable under the Penal Code are punishable under that law, S. 75 of the Penal Code will apply.⁵ See also the undermentioned cases.⁶

- (3) A previous conviction given *before the Penal Code came into force* cannot be taken into account for the purposes of this section.⁷

4. "Having been convicted." — The words "having been convicted shall be guilty of any offence" in S. 75 of the Penal Code have been held to imply that the previous conviction should have been *before* the commission of the offence with which the accused is subsequently charged.¹ The reason is that a man should be treated as an old offender only if it can be shown that the first conviction had no effect on him. It cannot be said that the first conviction had no effect in a case where such conviction was after the commission of the offence for which the accused is subsequently tried.² This section uses the words "is again *accused* of any offence, etc.," but it is conceived that the said principle will equally apply to the interpretation of this section also. Consequently, this section will not apply unless the offence with which a person is "again accused" was committed after the previous convictions.³ Under S. 75 of the Penal Code, the previous

4. ('93-1900) 1893-1900 Low Bur Rul 378, *Queen-Empress v. Nga Tha Kaing*. (Previous conviction under Lower Burma Villages Act.)

('04) 1 Cri L Jour 1061 (1062) : 1904 Pun Re No. 17 Cr, *Emperor v. Khan Muhammad*. (Previous conviction under the Punjab Frontier Crimes Regulation, 1887, on verdict of a Jirga.)

('77) 1 Weir 39 (39). (Prior conviction under Regn. IV of 1821.)

5. ('17) AIR 1917 Sind 17 (19) : 11 Sind L R 46 : 18 Cri L Jour 909 (910), *Mazar Attamahomed v. Emperor*. (Previous conviction by the Council of Elders under the Sind Frontier Regulation, 1892.)

6. ('93) 7 C P L R Cr 24 (26), *Empress v. Lalsing*. (Conviction in Berar Assigned Districts passed under the I. P. C. in accordance with an executive notification of the Governor-General of India in Council is not a conviction under the Penal Code for purpose of S. 75, I. P. C., but such conviction can be taken into consideration for determining the measure of punishment to be awarded for the later offence.)

('33) AIR 1933 Pesh 6 (8), *Emperor v. Johnson*. (District Magistrate passing sentence under Frontier Province Regulation, 1931—Such sentence can be taken into consideration—Previous conviction before Court Martial cannot however be considered for enhancement under S. 75, Penal Code.)

7. ('66) 4 Bom H C R Cr 11 (12), *Reg. v. Kushya Yesu*.

(1865) 4 Suth W R Cr 9 (10), *Queen v. Hurpal*. (Per Kemp and Glover JJ; Campbell, J., dissenting.)

(1865) 5 Suth W R Cr 66 (67), *Queen v. Puban*.

('82) 10 Cal L R 392 (392), *Budhon Bujwar v. Empress*.

('68) 1868 Pun Re No. 31 Cr, p. 89 (90), *Hurkishen v. Crown*.

Note 4

1. ('75) 1 All 637 (637), *Empress of India v. Megha*. (Accused committing offence punishable under Chap. XII or Chap. XVII and previously to his being convicted of such offence commits another such offence—S. 75 not applied.)

('82) 1882 Pun Re No. 39 Cr, p. 65 (65), *Gobind v. Empress*. (Previous conviction fourteen days after commission of subsequent offence—Section not applicable.)

('18) AIR 1918 Low Bur 121 (121) : 19 Cr. L. J. 47 : 9 Low Bur Rul 77, *Po So v. Emperor*. (Previous conviction subsequent to commission of offence charged.)

('75) 1 Weir 39 (39). (Prisoner cannot be charged under S. 75 for offence committed subsequent to the date of offence for which he is on his trial.)

2. ('66) 5 Suth W R Cr 66 (67), *Queen v. Puban*.

3. ('79) 1879 Rat 143 (144), *Queen-Empress v. Appa*.

Section 348
Notes 4-7

conviction must have been by a Court in British India or by a Court or tribunal, in any Indian State acting under the general or special authority of the Central Government or of the Crown Representative. A conviction by a Court in a Native State, not acting under any such authority, cannot be reckoned for the purposes of that section.⁴ See also the undermentioned case.⁵

5. "Punishable under . . . of the Indian Penal Code." — It is to be noted that for the application of this section it is not necessary that the previous *sentence* should have been three years or upwards; it is sufficient that the *offence* of which the accused was convicted is *punishable* under the Penal Code with imprisonment for three years or more. See also Note 3 above.

6. "For a term of three years or upwards." — Where the subsequent offence, though falling under chapter XII or chapter XVII of the Penal Code, is punishable with imprisonment for *less* than three years (*e. g.* S. 403, Penal Code), this section will not apply.¹

7. "Shall be committed." — It is the duty of the Magistrate to commit the accused to the Sessions Court or the High Court, as the case may be, if the conditions of the section are satisfied,¹ *viz.*,

- (1) that the accused has been *previously convicted* of an offence of the kind referred to in the section;
- (2) that the Magistrate is satisfied that there are *sufficient grounds* for committing the accused, and
- (3) that the Magistrate is either *not competent* to try the case or is of opinion that he cannot himself pass an *adequate sentence* if the accused is convicted.

The prosecution and the Magistrate should, therefore, ascertain and take notice of any circumstances showing that the accused is a habitual offender who ought, under this section, to be committed.² For this purpose, the Magistrate must, either as a preliminary matter

4. ('19) AIR 1919 All 63 (63) : 42 All 136 : 21 Cr. L. J. 144, *Bhanwar v. Emperor*. (Previous convictions by the Dig Nizam in the Bharatpur State.)

('05) 2 Cri L Jour 749 (750) : 1 Nag L R 137, *Ghasia Teli v. Emperor*. (Previous conviction by Nandgaon State.)

('13) 14 Cr. L. J. 527 (527) : 20 I C 1007 : 1913 Pun Re No. 17 Cr, *Bahawal v. Emperor*. (Previous conviction in Bikanir State.)

See also S. 221 Note 6.

5. ('33) AIR 1933 Pesh 6 (9), *Emperor v. Johnson*. (Previous conviction before Court Martial cannot be taken into consideration under S. 75, Penal Code.)

Note 6

1. ('93-1900) 1893-1900 Low Bur Rul 496, *Nga Pru Tun v. Queen-Empress*.

('11) 12 Cri L Jour 439 (440) : 11 Ind Cas 623 (Lah), *Chandaria v. Emperor*.

Note 7

1. ('99) 2 Weir 422 (422), *In re Mari Naicken*. (S. 380, Penal Code.)

('78) 1878 Pun Re No. 18 Cr, p. 45 (45), *Crown v. Subhan*. (S. 457, Penal Code, with four previous convictions of theft.)

('99) 2 Weir 423 (423), *In re Dasari Ramudu*.

(1864) 2 Bom H C R Cr 126 (127), *Reg. v. Gannu Ladu*. (Ss. 380, 454, Penal Code.)

('73) 19 Suth W R Cr 37 (37), *Doobri Hulwai v. A dumb person*.

('94) 1894 Rat 704 (704), *Queen-Empress v. Gandasing*. (Old offender under Ss. 380, 457, Penal Code.)

('72-92) 1872-1892 Low Bur Rul 335 (335), *Queen-Empress v. Nga Ne Dun*.

2. ('89) 1889 Rat 461 (462), *Queen-Empress v. Karim*.

or at any rate before framing a charge, determine whether there has been a previous conviction; having decided that point, he will have to consider whether, in the circumstances of the case, his powers enable him to pass a sufficiently severe sentence. If they do not so permit, but the evidence does not warrant the discharge of the accused, he must frame a charge under S. 210 and commit him for trial under chapter 18 of the Code.³ When an old convict for theft is again found prowling about at night and seems to be again, under these circumstances, guilty of stealing, he has created against himself a presumption of criminal habit which, if unrebutted, would justify a Magistrate in applying, ordinarily, the rule of this section.^{3a}

The fact that the property stolen was small in value is no reason by itself for not committing the accused and for passing a small sentence on him.⁴ On the other hand, the Court should, as was held by Macleod, C. J., in *King-Emperor v. Gala Mana*,⁵ exercise a wise discretion in making the penalty fit the crime, and should not ordinarily consider petty offenders liable to such heavy punishment as to necessitate their committal to the Court of Session. Thus, it has been held that the lapse of a long time since the previous conviction together with the fact that the accused has been leading a blameless life in the interval will make the application of S. 75, Penal Code inappropriate.⁶ See also the undermentioned case.⁷

The Magistrate has no jurisdiction, if the conditions of the section are satisfied, to do anything but commit the case to the sessions or transfer it to a duly empowered Magistrate.⁸ He has thus no power to

3. ('14) AIR 1914 Mad 149 (149, 150) : 38 Mad 552 : 15 Cr. L. J. 188, *In re Kora Sellandi*. (Conviction before commitment, however, would bar the trial by the Court of Session under S. 403, Criminal Procedure Code.)

3a. ('81) 1881 All W N 153 (153, 154), *Empress v. Budha*.

4. ('87) 1887 All W N 194 (194), *Empress v. Jhanda*. (Theft of property worth rupee one or rupee one and annas four.)

('03) 1903 Pun Re No. 28 Cr. p. 72 (73) : 1 Cr. L. J. 111, *King-Emperor v. Nur Din*. (Theft of a pair of shoes.)

5. ('24) AIR 1924 Bom 453 (453) : 26 Cr. L. J. 759. (Even if such petty offenders are committed there is no necessity for Sessions Judge to inflict a vindictive sentence.)

6. ('26) AIR 1926 Lah 617 (617) : 27 Cr. L. J. 944, *Ishar Singh v. Emperor*. (Previous conviction 12 years back.)

('27) AIR 1927 Lah 647 (647) : 28 Cr. L. J. 160, *Khushdil v. Emperor*. (Previous conviction 20 to 25 years back.)

('08) 7 Cri L Jour 293 (294) (Lah), *Kasim Ali v. Emperor*. (Accused of advanced age—Offence petty—Previous convictions for petty offences 10 years ago—Accused adopting regular life since then—Large family depending upon him—S. 75 not applied.)

('35) 1935 Mad W N 1294 (1295), *Chinnathambi Gounden v. Emperor*. (Accused an elderly man—Previous conviction 7 years back—Value of property stolen small—S. 75 not applied.)

('29) AIR 1929 Lah 278 (278) : 30 Cri L Jour 376, *Kunj Lal v. Emperor*. (S. 75, Penal Code is directed against habitual offenders—Where the subsequent offence was committed after a lapse of nine years during which time the accused was leading a blameless life, held that S. 75 could not be invoked in such a case.)

7. ('33) 1933 Mad W N 1259 (1260), *Kuppuswami Chetty v. Emperor*. (Accused cannot be sentenced to an altogether incommensurate punishment for a trivial offence merely because he has been convicted many times before.)

8. ('16) AIR 1916 Low Bur 65 (66) : 34 Ind Cas 313 (314) : 17 Cri L Jour 201, *Emperor v. Po Yin*. (4 Low Bur Rul 282, referred.)

('08) 8 Cri L Jour 478 (480) : 4 Low Bur Rul 282, *Emperor v. Po Thwe*.

('72) 1872 Pun Re No. 31 Cr. p. 41 (41), *Bhahadur Khan v. Crown*.

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*find the accused guilty.*⁹ Accordingly, where the accused had been previously convicted for an offence under chapter XVII of the Penal Code and the Magistrate noted his opinion that a more severe punishment than he could impose was required, it was held that he would be acting *ultra vires* if he found the accused guilty.¹⁰ Where, however, the fact of the previous conviction is not known to the Magistrate at the trial and he tries the case and passes a sentence not inadequate for a first offence, he cannot be said to have acted with any material irregularity.¹¹

But where there were previous convictions alleged against the accused and the Magistrate, without questioning or calling for proofs of those convictions, held that they were not proved, and convicted and sentenced the accused, the omission was held to amount to a material error, the conviction and sentence were set aside and the case was remanded to the Magistrate with a view to proceed under this section.¹²

8. Magistrate cannot act under section 349. — It follows from what has been stated in Note 7 above that in cases where the accused is liable to enhanced punishment under S. 75 of the Penal Code, and the Magistrate thinks he cannot pass an adequate sentence, he must act under S. 348 and not under S. 349.¹

Where, in such case, he acts irregularly under S. 349, it is open to the District Magistrate to take the case on his own file or transfer it to that of a first class Magistrate, the proceedings, in either case, being taken *de novo*.²

9. "Unless he can himself pass an adequate sentence." — Where the Magistrate thinks that the circumstances of the case permit him to pass an adequate sentence, he should try and dispose of the case himself.¹ It is only where, in the exercise of his discretion, he is of opinion that a higher punishment than what he is empowered to award is necessary that he is bound to commit the accused to the Court of Session. If, in the exercise of his discretion, he thinks he

(‘89) 11 All 393 (395) : 1889 A W N 152, *Queen-Empress v. Khalak*.

[See also (‘72-92) 1872-1992 Low Bur Rul 335 (335), *Queen-Empress v. Nga Ne Dun*. (Subordinate Magistrate should not attempt to deal with an old offender against whom there are two previous convictions under S. 380, Penal Code.)]

9. (‘14) AIR 1914 Mad 149 (149) : 38 Mad 552 : 15 Cri L Jour 188, *In re Kora Sellandi*. (Magistrate ought merely to frame a charge and then commit the accused to the sessions— If he finds him guilty before commitment, it would bar a fresh trial before Sessions Court under S. 403, Criminal P. C.)

10. (‘16) AIR 1916 Low Bur 65 (66) : 34 I. C. 313 (314) : 17 Cr.L.J. 201, *Emperor v. Po Yin*.

11. (‘05) 2 Cr. L. J. 228 (229) : 1905 Pun Re No. 19 Cr, *Emperor v. Maidhan*. (A case referred under S. 438 for enhancement of sentence.)

12. (‘74) 1874 Pun Re No. 12 Cr, p. 21 (21), *Crown v. Santu*.

Note 8

1. (‘08) 8 Cri L Jour 478 (480) : 4 Low Bur Rul 282, *Emperor v. Po Thue*.

(‘16) AIR 1916 Low Bur 65 (66) : 34 I. C. 313 (314) : 17 Cr.L.J. 201, *Emperor v. Po Yin*.

(‘99) 2 Weir 423 (423), *In re Dasari Ramudu*.

(‘35) 1935 Mad W N 1293 (1294), *Emperor v. Basava Appa Rao*.

2. (‘99) 2 Weir 422 (422, 423), *In re Mari Naicken*.

Note 9

1. (‘99) 2 Weir 423 (424), *In re Dasari Ramudu*.

can award an adequate sentence and tries the case himself, he cannot be said to have acted without jurisdiction, although a more adequate sentence could have been passed by his committing the accused to the Sessions Court.² An opinion has been expressed in the undermentioned case³ to the effect that even where the Magistrate considers that the circumstances of the case permit him to pass an adequate sentence, he *may commit the accused to the Sessions Court for trial*.

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Old offenders should ordinarily be charged before first class Magistrates to enable adequate sentences being passed without the necessity of always committing the accused to the Court of Session or the High Court.⁴

10. Transfer to Magistrate specially empowered. — A Magistrate may at any stage of the proceedings without framing a charge send the accused to any Magistrate in the district specially empowered under S. 30 to be placed upon his trial. Assuming that a charge should be drawn up before sending the case to such Magistrate, the charge may be drawn up whenever the Magistrate finds the offence proved which may be at any stage; the evidence of one witness may suffice.¹ See also Note 11.

11. Procedure before specially empowered Magistrate. — Before the amendment of S. 350 it was held in some cases that as that section could not be held to cover a case of transfer from one Court to another, a specially empowered Magistrate to whom a case is transferred under S. 348 cannot act on the evidence already recorded by the transferring Magistrate but must hear the case *de novo*.¹ After the amendment of S. 350 by the addition of sub-s.(3) this is no longer good law.

But, though the combined effects of sections 348 and 350 entitle a Magistrate to rely on the evidence already recorded, he cannot, at the same time, proceed to re-commence the enquiry and also rely upon the previously recorded evidence.²

There is no provision for *committing* an accused person to the Magistrate empowered under S. 30 to be tried as at a Court of Session. He must try the accused as a Magistrate invested with special powers.³

2. ('73) 1873 Rat 70 (72), *Reg. v. Annaji Krishna*.

('80) 2 Weir 31 (32). (The Magistrate has a discretion to try the case himself.)

3. ('15) 38 Mad 552 (553), *In re Kora Sellandi*.

4. ('99) 2 Weir 422 (422), *In re Mari Naicken*.

Note 10

1. See ('73) 1873 Pun Re No. 12 Cr, p. 13 (14), *In re a reference from the Commissioner of Lahore*. (Case under 1872 Code—The proviso permitted transfer only to the District Magistrate invested with powers under S. 30.)

Note 11

1. ('02) 15 C P L R Cr 66 (67, 68), *Emperor v. Kasim*.

('05) 2 Cri L Jour 820 (823, 824) : 1 Nag L R 187, *Ladya v. Emperor*.

2. ('27) AIR 1927 Lah 238 (238) : 28 Cri L Jour 302, *Kartar Singh v. Emperor*. See also S. 350 Note 5.

3. ('73) 1873 Pun Re No. 12 Cr, p. 13 (14), *In re a reference from the Commissioner, of Lahore*.

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349.* (1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

(1A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law:

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

Synopsis

- | | |
|---|---|
| 1. Legislative changes. | 11. To whom reference can be made. |
| 2. Scope of the section. | 12. Procedure of the Magistrate to whom a case is referred. |
| 3. Who can make a reference under this section. | 13. "Shall pass such judgment, sentence or order." |
| 4. "Having jurisdiction." | 14. Committal to sessions. |
| 5. Record of opinion. | 15. Whether superior Magistrate can quash proceedings. |
| 6. Punishment "different in kind." | 16. Whether superior Magistrate can return case. |
| 7. "More severe." | 17. Transfer to another Magistrate. |
| 8. "Or that he ought to be required to execute a bond under section 106." | 18. Whether superior Magistrate can order re-trial. |
| 9. Procedure of referring Magistrate. | 19. Proviso. |
| 10. Sub-section (1A) — Several accused. | |

* 1882 : S. 349; 1872 : S. 46; 1861 : S. 277.

Other Topics (miscellaneous)

Cases under section 348. See Note 2.	Return of cases — Informal reference. See Note 16.
Powers of superior Magistrate. See Notes 12 to 16.	Second and third class Magistrate only can refer. See Note 3.
Reference — Discretionary. See Note 3.	Summary cases — Applicability to. See Note 3.
Referring Magistrate — Duties of. See Note 9.	

**Section 349
Notes 1-2****1. Legislative changes.***Changes introduced in the Code of 1872 —*

- (1) For the words "subordinate Magistrate," occurring in the Code of 1861 (S. 277) the words "Magistrate of the second or third class" were substituted.
- (2) The words "shall record the finding and submit his proceedings" were altered into "*may* record the finding and *if sentence has not been passed, may* submit his proceedings."
- (3) The words "forward the accused" were newly added.
- (4) Before the words "sentence or order" in paragraph 2 the word "judgment" was introduced.
- (5) A proviso limiting the power of the superior Magistrate to those ordinarily exercisable by him under S. 20 of that Act was newly added.

Changes introduced in the Code of 1882 —

- (1) For the words "finds an accused person guilty" in the first paragraph the words "is of opinion that the accused person is guilty" were substituted.
- (2) The words "after hearing the evidence for the prosecution" in the first paragraph were introduced.
- (3) For the words "record the finding" the words "record the opinion" were substituted.
- (4) The proviso was amended by the substitution of the words "shall not inflict a punishment more severe than under Ss. 32 and 33" for the words "shall not exceed the powers ordinarily exercisable under S. 20 of this Act."

Changes introduced in 1898 —

No change has been effected except the numbering of the first and second paragraphs of the old section as sub-sections (1) and (2).

Changes introduced in 1923 —

Sub-section (1A) has been introduced by the Code of Criminal Procedure (Amendment) Act XVIII of 1923. It is similar in terms to sub-s. (2) of S. 348 and is intended to secure identity of treatment to all accused.

2. Scope of the section. — It is a general principle of law that only an authority who has heard the evidence is competent to decide whether the accused is innocent or guilty.¹ This section creates an

Section 349 — Note 2

1. ('24) AIR 1924 Nag 37 (37); 22 Nag L R 166; 24 Cr.L.J. 738, *Baba v. Emperor*. ('16) AIR 1916 Nag 115 (116); 18 Cr. L. J. 35 (36); 12 N L R 146. *Emperor v. Ramprasad*.

See also S. 346 Note 5.

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exception to this rule in that it provides that the Magistrate to *whom the proceedings are submitted* under this section may pass such judgment, sentence or order in the case as he thinks fit even on the evidence recorded by the referring Magistrate.² As such, it should be construed strictly.³

In order that the section may apply, the following conditions must be satisfied —

- (1) The Magistrate submitting proceedings should have *jurisdiction* to try or commit the case.⁴
- (2) He must be of opinion, after hearing the evidence, that the accused is guilty and that he ought to receive a punishment, different in kind from, or more severe than, that which he is empowered to inflict,⁵ or that he ought to be required to execute a bond under section 106.
- (3) He should *record* such opinion.⁶

This section must be read subject to the provisions of S. 348 and when a case falls under that section, the Court should proceed only thereunder and not under this section.⁷

3. Who can make a reference under this section. — This section does not apply to *first class* Magistrates.¹ According to the Chief Court of Lower Burma, it does not also apply to Magistrates trying cases *summarily*, the reason being that the procedure of this section is obviously unsuited to cases tried summarily.² The High Court of Allahabad seems to hold a contrary view.^{2a}

It is in the discretion of the subordinate Magistrate to decide whether he will send up a case or not under this section. An order by a superior Magistrate directing a subordinate Magistrate to send up a case under this section is *ultra vires*.³ A District Magistrate is not competent to forbid, by circular, all subordinate Magistrates in his district from taking up cases (which the Criminal Procedure Code says they may take up) if they think they shall have to act under this section in disposing of the case.⁴

2. ('24) AIR 1924 Nag 37 (37,38): 22 Nag L R 166: 24 Cr.L.J. 738, *Baba v. Emperor*. ('05) 2 Cri L Jour 369 (370): 1905 Pun Re No. 25 Cr, *Muhammad v. Emperor*.

[See however ('91) 2 Weir 690 (690): *Sundaraiyar v. Tiruvengada Naicker*. (Joint Magistrate withdrawing case to his file cannot dispose of case on evidence recorded by Magistrate from whom the case is withdrawn.)]

3. ('24) AIR 1924 Nag 37 (37): 22 Nag L R 166: 24 Cr.L.J. 738; *Baba v. Emperor*.

4. See Note 4.

5. ('29) AIR 1929 Pat 511 (512): 31 Cri L Jour 608, *Suraj Narayan v. Emperor*.

6. See Note 5.

7. ('91) 2 Weir 423 (423), *In re Dasari Ramudu*.

('08) 8 Cri L Jour 478 (480): 4 Low Bur Rul 282, *Emperor v. Po Thwe*.

('91) 2 Weir 422 (422), *In re Mari Naicken*.

Note 3

1. ('85) 7 All 414 (419, 423): 1885 A W N 105 (FB), *Queen-Empress v. Pershad*. ('08) 8 Cr. L. J. 475 (475): 4 Low Bur Rul 277, *Emperor v. Jalal Khan*. (Bench of Magistrates are not authorized to refer under S. 349.)

2. ('08) 8 Cri L Jour 475 (475): 4 Low Bur Rul 277, *Emperor v. Jalal Khan*.

2a. ('32) AIR 1932 All 507 (507, 508): 33 Cri L Jour 472, *Gopal v. Emperor*.

3. ('91) 2 Weir 427 (427): 9 Mad 377, *Empress v. Viranna*.

4. ('66) 3 Bom H C R Cr 29 (32), *Reg. v. Guna*.

4. "Having jurisdiction."—A Magistrate has no power to refer, under this section, a case which he has no jurisdiction to try. If he does so, his proceedings are illegal and void and will not empower the superior Magistrate to proceed under sub-s. (2) of this section.¹ But where the offence was one for which the Magistrate was not competent to try the accused, but for which he was empowered to commit him to the Court of Session, it was held that he was not entirely without jurisdiction and that the Magistrate to whom he referred the case, could, if he thought proper, commit the same to the Court of Session.²

5. Record of opinion. — As has been seen in Note 2 above, it is necessary that the Magistrate should record his opinion as to the guilt of the accused and the necessity for inflicting on him a punishment different in kind from or more severe than that which he is empowered to give, or the necessity for taking a bond from him under S. 106 of this Code.

Where a case was transferred by a Magistrate of the third class to a District Magistrate without any request to the latter to take up the case and without stating any of the three grounds mentioned in the section, it was held that the transfer could not be considered to be one under this section.¹

6. Punishment "different in kind." — It has been held by the Judicial Commissioner's Court of Nagpur that a submission of proceedings for the purpose of taking action under S. 562 cannot be considered to be one under this section inasmuch as the order under that section directing the release of the accused on probation of good conduct is not a punishment at all, and is, therefore, not a "punishment different in kind" from that which the Magistrate is empowered to inflict.¹ In the undermentioned case² where the sub-Magistrate convicted the two accused and sent up the third (a youth) under this section because he could not deal with a juvenile offender, the High Court of Madras held that the case of all the three accused should have been referred and not that of the third accused alone. It seems to have been assumed that a submission of proceedings in respect of an adolescent offender for being dealt with under S. 562 may be done under this section. The actual decision was, however, to the effect that one of the accused alone could not be sent up under this section.

7. "More severe."—Where a Magistrate of the third class who is empowered to inflict a fine not exceeding fifty rupees convicted certain persons of theft, but sent them up to a superior Magistrate under this section recommending the infliction of a fine of Rs. 15 on

Note 4

1. ('99) 1 Bom L R 27 (29), *Queen-Empress v. Sita Ram*.
 2. ('86) 13 Cal 305 (307), *Abdul Waheb v. Chandia*.
- See also Note 14 and S. 206 Note 3.

Note 5

1. ('90) 12 All 66 (68) : 1890 A W N 7, *Empress v. Radhe*.

Note 6

1. ('24) AIR 1924 Nag 37 (38) : 22 Nag L R 166:24 Cr.L.J. 738, *Baba v. Emperor*.
2. ('28) 29 Cr.L.J. 624 (624):109 I. C. 816 (Mad), *Murugesu Koundan v. Emperor*.

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them, it was held that the submission was improper inasmuch as the proposed fine could be inflicted by the third class Magistrate himself and as the section did not apply unless the referring Magistrate was of opinion that he *was not competent* to inflict the punishment deserved by the accused.¹

8. "Or that he ought to be required to execute a bond under section 106." — When a Magistrate is of opinion that the accused ought to be required to execute a bond under S. 106, he ought not to convict and sentence the accused before referring the case under this section, for S. 106 requires that the conviction and order for furnishing security should be passed by one and the same Magistrate.¹ If he convicts the accused, his recommendation that an order for furnishing security be passed will be without jurisdiction and any order of the superior Magistrate under S. 106 will also be without jurisdiction. It does not necessarily follow, however, that the conviction will be defective.² Similarly, where a second class Magistrate sent up a case to a joint Magistrate as he was of opinion that an order under S. 106 was necessary, and the latter passed the order under that section, but returned the case to the sub-Magistrate for conviction, it was held that the joint Magistrate acted without jurisdiction.³

9. Procedure of referring Magistrate.

"*Cannot convict.*" — A Magistrate submitting proceedings under this section is required only to record his opinion that the accused is guilty¹ but cannot legally convict him.² But in view of the amendments effected in S. 245, sub-s. (2) and S. 258, sub-s. (2), it has been held that those sub-sections cannot be read as necessarily prohibiting a Magistrate dealing with a case under this section from *finding* the accused guilty. But the conviction will not be one that has any legality in the sense of prohibiting the sub-divisional Magistrate or District Magistrate from dealing with the case under this section, or as constituting a conviction which would prevent any further trial under S. 403.^{2a} Hence, where a Magistrate submitting a case under this section gives a conviction, it is not necessary that it should be formally *quashed*. It will be treated as mere surplusage and as a legal nullity, so that the Magistrate to whom the case is sent can proceed with it without a reference to the High Court for the purpose of having the conviction

Note 7

1. ('81) 1881 All W N 99 (99), *In re Phullu*.

Note 8

1. ('94) 21 Cal 622 (625, 626), *Mahmudi Sheikh v. Aji Sheikh*.
(109) 9 Cri L Jour 72 (73, 74) : 35 Cal 1093, *Rohimuddi Howladar v. Emperor*.
(109) 10 Cr. L. J. 309 (311):1909 Pun Re No. 7 Cr : 3 I. C. 577, *Emperor v. Hardit*.- 2. ('10) 11 Cr. L. J. 170 (171):5 I. C. 576 (Cal), *Lukhan Dosadh v. Bachi Singh*.- 3. ('24) AIR 1924 All 141 (142) : 24 Cri L Jour 784, *Dukhi v. Emperor*.

Note 9

1. ('88) 1888 Rat 387 (387), *Queen-Empress v. Mahadu*.
[See also ('91) 2 Weir 428 (429), *In re Raghava Naiko*.]- 2. ('88) 1888 Rat 387 (387), *Queen-Empress v. Mahadu*.
(28) AIR 1928 Bom 240 (240): 52 Bom 456: 29 Cr.L.J. 904, *Emperor v. Narayan*.
(24) AIR 1924 Pat 764 (765): 3 Pat 1015: 25 Cr.L.J. 1276, *Prayag Gope v. Emperor*.- 2a. ('28) AIR 1928 Bom 240(240): 52 Bom 456:29 Cr.L.J. 904, *Emperor v. Narayan*.

formally quashed.³ The High Court of Patna has, however, held that where a Magistrate convicts the accused before referring his case, "ordinarily, the case is one which should go back for re-trial owing to the trial Court not carrying out the provisions of S. 349."⁴

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As to the difference between proceedings under this section and those under S. 562, see S. 562 Note 3.

"*Forward the accused.*" — Under the Code of 1861 the subordinate Magistrate was not required to forward either the accused or the witnesses to the District Magistrate; he had only to submit his proceedings.⁵ It was nevertheless held that the accused was entitled to be present before the District Magistrate to offer such reasons as he may have against the finding of the sub-Magistrate or to offer his plea for a lenient sentence,⁶ the proceedings before the superior Magistrate being a continuation of the proceedings before the referring Magistrate.⁷

"*Framing of charge.*" — See section 254 Note 6.

10. Sub-section (1A) — Several accused. — It was held under the Code of 1882 that it was open to a Magistrate to send up one only of several accused for enhanced punishment and to convict the others himself¹ and, in the absence of any appeal to him, the District Magistrate to whom the case of only some accused was referred had no jurisdiction to set aside the conviction of others regarding whom no reference had been made,^{1a} though it was desirable that all the accused should be sent up.² Shortly prior to the coming into force of the Amending Act of 1923, it was doubted in the undermentioned case³ whether in a case where the Magistrate considers it necessary to proceed against one of several accused under sub-section (1), he could validly forward all the other accused also.

Under the section as now amended in 1923, it is clear that all the accused must be forwarded in such cases.⁴ The failure to send up all the accused will not, however, vitiate the jurisdiction to try such of the accused as are *actually* sent up.⁵

The Magistrate is required to forward only such accused as are in his opinion *guilty*. An order, referring the case of those accused who in his opinion are not guilty, is illegal, they being entitled to an acquittal under section 258, sub-section (1).⁶

3. ('28) AIR 1928 Bom 240 (240): 52 Bom 456: 29 Cr.L.J. 904, *Emperor v. Narayan*. [See also ('97) 1897 Rat 945 (945), *Queen-Empress v. Chinnappa*. (It might be taken to have been the record only of his opinion of their guilt.)]

4. ('24) AIR 1924 Pat 764 (765): 3 Pat 1015: 25 Cr.L.J. 1276, *Prayag v. Emperor*.

5. ('66) 3 Bom H C R Cr 29 (31), *Reg. v. Guna*.

6. ('70) 7 Bom H C R Cr 31 (34), *Reg. v. Ragha Naranji*.

7. ('67) 7 Suth W R Cr 38 (38), *Queen v. Gunesb Sircar*.

Note 10

1. ('94) 2 Weir 429 (430), *In re Nachian*.

1a. ('69) 1869 Pun Re No. 5 Cr, p. 4 (4), *Crown v. Moninda*.

2. ('91) 2 Weir 428 (429), *In re Raghava Naiko*.

3. ('24) AIR 1924 Nag 37 (38): 22 Nag L R 166: 24 Cri L Jour 738, *Baba v. Emperor*. (Decided on 7th May 1923.)

4. ('26) AIR 1926 Sind 48 (48): 18 Sind L R 216: 26 Cr.L.J. 1363, *Emperor v. Dodo*.

('28) 29 Cr.L.J. 624 (624): 109 Ind Cas 816 (Mad), *Murugesu Koundan v. Emperor*.

5. ('26) AIR 1926 Sind 48 (48): 18 Sind L R 216: 26 Cr.L.J. 1363, *Emperor v. Dodo*.

6. ('26) AIR 1926 All 176 (176): 26 Cr.L.J. 1630, *Sultan Md. Khan v. Emperor*.

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Notes 11-12

11. To whom reference can be made. — Under the Code of 1861 (section 277) the Magistrate had to submit his proceedings to the Magistrate to whom he was *subordinate*.¹ Under the present Code he should submit his proceedings to the *District* Magistrate or to a *sub-divisional* Magistrate, who alone has jurisdiction to dispose of the matter.² The City Magistrate of Nagpur is not a sub-divisional Magistrate and no reference could be made to him under this section.³ A Magistrate located in a division temporarily in the discharge of his public duties will be deemed to have validly referred his proceedings under this section if he submits them to the Magistrate of that division of the district.⁴

12. Procedure of the Magistrate to whom a case is referred. — When proceedings are sent up to a superior Magistrate under this section, the whole case is opened up for him to deal with according to his discretion.¹ He is not, however, *bound* to hold a trial *de novo*.² He may act on the evidence recorded by the referring Magistrate and adopt his opinion or he may re-examine the witnesses already examined and take further evidence,³ but in any case he is bound to exercise his independent judgment in the matter and write a judgment according to the provisions of section 367.^{3a}

But the nature of the trial is not altered by the proceedings being submitted under this section.⁴ The superior Magistrate cannot, therefore, convict the accused sent up for an *aggravated form of offence*.⁵ Nor could he, where the case was triable summarily, pass

Note 11

1. ('69)-11 Suth W R Cr 7 (8), *In re Nidree Telhince*.
(‘68-69) 5 Bom H C R Cr 47 (47), *Reg. v. Bhagu*. (Case under S. 276 corresponding to the present S. 346.)
- (‘66-67) 4 Bom H C R Cr 8 (8), *Reg. v. Kuberio Ratno*.
2. ('14) AIR 1914 Bom 217 (218) : 38 Bom 719 : 16 Cri L Jour 273, *Emperor v. Vinayak Narayan*. (The Sub-divisional Magistrate cannot transfer the case to first class Magistrate.)
3. ('27) AIR 1927 Nag 209 (210) : 28 Cri L Jour 489, *Rajaram v. Emperor*.
4. ('82) 4 All 366 (371) : 1882 All W N 48, *Empress of India v. Kallu*.

Note 12

1. ('87) 1887 Rat 350 (353), *Queen-Empress v. Bapuda*.
(‘97) 1897 Rat 945 (945), *Queen-Empress v. Chinnappa*. (Magistrate to whom the case is referred can commit the case to the Court of Session.)
(‘97) 1897 Rat 948 (948), *Queen-Empress v. Kondi Malhari*.
2. ('26) AIR 1926 Sind 48 (48) : 18 Sind L R 216 : 26 Cr.L.J. 1363, *Emperor v. Dodo*.
[See ('38) AIR 1938 Cal 415 (416) : 39 Cri L Jour 606, *Sasthi Gopal v. Haridas Bagdi*. (Accused cannot insist on a *de novo* trial.)]
See also S. 350 Note 16.
3. ('91) 2 Weir 428 (429), *In re Raghava Naiko*.
- 3a. ('39) AIR 1939 Oudh 35 (36) : 39 Cr. L. J. 1005, *Lallu Ram v. Emperor*. (It is not sufficient to accept the findings of the referring Magistrate but superior Magistrate should form his own independent judgment and write a judgment according to the provisions of S. 367.)
- (‘20) AIR 1920 Mad 171 (172) : 21 Cri L Jour 52, *In re Karuppiiah Pillai*. (It is wrong to say that all that the Sub-divisional Magistrate has to do under S. 349 is to pass a sentence and make up his mind whether the accused were guilty or not.)
- (‘19) AIR 1919 Pat 290 (290) : 20 Cri L Jour 444, *Thakur Singh v. Emperor*.
4. ('32) AIR 1932 All 507 (507) : 33 Cri L Jour 472, *Gopal v. Emperor*.
5. ('91) 2 Weir 21 (22). (Conviction by second class Magistrate under S. 417, Penal Code — Sub-divisional Magistrate to whom case is referred under S. 349 cannot convict under S. 420, Penal Code, without commencing trial afresh.)

a sentence of imprisonment exceeding three months as prescribed by section 262.⁶

Section 349
Notes 12-14

Where the superior Magistrate examines the accused under sub-section (2), the examination should be reduced to writing as required by section 364.⁷

Where a Magistrate acts irregularly under this section, it is open to the District Magistrate to take the case on his own file or to transfer it to that of some first class Magistrate, the proceedings in either case being taken *de novo*.⁸

13. "Shall pass such judgment, sentence or order." — The superior Magistrate must form his own judgment and pass sentence on the case referred to him.¹ The opinion of the referring Magistrate that the accused is guilty is not binding on the superior Magistrate and the latter may direct an acquittal or discharge.² But he must not confine himself to merely seeing whether the decision of the referring Magistrate was opposed to the evidence; he must consider whether the evidence is worthy of belief and pass such judgment, sentence or order as he deems proper.³ Such judgment should conform to the requirements of s. 367 of the Code.⁴

The word "order" in sub-s. (2), being associated with the words "judgment" and "sentence," what the section contemplates must be taken to be a final order disposing of the case so far as the Magistrate is concerned.⁵

14. Committal to sessions. — A Magistrate to whom the proceedings are submitted under this section has power to commit the case to a Court of Session if necessary.¹ As was observed by a Full

6. ('32) AIR 1932 All 507 (507) : 33 Cri L Jour 472, *Gopal v. Emperor*.
See also S. 262 Note 3.

7. ('08) 7 Cri L Jour 177 (177) (Mad), *In re Venkataraya*.

8. ('91) 2 Weir 422 (422, 423), *In re Mari Naicken*.

Note 13

1. ('39) AIR 1939 Oudh 35 (36) : 39 Cri L Jour 1005, *Lallu Ram v. Emperor*.

('70) 5 Mad H C R App xliii (xliii).

(20) AIR 1920 Mad 171 (172) : 21 Cri L Jour 52, *In re Karupiah Pillai*. (It is not necessary for the superior Magistrate to write a long judgment.)

[See ('19) AIR 1919 Pat 290 (290) : 20 Cr.L.J. 444, *Thakur Singh v. Emperor*.]

2. ('80) 4 Bom 240 (246), *Imperatrix v. Abdulla*. (Superior Magistrate can order acquittal or can commit the case to Sessions Court.)

('02) 1 Low Bur Rul 141 (142), *Crown v. San E*. (Though a Magistrate to whom case is referred should as a rule pass final orders, and should not return the case he is not debarred from committing the case or referring it to a higher Magistrate.)

('82) 1882 Pun Re No. 44 Cr, p. 73 (74), *Musa v. Babri*. (Order of discharge.)

3. ('93) 1893 Rat 636 (637), *Queen-Empress v. Nawal Mal*.

4. ('39) AIR 1939 Oudh 35 (36) : 39 Cri L Jour 1005, *Lallu Ram v. Emperor*.

(20) AIR 1920 Mad 171 (172) : 21 Cri L Jour 52, *In re Karupiah Pillai*.

('19) AIR 1919 Pat 290 (290) : 20 Cri L Jour 444, *Thakur Singh v. Emperor*.

('93) 1893 Rat 636 (637), *Queen-Empress v. Nawal Mal*.

5. ('80) 4 Bom 240 (245), *Imperatrix v. Abdulla*.

('02) 1 Low Bur Rul 124 (125), *Queen-Empress v. Nga Khan*.

('12) 13 Cr.L.J. 16 (16) : 36 Mad 470 : 13 I C 110, *Ponnuswamy Naidu v. Emperor*.

Note 14

1. ('86) 9 Mad 377 (378) : 2 Weir 427, *Empress v. Viranna*.

('87) 1887 Rat 350 (353), *Queen-Empress v. Bapuda*.

('97) 1897 Rat 945 (945), *Queen-Empress v. Chinnappa*.

('80) 4 Bom 240 (246), *Imperatrix v. Abdulla*.

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Notes 14-16**

Bench of the High Court of Madras, "the words of the section enabling the Magistrate to pass such judgment, sentence or order, etc., expressly provide for the disposal of the case otherwise than by an acquittal or sentence, . . . and it was quite competent to the Magistrate to whom the case was referred, to say that, either from the gravity of the matter or other sufficient reason, the Sessions Court was the proper tribunal for the disposal of the case, and to make an order in accordance with that opinion."²

The undermentioned cases,³ which held a contrary view were decided under the Codes of 1861 and 1872 and are no longer good law.

15. Whether superior Magistrate can quash proceedings.

— A Magistrate to whom a case is submitted under this section has no power to quash the proceedings of the referring Magistrate and send the case to another Magistrate for re-trial. If he considers that such proceedings are incorrect or illegal he should report them for orders under section 438.¹

16. Whether superior Magistrate can return case. — A Magistrate to whom proceedings are submitted under this section is not at liberty to return the case to the submitting Magistrate, but must dispose of it himself.¹ Where a case was returned by a sub-divisional Magistrate to the submitting Magistrate to pass such sentence as the latter was competent to pass, the conviction and sentence of the latter acting under such order were reversed and the sub-divisional Magistrate directed to dispose of the case himself.² Where, however, the case was returned for committal, although the procedure of the superior Magistrate was held to be incorrect, the committal was allowed to stand by the Madras and Calcutta High Courts as not being illegal.³

(186) 10 Bom 196 (197), *Queen-Empress v. Havia Tellapa*.

(187) 13 Cal 305 (307), *Abdul Wahab v. Chandia*.

(1902) 1 Low Bur Rul 141 (141), *Crown v. San E*.

See also S. 206 Note 3.

2. (1976) 1 Mad 289 (290) : 2 Weir 425 (FB), *In the matter of Chinnimarigadu*.
(Case under S. 46 of the Code of 1872 corresponding to this section.)

See also Note 4 and S. 206 Note 3.

3. (1977) 1877 Rat 130 (131), *Queen-Empress v. Lakshman*.

(1968) 10 Suth W R Cr 50 (51), *In the case of Bhikaree Mullick*.

Note 15

1. (1900) 1900 Pun L R Cr, p. 37 (38), *Jawind Singh v. Empress*.

Note 16

1. (182) 1882 Pun Re No. 33 Cr, p. 40 (41), *Empress v. Bhana*.

(186) 9 Mad 377 (378) : 2 Weir 427, *Empress v. Viranna*.

(111) 13 Cri L Jour 16 (16) : 36 Mad 470 : 13 I. C. 110, *Ponnuswamy v. Emperor*.

(192-96) 1 Upp Bur Rul 274 (274), *Queen-Empress v. Nga Po Thit*.

(189) 1889 Rat 479 (480), *Queen-Empress v. Sitaram*.

(186) 10 Bom 196 (197), *Empress v. Havia Tellapa*.

(1900-02) 1 Low Bur Rul 124 (125), *Queen-Empress v. Nga Khan*.

(1904) 1 Cr. L. J. 137 (138) : 26 All 344 : 1904 A W N 42, *Emperor v. Thakur Dayal*.

See also S. 206 Note 3.

2. (180) 6 Cal L Rep 276 (277), *Dula Faqueer v. Bhagirat Sircar*.

(189) 1889 Rat 479 (480), *Queen-Empress v. Sitaram*.

(112) 13 Cri L Jour 16 (16) : 36 Mad 470 : 13 I. C. 110, *Ponnuswamy v. Emperor*.

3. (186) 9 Mad 377 (378) : 2 Weir 427, *Empress v. Viranna*.

(188) 2 Weir 428 (428), *In re Nagularapu Dasarigadu*.

(187) 14 Cal 355 (356), *Empress v. Chandu Gowala*.

The Bombay High Court,⁴ on the other hand, held, in a similar case, that the action of the sub-divisional Magistrate in returning the case to the second class Magistrate was illegal and annulled the order of the superior Magistrate; but nothing was said about the order of committal being illegal.

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Notes 16-18

It has been held in the undermentioned case⁵ that there is nothing illegal in the action of a District Magistrate pointing out that the reference was informal since the inquiry was defective (statements of the accused not having been recorded), and requiring the defect to be supplied before the case was laid before him; and further that the proceedings of the submitting Magistrate being incomplete, he is not precluded, when he has remedied the defects, from coming to a different finding from that previously recorded and acquitting some of the accused whom he had formerly believed to be guilty. On the other hand, where a Magistrate recorded a plea of guilty and submitted the case and the same was returned to him with the remark that in warrant-cases the accused could not be convicted on a mere plea of guilty, it was held that S. 349 does not give the superior Magistrate any power to return the case for supplying omissions and that if there had been any need for taking the accused's defence, the superior Magistrate ought to have done it himself.⁶

17. Transfer to another Magistrate. — The jurisdiction to deal with proceedings under this section is conferred, as has been seen already in Note 11, upon District Magistrates and sub-divisional Magistrates, and upon no other Magistrates. A sub-divisional Magistrate to whom a case is submitted under this section cannot, therefore, transfer it to a Magistrate who is not empowered to act under this section.¹ But he can commit the case to a Court of Session or transfer to a District Magistrate who can act under the section.²

18. Whether superior Magistrate can order re-trial. — It is open to the superior Magistrate to acquit the accused on the charge framed and order a fresh trial before a competent Magistrate under such section as he thinks proper.¹

But a Magistrate should not pass a sentence under S. 349 and then try the accused on another charge arising in the same case. If he

4. ('86) 10 Bom 196 (197), *Queen v. Havia Tellapa*.

5. ('91) 2 Weir 426 (426, 427).

6. ('07) 5 Cri L Jour 416 (417) : 3 Low Bur Rul 279, *Emperor v. Taw Pyu*.

Note 17

1. ('14) AIR 1914 Bom 217 (218) : 38 Bom 719 : 16 Cri L Jour 273 (273), *Emperor v. Vinayak Narayan*.

('90) 5 Mad H C R App xliii (xliii).

('05) 2 Cri L Jour 464 (465) : 1905 Upp Bur Rul Cr. P C 33, *Emperor v. Nga Po Si*. (Transfer by Sub-Divisional Magistrate to Head-Quarter Magistrate of the second class.)

('82) 4 Mad 233 (233), *Queen v. Velayudam*.

('81) 2 Weir 424 (424).

See also S. 192 Note 6 and S. 528 Note 11.

2. (1900-02) 1 Low Bur Rul 141 (141), *Crown v. San E*.

Note 18

1. (1900-02) 1 Low Bur Rul 141 (142), *Crown v. San E*.

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Notes 18-19

wishes to do so, the proper course for him is to set aside the proceedings and direct a fresh trial before himself *ab initio*.²

19. Proviso. — When a case is sent up under this section to a District or sub-divisional Magistrate, such Magistrate is not competent to inflict a punishment more severe than what he is empowered to inflict under S. 32 or S. 33.¹

A District Magistrate acting under this section must be regarded as a Magistrate not empowered under S. 30, and hence cannot pass a sentence longer than what he is empowered to pass under S. 32, *viz.*, two years.² Where he does pass a sentence in excess of those powers, an appeal will lie to the Sessions Court under section 408 of the Code and not to the High Court.³

Section 350

350.* (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

* Code of 1882 : S. 350 — Same as that of 1898 Code.

Code of 1872 : Ss. 328 and 329.

328. Whenever any Magistrate, after having heard part of the evidence in a case, ceases to exercise jurisdiction in such case and is succeeded by another Magistrate who has and who exercises jurisdiction in such case, such last-named Magistrate may decide the case on the evidence partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and commence afresh :

Convictions on evidence partly recorded by one Magistrate and partly by other.

Provided that the accused person may, when the second Magistrate commences his proceedings, demand that the witnesses shall be re-summoned and re-heard, in which case the trial shall be commenced afresh :

Provided also that any Court of appeal or revision before which the case may be brought, or, in cases tried by Magistrates subordinate to the Magistrate of the District, the Magistrate of the District, without appeal, may set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or Magistrate is of opinion that the accused person has been materially prejudiced thereby; and may order a new trial.

Commitments, on evidence partly recorded by one officer and partly by another, valid.

329. Whenever, from any cause, a Magistrate making an inquiry under chapter XV of this Act is unable to complete the proceedings himself, any other Magistrate having jurisdiction to inquire and to commit may complete the case and proceed as if he had recorded all the evidence himself.

Code of 1861 — Nil.

2. ('92-96) 1 Upp Bur Rul 241 (243), *Queen-Empress v. Nga Paik Hmwe*.

Note 19

1. ('03) 1903 Pun Re No. 12 Cr, p. 32 (33), *Allah Bakhsh v. Emperor*.
2. ('07) 6 Cri L Jour 289 (290): 4 Low Bur Rul 53, *Nga Pya v. Emperor*. (In this case one of the accused was sentenced to five years' imprisonment.)
- ('69) 1869 Pun Re No. 16 Cr, p. 31 (32), *Bhag Singh v. Crown*. (Sentence of three years' rigorous imprisonment.)
3. ('07) 6 Cri L Jour 289 (290): 4 Low Bur Rul 53, *Nga Pya v. Emperor*.
- ('73) 1873 Pun Re No. 2 Cr, p. 3 (3), *Crown v. Rahim*.

See also S. 34 Note 3 and S. 408 Notes 4 and 7.

act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and recommence the inquiry or trial :

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Provided as follows :—

- (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard ;
 - (b) the High Court, or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.
- (2) Nothing in this section applies to cases in which proceedings have been stayed under section 346 or in which proceedings have been submitted to a superior Magistrate under section 349.
- (3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1).

Synopsis

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|---|--|
| 1. Legislative changes. | 10a. Witnesses examined on commission—Applicability of proviso. |
| 2. Scope and applicability of the section. | 10b. Proviso, if applies to maintenance proceedings. |
| 2a. Applicability of the section to summary trials. | 11. Duty of Magistrate under proviso (a). |
| 3. "Ceases to exercise jurisdiction." | 12. Re-commence the inquiry or trial. |
| 4. "Is succeeded by another Magistrate." | 13. From what stage inquiry may be re-commenced. |
| 5. "May act on the evidence so recorded." | 14. Case coming again before original Magistrate. |
| 6. Delivery of judgment of predecessor. | 14a. Transfer of a case from a Bench of Magistrates to a Magistrate. |
| 7. Proviso (a). | 15. Proviso (b) — Prejudice to the accused. |
| 8. Application for re-hearing, when to be made. | 16. Sub-section (2). |
| 9. Who can demand de novo trial. | 17. Sub-section (3) — Transfer of cases. |
| 10. Proviso, if applicable to inquiries. | |

Section 350

Note 1

Other Topics (miscellaneous)

- Accused's statement taken by one Magistrate—Committal by successor—Admitted in sessions under S. 287. See Note 5.
- Applicability to enquiries. See Notes 2 and 10.
- Case also transferred with the Magistrate. See Note 2.
- Consent of counsel immaterial. See Note 2.
- Death of Magistrate. See Notes 2 and 4.
- Defamation—Examination of complainant afresh. See Note 15.
- De novo* trial and mere re-hearing of witnesses. See Note 12.
- Details as to refusal—Needed. See Note 7.
- Directions of High Court. See Note 12.
- Effect of *de novo* trial on prior charge. See Note 13.
- Effect of S. 117, sub-s. (2). See Note 10.
- Evidence by Magistrate before reference under S. 346. See Note 16.
- Evidence by Magistrate before reference under S. 349. See Note 16.
- Evidence by Magistrate with no jurisdiction. See Note 2.
- Evidence wholly taken by another Magistrate. See Note 2.
- Exhibiting prior depositions insufficient. See Note 12.
- Expenses of *de novo* trial. See Note 7.
- Failure, to inform accused of his right, curable irregularity. See Note 11.
- First class Magistrate—Subordinate to District Magistrate. See Note 15.
- Fresh hearing and not mere cross-examination. See Note 12.
- Inquiry re-commenced—Prior evidence not to be relied upon. See Note 5.
- Judgment after cessation of jurisdiction. See Note 6.
- Mere absence of Magistrate—No cessation of jurisdiction. See Note 3.
- No prejudice. See Note 2.
- No re-hearing of merely arguments. See Note 7.
- Non-applicability to committals. See Note 2.
- Non-applicability to Sessions Judges. See Note 2.
- Object of the section. See Note 12.
- Objection by the accused—Immaterial. See Note 15.
- Option exercised can be retracted. See Note 8.
- Option to accused — Only once. See Note 8.
- Part-heard trials. See Note 3.
- Re-calling not wanted at framing charge — Immaterial. Note 7.
- Refusal of *de novo* trial — Incurable defect. See Note 7.
- Re-hearing and not reading out of prior statement. See Notes 7 and 12.
- Re-hearing — Prior proceedings unaltered. See Note 13.
- Remand merely for further evidence—Section applies. See Note 7.
- Section 33, Evidence Act, applies. See Note 7.
- Section 437 and this section. See Note 5.
- Shifting of jurisdiction—No automatic removal of cases. See Note 3.
- Successive transfers. See Note 2.
- Successor—Meaning. See Note 4.
- Successor — No powers under S. 203 or S. 202. See Note 13.
- Transfer after discharge and before re-trial. See Note 2.
- Transfer before hearing. See Note 2.
- Transfer of case to another Court. See Notes 3 and 17.
- Undertaking against *de novo* trial — Repudiation. See Note 7.

1. Legislative changes.

Code of 1861 — The Code of 1861 contained no corresponding section and hence, when a Magistrate was transferred pending a part-heard case, the same had to be heard *de novo*.¹ But even under that Code, it was held that in inquiries preliminary to commitment it would be waste of time and vexation to the witnesses to insist on their being examined again in all cases.²

Code of 1872 — Section 323 contemplated cases in which only *part* of the evidence had been recorded by the outgoing Magistrate; it

Section 350 — Note 1

1. ('69) 4 Mad H C R App xlii (xliii) : 1 Weir 469.
- ('70) 2 N W P H C R 468 (470), *Queen v. Kullian Singh*. (Joint Magistrate going on leave—District Magistrate bringing the case on his own file and deciding it is not legal.)
- ('67) 8 Suth W R Cr 59 (59), *Queen v. Poorno Chunder Doss*. (Where a prisoner is convicted by a Magistrate on evidence recorded by another the defect cannot be cured by evidence being recorded again without setting aside the prior conviction.)
2. ('67) 7 Suth W R Cr L 3 (4), *In re Shiboo Koorul*.

did not contemplate cases where the *whole* of the evidence had been recorded by the first Magistrate.³

Section 350
Notes 1-2

Under the first proviso to S. 328 it would seem that where the accused exercised his option and had the witnesses re-summoned, the trial had to commence afresh.

The case of one Magistrate succeeding another pending an enquiry preliminary to commitment was provided for separately by S. 329 of the Code of 1872.

Code of 1882 — The wording of the section was appropriately altered to cover not only cases where a *part* of the evidence had been recorded, but also cases where the *whole* evidence had been recorded by the outgoing Magistrate.

While under the Code of 1872 power to set aside the conviction on the ground of prejudice to the accused was given to *all Courts* of appeal and revision and to the District Magistrate, S. 350 of the Code of 1882 mentions only the High Court and the District Magistrate having such power.

Act XVIII of 1923 — The words "or in which proceedings have been submitted under S. 349" have been added to sub-s. (2) and this addition makes it clear that such proceedings also are not covered by this section. Sub-section (3) has been added and sets at rest the question whether the provisions of the section applied to cases where the Magistrate ceases to exercise jurisdiction by reason of the transfer of a case from his file. The amendment endorses the view that had been followed already by the majority of Courts, that such cases also come within the scope of the section.

2. Scope and applicability of the section. — It is a general principle of law that only a person who *has heard the evidence in the case* is competent to decide whether the accused is innocent or guilty.¹ This section is another exception to that rule and has been introduced purely for administrative convenience.^{1a} See also S. 349 Note 2. It is obviously intended to meet the case of transfers of Magistrates from one district to another, and to prevent the necessity of trying from the beginning all cases which may be part-heard at the time of such transfer.² It applies as much to cases in which a Magistrate ceases to exercise jurisdiction by reason of the *transfer of a case* to another

3. See Note 2.

Note 2

1. ('38) AIR 1938 All 536 (537): I L R (1938) All 794 : 39 Cr. L. J. 978, *Shyama Pado Deb v. Sunder Das*.

('37) 1937 Mad W N 1245 (1247), *Maddeem Sahib v. Emperor*.

('37) AIR 1937 Nag 147 (148): 38 Cri L Jour 697 : I L R (1937) Nag 538, *Sardari Lal v. Emperor*. (It is desirable for the proper administration of justice that normally, the Magistrate who passes the final order should be the Magistrate who has heard all the evidence.)

1a. ('05) 2 Cri L Jour 820 (823) : 1 Nag L R 187, *Ladya v. Emperor*. (Like all statutory exceptions to the rules of common law this section must be strictly construed.)

('89) 1889 Rat 472 (472), *Queen-Empress v. Sesha*.

2. ('93) 20 Cal 870 (873), *Hardwar Singh v. Khaga Ojha*.

Section 350
Note 2

Court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of *his own death or transfer* to another post.³

The section is wide enough to cover every trial or enquiry under the Code⁴ and is applicable to summons-cases as well as to warrant-cases.⁵ Its application is, however, limited to *Magistrates*; the section does not cover trials before *Sessions Judges*, so that a Sessions Judge is not empowered to try a case in which part of the evidence has not been recorded by himself.⁶ Not even the accused's consent will give the Sessions Judge such jurisdiction.⁷ But where a sessions trial had not begun, but only the preliminary proceedings of swearing in the jury and reading out of the charges to them had been gone through before a change of Judge took place, it was held that the successor could conduct the trial without going through the preliminary proceedings over again.⁸

The application of the section is not confined to the single occurrence of one Magistrate succeeding another as may be suggested by the use of the word "second" in proviso (a). On principle, if a second Magistrate can act on evidence recorded by his predecessor, there seems to be no reason why a third Magistrate should not act on evidence recorded by his predecessors.⁹

3. See Note 17.

4. ('10) 11 Cri L Jour 440 (440): 7 I C 54: 37 Cal 812, *Anu Sheikh v. Jitu Sheikh*. (Proceedings under S. 145 is an enquiry and S. 350 applies.)

('08) 9 Cr.L.J. 278 (279): 1 I C 336 (Cal), *Ali Mahomed v. Tarak Chandra* (Do.)

('24) AIR 1924 Pat 786 (786, 787): 25 Cr.L.J. 89, *Sondi Singh v. Govind Singh*. (S. 350 applies in part to proceedings under S. 145.)

('79) 4 Cal L R 452 (454), *Buroda Kant v. Korimuddi*. (Applies to security proceedings.)

('25) AIR 1925 Oudh 228 (229): 27 Oudh Cas 323: 25 Cri L Jour 1380, *Baij Nath v. Emperor*. (Do.)

('07) 6 Cri L Jour 1 (5): 11 C W N 789, *Wahid Ali Khan v. Emperor*. (Do.)

('25) AIR 1925 All 245 (245): 25 Cri L Jour 651, *Basanti v. Emperor*. (Applies to enquiries under S. 247, U. P. Municipalities Act.)

[But see ('75) 23 Suth W R Cr 62 (63), *Guru Charan Sen v. Kali Nath*. (Decided with reference to S. 530 of the Code of 1872.)]

5. ('25) AIR 1925 Oudh 228 (229): 27 OC 323: 25 Cr.L.J. 1380, *Baij Nath v. Emperor*.

6. ('81) 3 Mad 112 (113): 2 Weir 430, *Tarada Baladu v. Queen*.

('94) 7 C P L R Cr 1 (2), *Empress v. Kaluram*.

('74) 21 Suth W R Cr 47 (47), *Queen v. Gopi Noshyo*.

('90) 1890 Pun Re No. 1 Cr, p. 1 (2), *Buta Singh v. Empress*. (Such defect cannot be cured by S. 537.)

('12) 13 Cri L Jour 861 (862): 35 All 63: 17 I C 797, *Badri Prasad v. Emperor*.

('02) 26 Bom 50 (53): 3 Bom L R 558, *King-Emperor v. Sakharan Pandurang*.

('75) 23 Suth W R Cr 59 (60), *Queen v. Rughoonath Dass*.

7. ('75) 23 Suth W R Cr 59 (60), *Queen v. Rughoonath Dass*.

('90) 1890 Pun Re No. 1 Cr, p. 1 (2), *Buta Singh v. Empress*. (Defect is a fatal one and not a mere irregularity.)

('01) 26 Bom 50 (53): 3 Bom L R 558, *King-Emperor v. Sakharan Pandurang*.

('08) 8 Cri L Jour 121 (123): 8 C. L. J. 59, *Durga Charan v. Emperor*.

('30) AIR 1930 Rang 354 (354): 32 Cr. L. J. 115, *Nga San Tin v. Emperor*.

8. ('27) AIR 1927 Bom 161 (162): 28 Cr. L. J. 402, *Emperor v. Dorabji Pestonji*. See also S. 286 Note 2.

9. ('38) AIR 1938 Nag 288 (289): 39 Cri L Jour 815: I L R (1939) Nag 79, *Moti Shankarlal v. Keshrichand*. (Each transfer gives accused fresh chance of exercising his right under proviso to S. 350—Word 'predecessor' means 'predecessors' where there are more than one.)

('24) AIR 1924 Mad 227 (228): 47 Mad 245: 25 Cri L Jour 566, *Govindan Nair v. Krishnan Nair*.

Nor is there any distinction between cases where there has been a change of Magistrates in the course of the enquiry in the original Court and cases where the inquiry has been closed by one Magistrate in the original Court by an order of discharge and then re-opened by the Sessions Judge when another Magistrate has succeeded.¹⁰ See also Note 5.

This section does not purport to deal with cases in which process has been issued by a Magistrate who is transferred *before the cases come up for hearing*. But it has been held that a similar rule must prevail and that if jurisdiction may as a matter of course be exercised by the successor after evidence has begun, there seemed no reason why it should not be exercised where it has not been commenced.¹¹

Where a Magistrate is transferred pending a trial, but the case is also transferred to his file for completion by him, there is no necessity for a *de novo* trial, there being no change of Magistrates, and the judicial mind brought to bear on the case throughout being the same. Neither this section nor any other provides for such a case.¹²

Similarly, where a Bench of Magistrates consisting of A and B hears a case but the depositions are recorded by A and subsequently the Bench is dissolved and the case is transferred to A alone sitting singly, this section does not apply and he is not bound to re-hear the witnesses already examined by him.^{12a} See also Note 14.

This section does not permit of a commitment by a Magistrate upon evidence recorded partly by himself and partly by a Magistrate who has *not* ceased to exercise jurisdiction.¹³

Section 328 of the Code of 1872 was more restricted in its scope than the present section, and did not allow of one Magistrate's deciding a case upon evidence *wholly* recorded by another.¹⁴ But on principles analogous to S. 328, the High Court declined to interfere when the accused was not prejudiced.¹⁵

Where evidence has been recorded wholly or partly by a Magistrate who has no jurisdiction, and the case is then transferred to the file of a Magistrate having jurisdiction, this section does not apply, and such evidence cannot be legally considered by the latter Magistrate; the trial must be held *de novo*.¹⁶

10. ('31) AIR 1931 Mad 488 (489) : 54 Mad 512 : 32 Cri L Jour 635, *Lakshmi Reddy v. Muni Reddy*.

(127) AIR 1927 Pat 5 (6) : 27 Cri L Jour 1125, *Daroga Singh v. Emperor*. (Case remanded by appellate Court for further evidence — Transfer of Magistrates in the meanwhile—New Magistrate is bound to hold *de novo* trial at the request of the accused.)

11. ('93) 1893 Rat 652 (654), *Queen-Empress v. Govinda*.

12. ('98) 22 Mad 47 (48) : 2 Weir 430, *Queen-Empress v. Sri Ahoballamatam*. See also Note 14.

12a. ('35) AIR 1935 Cal 287 (288, 289) : 62 Cal 266 : 36 Cri L Jour 857, *Abdul Hakim v. Fozu Mia*.

13. ('93-1900) 1893-1900 Low Bur Rul 52, *Queen-Empress v. Nga Shwe The*.

14. ('75) 23 Suth W R Cr 59 (60), *Queen v. Rughoonath Dass*. (Obiter.)

(177) 1877 Rat 124 (125), *Queen-Empress v. Bhikaiji*.

15. ('75) 24 Suth W R Cr 12 (13), *Thakur Dass Manghi v. Namdur Mundul*.

16. ('28) AIR 1928 Cal 183 (183):55 Cal 65:29 Cr.L.J.464, *Budhu Tatua v. Emperor*.

Section 350
Notes 2a-3

2a. Applicability of the section to summary trials. — The Nagpur High Court holds that this section applies to summary trials.¹ The opposite view is held by the Sind Judicial Commissioner's Court.² The conflict of views arises from the fact that this section applies to cases where the evidence has been *recorded* wholly or partially by the first Magistrate whereas the recording of evidence is dispensed with under the law in the case of summary trials. According to the Nagpur High Court, notwithstanding this, if evidence is recorded, as a matter of fact, in a particular case, there is no reason why this section should not apply to it. The Sind Court thinks that such evidence does not form part of the record and cannot be taken into consideration under this section.

Where a case is summarily tried by a Magistrate and before the trial is complete the case is transferred to another Magistrate having no power to try cases summarily, the latter Magistrate must commence the trial *de novo*. The reason is that a case cannot be tried summarily as to a part of it and in the ordinary way as to the rest of it.³

3. "Ceases to exercise jurisdiction." — Where a Magistrate is transferred from one district to another, his jurisdiction ceases in the former district when the transfer takes effect,¹ and he can no longer be held to be the presiding officer of the Court from which he was transferred.² With his transfer his office *qua* the exercise of jurisdiction in any particular case in which he was engaged is vacated.³

But the words "ceases to exercise jurisdiction therein" do not mean that the Magistrate should have ceased to occupy the *particular post*, but mean that he should have ceased to exercise jurisdiction *in the enquiry or trial*.⁴ Thus, the words would apply even to cases where the Magistrate's connexion with a part-heard case is terminated by the transfer of the *case* to the file of another Magistrate.⁵ See Note 17.

Note 2a

1. ('40) AIR 1940 Nag 239 (240) : 1940 N L J 321 (322) : 41 Cr L J 782, *Emperor v. Durga Prasad*. (Where only scanty notes of evidence are made they need not be kept on the record and cannot be relied on.)
2. ('36) AIR 1936 Sind 40 (40) : 37 Cr.L.J. 455, *Emperor v. Hemandas Devansingh*. (Section 350 relates to jurisdiction and an error in jurisdiction is not a mere irregularity.)
3. ('32) AIR 1932 Mad 505 (507) : 33 Cr. L. J. 653 : 55 Mad 79, *Nannier v. Dasalier*.

Note 3

1. ('81) 3 All 563 (565, 566) : 1881 A W N 37 (FB), *Empress of India v. Anand Sarup*. (Spankie, J., dissenting.)
- ('02) 15 C P L R Cr 15 (16), *Emperor v. Dhondu Singh*. (Order passed by a Magistrate after his successor had taken charge set aside.)
- ('96) 19 All 114 (115) : 1896 A W N 195, *Balwant v. Kishen*. (Do.)
- ('13) 14 Cri L Jour 239 (240) : 19 Ind Cas 335 (All), *Hira Lal v. Emperor*.
2. ('24) AIR 1924 All 770 (771) : 46 All 851 : 25 Cr.L.J. 1277, *Emperor v. Baldeo*.
3. ('10) 11 Cr.L.J. 440 (440) : 7 I. C. 54 : 37 Cal 812, *Anu Sheikh v. Jitu Sheikh*.
4. ('12) 13 Cri L Jour 218 (220) : 14 Ind Cas 314 : 39 Cal 781, *Kudrutullah v. Emperor*. (Dissenting from 12 All 66.)
- ('06) 4 Cr.L.J. 140 (142) : 1906 A W N 201 : 3 A L J 825, *Emperor v. Sajjad Husain*. (Trial commenced by the same Magistrate while acting as District Magistrate but completed as first class Magistrate — Held that Magistrate had jurisdiction.)
5. ('17) AIR 1917 U B 11 (11) : 2 U B R 108 : 17 Cr.L.J. 401(401), *Barachi v. Emperor*.
- ('20) AIR 1920 Pat 693 (694) : 22 Cri L Jour 82, *Rupa Singh v. Emperor*.
- ('09) 32 Mad 218 (219) : 9 Cr.L.J. 146 : 1 I. C. 54, *Palaniandy Goundan v. Emperor*.

A mere shifting of local areas from the jurisdiction of one Magistrate to that of another does not automatically remove cases from the file of the former, and the former will not automatically cease to have jurisdiction over such cases.⁶

Nor does a Magistrate cease to have jurisdiction in a case merely by absenting himself from a subsequent hearing.⁷

4. "Is succeeded by another Magistrate." — When a new officer is appointed to any magisterial office he becomes the successor of the outgoing Magistrate.¹ Further, when a case is transferred from the file of one Magistrate to that of another, the former is succeeded by the latter in the sense that the latter exercises the jurisdiction over the case which had been exercised by the Magistrate who had begun it.² See Note 17.

On the death of a Magistrate empowered under S. 30 of the Code, the District Magistrate, being the only remaining Magistrate in the district having powers under that section, took upon his file a case which was being tried by the deceased Magistrate. It was held that the District Magistrate must be regarded as having *succeeded* the deceased within the meaning of this section.³ See also Note 14.

5. "May act on the evidence so recorded." — When the accused persons do not insist upon a *re-hearing* of the witnesses, a Magistrate succeeding another is entitled to act on the evidence recorded by his predecessor or partly by his predecessor and partly by himself.¹

The undermentioned cases² which held that when a case is remanded for further enquiry to another Magistrate by a Court of

(1908) 7 Cri L Jour 220 (221) : 12 C W N 416 : 7 C L J 488 : 35 Cal 457, *Mohesh Chandra v. Emperor*.

(14) AIR 1914 All 45 (46) : 15 Cri L Jour 354 : 36 All 315, *Emperor v. Nankhua*.
6. (12) 13 Cri L Jour 203 (204) : 14 Ind Cas 203 (All), *Mt. Nithani v. Emperor*.
7. (23) AIR 1923 Oudh 163 (163) : 25 Cr. L. J. 198, *Brij Bhukan v. Ram Kirat*.

Note 4

1. (93) 1893 Rat 652 (654), *Queen-Empress v. Govinda*.
(1909) 9 Cri L Jour 278 (280) : 1 Ind Cas 336 (Cal), *Ali Mahomed Khan v. Tarak Chandra*. (When there is only one Deputy Magistrate and he is transferred it is reasonable to regard the new Magistrate as his successor.)
2. (10) 11 Cr. L. J. 440 (440) : 7 I. C. 54 : 37 Cal 812, *Anu Sheikh v. Jitu Sheikh*.
3. (17) AIR 1917 Nag 63 (64) : 19 Cr. L. J. 705, *Gorelal v. Emperor*.

Note 5

1. (38) AIR 1938 Mad 742 (743) : 39 Cr. L. J. 828, *In re Harichandra Reddy*.
(12) 9 All L Jour 3n (3n).
- (21) AIR 1921 All 122 (122) : 22 Cri L Jour 406, *Ram Devi v. Govind Sahai*.
(Evidence recorded partly by his predecessor and partly by Magistrate.)
- (21) AIR 1921 Pat 472 (473), *Ramlakhan Mahito v. Emperor*. (Do.)
- (91) 5 C P L R Cr 20 (25), *Empress v. Ramdayal*. (Evidence wholly recorded by first Magistrate.)
[See (12) 13 Cri L Jour 120 (121) : 13 I. C. 776 : 38 Cal 828, *Amodinidasee v. Darson*. (Case withdrawn by sub-divisional Magistrate from Bench of Magistrates after some witnesses for prosecution had been examined—Sub-divisional Magistrate discharging accused on ground that no evidence had been produced — Held that the sub-divisional Magistrate ought to have considered the evidence recorded by the Bench of Magistrates.)]
2. (92) 6 C P L R Cr 11 (12), *Empress v. Dulzsha*.
(12) 13 Cri L Jour 255 (255) : 14 Ind Cas 607 (All), *Ram Dial v. Emperor*.

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Notes 5-6

revision, the Magistrate must hear the evidence over again, are not really restrictive of the scope of S. 350, but are based upon the interpretation therein placed on the words "further inquiry" in S. 436.

But he cannot re-commence the enquiry and at the same time rely upon evidence already recorded.³

A statement of an accused was recorded by a Magistrate who was thereafter transferred. The case was subsequently committed to sessions by his successor. It was held that the statement, though not recorded by the committing Magistrate, could nevertheless, in view of S. 350, be admitted in evidence in the sessions case under S. 287.⁴

6. Delivery of judgment of predecessor. — Section 350 gives a Magistrate jurisdiction under certain circumstances to *decide* a case upon evidence recorded by his predecessor, but does it give him a jurisdiction to deliver a judgment written by the latter? According to the Calcutta High Court it does not, the reason being that the Magistrate who makes himself responsible for the judgment, must always be the Magistrate who, before delivery thereof, had considered the evidence on record fairly and had also listened to the arguments, if any, of the accused.¹ The Rangoon High Court also agrees with this view but points out that if there is no demand for a new trial by the accused the succeeding Magistrate may take the judgment of his predecessor and compare it with the evidence recorded in the case and if he finds that it expresses what he himself would have decided in the case, he may deliver it as his own judgment.²

The High Court of Madras and the Chief Court of Oudh take the opposite view, *viz.*, that there is no irregularity in a Magistrate's pronouncing the judgment of his predecessor.³ At the same time, the Madras High Court makes it clear that a Magistrate cannot be compelled to pronounce a judgment of his predecessor and thereby adopt it as his own.⁴ The Allahabad High Court has considered the

3. ('27) AIR 1927 Lah 238 (238) : 28 Cri L Jour 302, *Kartar Singh v. Emperor*. ('03-04) 2 Low Bur Rul 17 (18), *King-Emperor v. Nga Pe*.
See also S. 348 Note 11.

4. ('26) AIR 1926 Lah 271(271):7 Lah 70:27 Cr. L. J. 627, *Ghulam Jannet v. Emperor*.
See also S. 287 Note 3.

Note 6

1. ('26) AIR 1926 Cal 537 (539) : 27 Cr. L. J. 406, *Mahomed Rafique v. Emperor*. ('31) AIR 1931 Cal 637 (638) : 33 Cr. L. J. 60, *Jogeshchandra v. Surendra*.

('24) AIR 1924 Cal 55 (55) : 50 Cal 664 : 24 Cr. L. J. 489, *Baisnab Charan v. Amin Ali*.

2. ('39) AIR 1939 Rang 249 (250, 251) : 1939 R L R 570 : 40 Cri L Jour 829, *Chinnayar v. Maung Mya Thi*. (Succeeding Magistrate delivering judgment written by his predecessor without adopting it as his own judgment or signing or dating it—Defect is not mere irregularity curable under S. 537.)

('31) AIR 1931 Cal 637 (638) : 33 Cr. L. J. 60, *Jogeshchandra v. Surendra Mohan*.

3. ('08) 7 Cr. L. J. 459 (459) : 18 M L J 197, *In re Sankara Pillai*.

('33) AIR 1933 Mad 251 (251) : 34 Cr. L. J. 117, *In re China Somayya*.

('25) AIR 1925 Oudh 62 (63) : 28 Oudh Cas 109 : 25 Cr. L. J. 1075, *Chandika Prasad v. Emperor*.

[See also ('17) AIR 1917 Mad 340 (341): 40 Mad 108 : 17 Cr. L. J. 166 (167), *In re Savarimuthu Pillia*. (Whether it is legal for a Magistrate to pronounce his predecessor's judgment in face of demand for de novo trial doubted.)]

4. ('17) AIR 1917 Mad 340 (341) : 17 Cri L Jour 166 (167) : 40 Mad 108, *In re Savarimuthu Pillia*. (There is no specific provision in the Criminal Procedure

procedure as being at most an irregularity curable under S. 537 in the absence of prejudice to the accused.⁵ The Lahore High Court has held a similar view in the undermentioned cases.⁶

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Notes 6-7

The Madras and Lahore High Courts have held in the cases cited below⁷ that even where the accused demands a re-hearing the Magistrate is entitled to refuse his request and deliver the judgment written by his predecessor. This view proceeds on the ground that the trial must be deemed to have ended on the writing and signing of the judgment by the first Magistrate and the mere pronouncing of the judgment is no part of the trial. But in the undermentioned decision⁸ the Madras High Court considered it very doubtful if a re-hearing could be refused if it was demanded by the accused. The Oudh Chief Court has also held that a re-hearing cannot be refused if it is demanded by the accused on the ground of there having been a change in the Magistrates.^{8a}

There is, however, certainly no provision in the Code for delivery of a judgment written by a Magistrate *after* he had ceased to have jurisdiction in the district;⁹ a judgment so written is in fact no judgment at all.¹⁰

7. Proviso (a).—The discretion given to a Magistrate by sub-s. (1) to act or not to act in a *trial* upon evidence recorded by his predecessor is controlled by this proviso.¹ Under this proviso the accused is entitled to demand that witnesses already examined be re-called and re-heard.² As to whether he is entitled to demand that witnesses examined on commission be re-examined, see Note 10a. Refusal by a Magistrate to

Code corresponding to O. 20 R. 2, Civil Procedure Code, under which the successor of a Judge can be said to be the mouthpiece of his predecessor.)

5. ('23) AIR 1923 All 276 (277) : 24 Cr. L. J. 173, *Nur Muhammad v. Emperor*. (1889 All W N 181, distinguished.)

6. ('40) AIR 1940 Lah 289 (290) : 41 Cr. L. J. 803, *Harnam Singh v. Emperor*.

('39) AIR 1939 Lah 21 (22) : I L R (1938) Lah 567 : 40 Cr. L. J. 288, *Gian Singh v. Amar Singh*. (Magistrate signing judgment written by him in absence of accused and keeping it for pronouncement by his successor—Judgment is delivered within S. 366 (3) and the failure to pronounce it is a mere irregularity.)

7. ('39) AIR 1939 Lah 21 (22) : 40 Cr. L. J. 288 : I L R (1938) Lah 567, *Gian Singh v. Amar Singh*. (Once Magistrate signs judgment written by him, he delivers it and trial is over — Mere fact that successor pronounces it makes no difference — S. 350 does not apply.)

('33) AIR 1933 Mad 251 (251) : 34 Cr. L. J. 117, *In re China Somayya*.

[See also ('38) AIR 1938 All 102 (106) : I L R (1938) All 157 : 39 Cr. L. J. 345, *Bakshi Ram v. Emperor*. (Judgment is not part of trial.)

8. ('17) AIR 1917 Mad 340 (341) : 17 Cr. L. J. 166 : 40 Mad 108, *In re Savarimuthu*.

8a. ('25) AIR 1925 Oudh 62 (63) : 28 O C 109 : 25 Cr. L. J. 1075, *Chandika v. Emperor*.

9. ('24) AIR 1924 Cal 55 (55) : 50 Cal 664 : 24 Cr. L. J. 489, *Baisnab v. Amin Ali*.

10. ('17) AIR 1917 Cal 310 (310) : 18 Cr. L. J. 10 (11), *Chandra Kishore v. Emperor*. See also S. 12 Note 7 and S. 366 Note 3.

Note 7

1. ('37) AIR 1937 Nag 147 (148) : 38 Cr. L. J. 697 : ILR (1937) Nag 538, *Sardari Lal v. Emperor*.

('30) AIR 1930 Nag 59 (60) : 31 Cr. L. J. 282, *Emperor v. J. B. Sane*. (The right to be exercised by the accused under this proviso can be exercised only at the time when second Magistrate commences his proceedings.)

('34) AIR 1934 Oudh 324 (325) : 35 Cr. L. J. 1147, *Manzoor Ali v. Abdul Salam*.

2. ('37) AIR 1937 All 438 (439) : 38 Cr. L. J. 804, *Mahtab Singh v. Emperor*. (This applies to inquiries under S. 110 also.)

(1900-02) 1 Low Bur Rul 139 (140), *U Waradama v. Crown*.

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re-summon witnesses required by the accused is a defect which is not curable by s. 537.³ The Madras High Court has, however, held that proviso (b) applies to such cases and that the proceedings are not vitiated in absence of prejudice.^{3a} But subject to giving effect to this right of the accused the option lies with the Magistrate to start the inquiry or trial all over again or not.⁴ The accused has no right to insist that there shall not be a *de novo* trial or inquiry and if the Magistrate begins the proceedings anew against the wishes of the accused, the Magistrate's action is not without jurisdiction.⁵ In such a case no question of prejudice to the accused arises.⁶

The proviso does not apply unless the accused *asks* for a re-hearing⁷ and where a trial is impeached on the ground that a re-hearing was refused, it is insufficient to make a general allegation of such refusal, without any specific allegation as to the date when and the person to whom the application was made, and the order thereon.⁸

The mere fact that at the time of the framing of the charge the accused stated that he did not wish the witnesses to be re-called should not deter the Magistrate's successor from acting under this section,⁹ and if a case is remanded for further inquiry, and in the meanwhile there is a change of Magistrates, the new Magistrate is bound to accede to the accused's request under this proviso, notwithstanding that the remand had been made only for recording further evidence.¹⁰

3. ('98) 25 Cal 863 (868) : 2 C W N 465, *Gomer Sirda v. Queen-Empress*. (The right of accused to recall some witnesses is not lost by his having previously made an application for the attendance of witnesses.)

('03) 1903 Pun Re No. 3 Cr, p. 8 (9, 10), *Amir Khan v. Emperor*. (Magistrate not asking the accused whether he wants the witnesses to be recalled is an irregularity curable by S. 537.)

('18) AIR 1918 L B 63 (63) : 9 L B R 92 : 19 Cr.L.J. 321, *Hnin Yin v. Than Pe*.

('25) AIR 1925 All 245 (245) : 25 Cr. L. J. 651, *Basanti v. Emperor*. (Case under U. P. Municipalities Act.)

('21) AIR 1921 All 35 (36) : 22 Cri L Jour 668, *Chajju v. Emperor*. (Order of acquittal passed after refusal is void in law.)

[See also ('38) AIR 1938 Oudh 212 (213) : 39 Cr. L. J. 854 : 14 Luck 172, *Sheo Ram v. Emperor*.]

3a. ('38) AIR 1938 Mad 724 (725) : 39 Cri L Jour 932, *In re Ramamuni Reddi*. ('37) 1937 Mad W N 1245 (1247), *Naddeem Sahib v. Emperor*.

4. ('36) AIR 1936 Nag 153 (154) : 37 Cr. L. J. 983 : ILR (1936) Nag 92, *Tukaram v. Emperor*.

5. ('38) AIR 1938 Oudh 218 (221) : 39 Cr. L. J. 858 : 14 Luck 156, *Gur Dayal v. Sheo Dularay*. (Dissenting from A I R 1934 Oudh 324.)

('37) AIR 1937 Nag 147 (148) : 38 Cr. L. J. 697 : ILR (1937) Nag 538, *Sardarilal v. Emperor*. (There is no provision in the Code which enables the accused to demand that witnesses examined by the Magistrate who has ceased to exercise jurisdiction shall not be re-summoned and re-heard.)

('35) AIR 1935 Mad 318 (319) : 36 Cr. L. J. 1265, *Mudda Veerappa v. Emperor*. [But see ('34) AIR 1934 Oudh 324 (325) : 35 Cr.L.J. 1147, *Manzoor Ali v. Abdus*. ('30) AIR 1930 Nag 59 (60) : 31 Cri L Jour 282, *Emperor v. J. B. Sane*.]

6. ('38) AIR 1938 Oudh 218 (221) : 39 Cr. L. J. 858 : 14 Luck 156, *Gur Dayal v. Sheo Dularay*.

7. ('18) AIR 1918 All 279 (281, 282) : 40 All 307 : 19 Cr. L. J. 378, *Ram Dass v. Emperor*.

('20) AIR 1920 Pat 693 (694) : 22 Cri L Jour 82, *Rupa Singh v. Emperor*.

8. ('23) AIR 1923 Cal 320 (320) : 23 Cr L.J. 502, *Aziz Mandal v. Girish Chandra*.

9. ('12) 14 Cr.L.J. 175 (176) : 19 I. C. 175 : 1912 U B R 151, *Nga Po Tein v. Emperor*.

10. ('27) AIR 1927 Pat 5 (6) : 27 Cri L Jour 1125, *Daroga Singh v. Emperor*.

If the accused or his pleader in applying for a transfer undertakes not to exercise his right under this proviso, and he repudiates such undertaking, the Magistrate to whom the case is transferred is bound to consider the accused's application for re-summoning and re-hearing the witnesses and is not controlled by any directions in this regard by the Court transferring the case to him.¹¹

The accused's right is to have the witnesses re-summoned and *re-heard* and not merely that their former statements be read out to him.¹² He cannot be asked to pay the expenses of re-summoning the witnesses.¹³

The extent of the right of the accused is only to have the *witnesses re-called and re-examined*.¹⁴ He is not entitled to demand a retrial as such.¹⁵ It has been held that the accused is not entitled under the proviso to claim a re-hearing on the ground that his *pleader's arguments* were not heard by the previous Magistrate.¹⁶ Where, after a charge is framed in the trial of a warrant-case the case comes before a new Magistrate and the witnesses are re-summoned and re-heard as required by the accused, he is not entitled to have the prosecution witnesses re-called *again* for further cross-examination.¹⁷ Where the Magistrate has not exercised his option of re-summoning the witnesses and recommencing the inquiry or trial, it is open to an accused who has demanded the re-summoning and re-hearing of witnesses under this proviso, to ask that the evidence of any particular witness should not be taken afresh.¹⁸ Where witnesses for prosecution are re-summoned for examination at the instance of the accused under this proviso,

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11. ('18) AIR 1918 All 279 (281) : 40 All 307 : 19 Cri L Jour 378, *Ram Das v. Emperor*. (Obiter.)

('18) AIR 1918 Nag 22 (26) : 19 Cri L Jour 657, *Jangilal v. Emperor*. (Expression of intention by counsel in High Court not to claim 'de novo' trial.)

[See also ('30) AIR 1930 Lah 168 (170) : 31 Cr. L. J. 257, *Gowardhan Dass v. Abbas Ali*. (Doubtful if Magistrate can impose condition while ordering transfer.)]

12. ('20) AIR 1920 Lah 344 (344) : 22 Cri L Jour 119, *Mangal Singh v. Emperor*.

('18) AIR 1918 Low Bur 63 (63) : 9 L.B.R. 92 : 19 Cr. L. J. 321, *Hnin Yin v. Than'Pe*.

13. ('15) AIR 1915 Low Bur 107 (107) : 15 Cri L Jour 687, *Elias v. Eza Kiel*.

('35) AIR 1935 Rang 108 (109) : 13 Rang 297 : 36 Cri L Jour 953, *Maung Chit Tay v. Maung Tun Nyun*. (Magistrate should, under discretion conferred by S. 544, order the expenses of witnesses to be paid by the Government.)

See also S. 544 Note 1.

14. ('38) AIR 1938 Oudh 218 (221) : 39 Cr. L. J. 858 : 14 Luck 156, *Gur Dayal v. Sheo Dularay*.

('36) AIR 1936 Nag 153 (154) : 37 Cr. L. J. 983 : ILR (1936) Nag 92, *Tukaram v. Emperor*.

('33) AIR 1933 Mad 841 (842) : 35 Cri L Jour 79, *Ramanna v. Emperor*.

15. ('36) AIR 1936 Nag 153 (154) : 37 Cr. L. J. 983 : ILR (1936) Nag 92, *Tukaram v. Emperor*.

('35) AIR 1935 Mad 318 (319) : 36 Cr. L. J. 1265, *Mudda Veerappa v. Emperor*.

16. ('25) AIR 1925 Oudh 62 (63) : 28 O.C. 109 : 25 Cr. L. J. 1075, *Chandika Prasad v. Emperor*. (But it is submitted that the question as to the ground on which the accused applies for rehearing under this proviso is irrelevant.)

17. ('35) AIR 1935 Mad 258 (259) : 37 Cr. L. J. 150, *Edward Philbert v. Emperor*.

('33) AIR 1933 Mad 841 (842) : 35 Cr. L. J. 79, *In re Ramanna*.

18. ('35) AIR 1935 Mad 318 (319) : 36 Cri L Jour 1265, *Veerappa v. Emperor*. (But examination of witness not wanted by accused is only irregularity which will not vitiate proceedings in absence of prejudice to accused.)

('34) AIR 1934 Nag 209 (212, 213) : 36 Cri L Jour 41, *Ibrahim v. Emperor*. (Previous depositions of particular witnesses taken as part of record with express consent of accused's pleader and after due consideration if accused would be prejudiced by such course—*Held* not illegal.)

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the order in which they should be examined-in-chief rests with the prosecution.¹⁹

This section in no way affects the provisions of S. 33 of the Evidence Act, and if a *de novo* trial is conducted, but one of the witnesses cannot be re-summoned because he is dead, his evidence may, nevertheless, be admitted under S. 33 of the Evidence Act.²⁰

8. Application for re-hearing when to be made. — The time when the accused may apply under proviso (a) is when the second Magistrate *commences his proceedings*; that is, when the case is called on, with the Magistrate on the Bench and the accused in the dock, and the representatives for the prosecution and for the defence (if the accused are defended) are present in the Court for the hearing of the case.¹

The option given to the accused can be exercised by him *only once*.² An accused who has asked for a re-hearing of the witnesses can change his mind and leave the Court free to exercise its statutory option to act upon the evidence already recorded.³

9. Who can demand de novo trial. — The proviso is entirely in the interests of the accused and it is for him to say who is to be re-summoned and re-heard. The *complainant* has no privilege under S. 350, and cannot demand a re-hearing.¹

10. Proviso, if applicable to inquiries. — This proviso is limited to criminal *trials* and is not applicable to *inquiries*.¹ Thus,

19. ('84) AIR 1934 Nag 209 (211) : 36 Cri L Jour 41, *Ibrahim v. Emperor*.

20. ('27) AIR 1927 Lah 332 (333) : 8 Lah 570 : 28 Cr. L. J. 451, *Lekal v. Emperor*. (Disapproving of AIR 1922 Lah 49.)

Note 8

1. ('98) 25 Cal 863 (865) : 2 C W N 465, *Gomer Sirda v. Queen-Empress*. ('22) AIR 1922 Lah 49 (54) : 3 Lah 115 : 23 Cr. L. J. 330, *Sahib Din v. Emperor*. [See ('37) AIR 1937 Bom 55 (56) : 38 Cr. L. J. 250 : ILR (1937) Bom 211, *Dagdu Govind Set v. Punja Vedu*.]
2. ('30) AIR 1930 Nag 59 (60) : 31 Cri L Jour 282, *Emperor v. J. B. Sane*.
3. ('38) AIR 1938 Nag 288 (289) : 39 Cri L Jour 815 : ILR (1939) Nag 79, *Moti Shankarlal v. Keshrichand*. (Accused claiming de novo trial before second Magistrate but waiving it before the third Magistrate—Third Magistrate can act on the evidence recorded by the first Magistrate.)
- ('26) AIR 1926 Mad 815 (816) : 27 Cri L Jour 659, *In re Arulay*.
- ('25) AIR 1925 Mad 317 (317) : 26 Cri L Jour 526, *In re Vudigalapudi Gadu*. [But see ('30) AIR 1930 Nag 59 (60) : 31 Cri L Jour 282, *Emperor v. J. B. Sane*.]

Note 9

1. ('38) AIR 1938 Oudh 218 (220) : 39 Cri L Jour 858 : 14 Luck 156, *Gur Dayal v. Sheo Dularey*. (Though he can put before the Magistrate reasons why the proceedings should be recommenced—Obiter.)
- ('25) AIR 1925 Mad 317 (317) : 26 Cr. L. J. 526, *In re Vudigalapudigadu*. (Complainant cannot insist on the accused to have a de novo trial.)
- ('26) AIR 1926 Mad 815 (816) : 27 Cri L Jour 659, *In re Arulay*. (If the accused declines to act under sub-cl. (1) (a) the complainant must suffer any disadvantage following upon the Magistrate's choosing to proceed on the evidence recorded.)

Note 10

1. ('36) AIR 1936 Nag 153 (154) : 37 Cr. L. J. 983 : ILR (1936) Nag 92, *Tukaram v. Emperor*.
- ('36) AIR 1936 Nag 220 (221) : 38 Cr. L. J. 15 : ILR (1937) Nag 135, *Emperor v. Ganpat*.
- ('23) AIR 1923 Cal 483 (484) : 24 Cri L Jour 569, *Sadak Reza v. Sachindra Nath Roy*. (Does not apply to inquiries under S. 145.)

it does not apply to inquiries preparatory to a commitment² or to proceedings in warrant-cases before a charge is framed, such proceedings being held to amount only to inquiries.³ The Lahore High Court, however, in the undermentioned case,⁴ seems to hold the view that the proviso is available to an accused even in proceedings prior to the framing of a charge. The Sind Judicial Commissioner's Court has also held that a trial within the meaning of the proviso does not commence with the framing of the charge in warrant-cases but commences when the accused appears or is brought before the Court under S. 252 and that, therefore, the proviso applies even to cases where a charge has not been framed.⁵ The Bombay High Court has also held that 'trial' includes the proceedings before the charge is framed.⁶

As to whether proceedings under chapter VIII of the Code are enquiries or trials within the meaning of this section, there is a difference of opinion. In a Full Bench case of the Madras High Court, Ayling, J., was of opinion that they were only enquiries, while Wallis J., was of the opinion that they were *trials*.⁷ It was also held in an earlier Calcutta case that there was so much similarity in substance between enquiries into offences and inquiries for taking security that the proviso should be equally applicable to both.⁸ Whether or not the proviso to S. 350 applies *suo vigore* to proceedings under chapter VIII, it has been definitely held that the proviso is, nevertheless, applicable by virtue of the provisions of S. 117, sub-s.(2).⁹

(20) AIR 1920 Mad 337 (342, 344) : 43 Mad 511 : 21 Cr.L.J. 402 (FB), *Venkatachennayya v. Emperor*. (S. 117 (2), Cr. P. C., does attract proviso (a) to S. 350 and the latter applies to case under S. 107, Cr. P. C.)

(24) AIR 1924 Pat 786 (787) : 25 Cri L Jour 89, *Sondi Singh v. Govind Singh*. (Does not apply to inquiries under S. 145, Cr. P. C.)

(31) AIR 1931 Mad 488 (489) : 54 Mad 512 : 32 Cr. L. J. 635, *Lakshmi Reddy v. Muni Reddy*. (Obiter.)

See also S. 145 Note 39.

2. ('38) 42 C W N 224 (224), *Ashutosh Sen v. Emperor*. (The Magistrate has, however, got a discretion to exercise whether he will act on the evidence recorded by his predecessor, or he will resummon any of the witnesses before he frames a charge against the accused.)

(30) AIR 1930 Cal 666 (668) : 32 Cri L Jour 243, *Panchanan Sirkar v. Emperor*. ('09) 9 Cr. L. J. 146 (146, 147) : 1 I. C. 54 : 32 Mad 218, *Palaniandi v. Emperor*.

3. ('38) AIR 1938 Mad 742 (743) : 39 Cri L Jour 828, *In re Harichandra Reddy*. ('36) AIR 1936 Nag 153 (155) : 37 Cri L Jour 983 : ILR (1936) Nag 92, *Tukaram v. Emperor*. (If no charge has been framed at all, accused is not entitled to a fresh examination of the witnesses.)

(36) AIR 1936 Nag 220 (221) : 38 Cr.L.J. 15 : ILR (1937) Nag 135, *Emperor v. Ganpat*.

(23) AIR 1923 Mad 660 (661) : 46 Mad 719 : 24 Cr.L.J. 192, *Ramanathan v. Emperor*. ('22) AIR 1922 Lah 49 (54) : 3 Lah 115 : 23 Cri L Jour 330, *Sahib Din v. Emperor*. (Accused has a right to demand that the witnesses shall be re-summoned and re-heard in case of summary trials, and also in summons-cases.)

5. ('34) AIR 1934 Sind 106 (110) : 28 SLR 239 : 35 Cr.L.J. 1261, *Labsing v. Emperor*. 6. ('37) AIR 1937 Bom 55 (56) : 38 Cri L Jour 250 : ILR (1937) Bom 211, *Dagdu Govind Set v. Punja Vedu*. (Case under sub-section (1).)

7. ('20) AIR 1920 Mad 337 (341) : 43 Mad 511 : 21 Cri L Jour 402 (F B), *Venkatachennayya v. Emperor*.

8. ('79) 4 Cal L R 452 (454), *Buroda Kant Roy v. Korimuddi Moonshee*.

9. ('37) AIR 1937 All 438 (439) : 38 Cri L Jour 804, *Mahtab Singh v. Emperor*. (Enquiry under S. 110)

(37) 20 N L J 117 (118), *Govinda v. Emperor*.

(20) AIR 1920 Mad 337 (342, 344) : 43 Mad 511 : 21 Cr.L.J. 402 (FB), *Venkatachennayya v. Emperor*.

Section 350
Notes 10a-11

10a. Witnesses examined on commission — Applicability of proviso. — The object of re-summoning witnesses who have already been examined is that the Magistrate may see their demeanour in the witness-box. A demand for re-summoning cannot therefore be made in the case of a witness who has never been summoned but whose evidence has only been taken on commission.¹ The words "re-summoned and re-heard" in proviso (a) presuppose that the witnesses have been already summoned and heard.²

Where interrogatories had been issued to such a witness and answered by him, in a subsequent *de novo* trial it is not necessary to issue fresh interrogatories and the answers to the interrogatories already made can be considered as evidence against the accused.³

10b. Proviso, if applies to maintenance proceedings. — The proviso applies only in the case of trials of persons accused of offences alleged to have committed by them. A person against whom proceeding under chapter XXXVI of the Code is taken not being an accused person, the proviso does not apply to such a proceeding.¹ See also Note 5 under S. 488.

11. Duty of Magistrate under proviso (a). — This section does not require that the Magistrate shall ask the accused if he wishes to exercise the right¹ though it would be desirable and proper that the accused should be informed of his rights under the proviso.² But the

(25) AIR 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cr. L. J. 1380, *Baij Nath v. Emperor*.

See also S. 117 Note 5.

Note 10a

1. ('40) AIR 1940 Sind 193 (193, 194), *Sukhramdas Hiranand v. Emperor*. (Magistrate cannot be said to have exercised discretion wrongly in refusing to compel attendance of such witness.)

('40) AIR 1940 Pesh 17 (17) : 41 Cri L Jour 681, *Roshan Lal v. Emperor*. (Interrogatories issued and answered—Subsequent trial *de novo* under S.350—Fresh interrogatories need not be issued — Nor can interrogatories already answered be excluded from evidence.)

('37) AIR 1937 Pesh 67 (68) : 38 Cri L Jour 748, *Kaura Ram v. Emperor*. (Words 're-summoned and re-heard' in proviso (a) presuppose that witnesses have already been summoned and heard — Government expert examined on commission need not be re-examined on *de novo* trial of case.)

2. ('37) AIR 1937 Pesh 67 (68) : 38 Cri L Jour 748, *Kaura Ram v. Emperor*.

3. ('40) AIR 1940 Pesh 17 (17) : 41 Cri L Jour 681, *Roshan Lal v. Emperor*.

Note 10b

1. ('37) AIR 1937 Rang 536 (537) : 39 Cr.L.J. 205, *U Kun Zaw v. Ma Aye Khin*. (The use of the word 'conviction' in proviso (b) makes it doubly clear that the section applies only in case of trials of persons accused of offences.)

Note 11

1. ('39) AIR 1939 Rang 249 (250) : 1939 R L R 570 : 40 Cr. L. J. 829, *Chinnayar v. Maung Mya Thi*. (Duty is cast on the accused to demand a new trial if they desire it and not upon the Magistrate to offer it.)

('12) 14 Cr.L.J.175 (176) : 1912 U B R 151 : 19 I.C. 175, *Nga Po Tein v. Emperor*.

2. ('39) AIR 1939 Rang 249 (250) : 1939 R L R 570 : 40 Cr.L.J. 829, *Chinnayar v. Maung Mya Thi*. (When a Magistrate purports to act under S. 350, it is the routine practice that he should tell the accused that he is entitled to a new trial.) (1900-02) 1 Low Bur Rul 238 (239, 240), *Chit Tun v. Crown*. (The Magistrate should record the fact that he has so informed the accused.)

('02) 1 Low Bur Rul 287 (288), *Crown v. Chit Ye*. (Do.)

('97-01) 1 Upp Bur Rul 87 (88) *Queen-Empress v. Nga Po Min*. (Do.)

('17) AIR 1917 Upp Bur 11 (11) : 17 Cri L Jour 401 (401) : 2 Upp Bur Rul 108, *Barachi v. Emperor*.

failure to do so is only an irregularity which is curable by S. 537.³

Section 350
Notes 11-12

12. Re-commence the inquiry or trial. — It may be right to describe a fresh inquiry as a "*de novo trial*" when a Magistrate *suo motu* decides to re-commence the trial; but when proviso (a) is brought into force there does not seem to be any question of "*de novo trial*," the right given to the accused being only to have *witnesses re-heard*.¹ When the accused exercises this right, the proceedings which had taken place before are not completely wiped out, and it is not necessary for the accused to renew every application which he had made before he claimed the right.² So also the re-summoning of witnesses is not tantamount to recommencing the inquiry and even if the Magistrate, when he re-summoned the witnesses, contemplated re-commencing the enquiry, he is not precluded from changing his mind before he actually recommences the enquiry.³

Whether the Magistrate acts *suo motu* and grants a *de novo trial* or accedes to the demand of the accused, his duty is to re-summon and re-hear the witnesses and not merely to allow *further cross-examination*.⁴ The object in granting a re-hearing is to enable the Magistrate who hears the case to judge of the credibility of the witnesses by their demeanour.⁵ This object is lost if the witnesses are not examined again but only cross-examined.⁶ Failure to examine the witnesses in chief amounts to an illegality which vitiates the trial and the mere fact that the accused acquiesces in the procedure adopted by the Magistrate does not estop him from raising the plea of illegality of the trial.⁷ Where the Magistrate permitted the re-hearing of witnesses but the prosecution declined to examine them again, and the accused without raising any objection only cross-examined those witnesses, it was held that the provisions of S. 350 were not complied with and it was impossible to say that the accused were not prejudiced.⁸ It has,

3. ('84) 1884 Pun Re No. 6 Cr p. 7 (8), *Kesra Ram v. Empress*.

('03) 1903 Pun Re No. 3 Cr p. 8 (10), *Amir Khan v. Emperor*.

Note 12

1. ('37) AIR 1937 Mad 448 (448, 449): 38 Cr.L.J. 537, *Venkatanarayana v. Emperor*.
('36) AIR 1936 Nag 153 (154, 155) : 37 Cr.L.J. 983: 1 L R (1936) Nag 92, *Tukaram v. Emperor*.

('25) AIR 1925 Mad 317 (317) : 26 Cri L Jour 526: *In re Vudigalapudigadu*.

('35) AIR 1935 Mad 318 (319) : 36 Cri L Jour 1265, *Vecrappa v. Emperor*.

2. ('37) AIR 1937 Mad 448 (449) : 38 Cr.L.J. 537, *Venkatanarayana v. Emperor*.

3. ('38) AIR 1938 Mad 742 (743) : 39 Cr. L. J. 828, *In re Hari Chandra Reddi*.

4. ('38) AIR 1938 Nag 493 (495) : 40 Cr. L. J. 73, *Purshottam Rao v. Emperor*.

('26) AIR 1926 Sind 158 (159) : 20 Sind LR 50 : 27 Cr. L. J. 332, *Sidik v. Emperor*.

5. ('40) AIR 1940 Sind 193 (193), *Sukhranddas Hiranand v. Emperor*. (Purpose of S. 350 cannot be assisted by cross-examination on commission of witness examined on commission in previous proceedings.)

('40) AIR 1940 Pesh 17 (17) : 41 Cri L Jour 681, *Roshan Lal v. Emperor*.

('37) AIR 1937 All 438 (439) : 38 Cri L Jour 804, *Mahtab Singh v. Emperor*.

('25) AIR 1925 Mad 1280 (1281) : 26 Cr. L. J. 1596, *Narayana v. Enumalai*.

('18) AIR 1918 Low Bur 63 (63) : 19 Cr. L. J. 321 : 9 L. B. R. 92, *Hnin Yin v. Than Pe*.

6. ('25) AIR 1925 Mad 1280 (1281) : 26 Cr. L. J. 1596, *Narayana v. Enumalai*.

('26) AIR 1926 Sind 158 (159) : 20 Sind LR 50 : 27 Cr. L. J. 332, *Sidik v. Emperor*.

('18) AIR 1918 L.B. 63 (63) : 9 L. B. R. 92 : 19 Cr.L.J. 321, *Hnin Yin v. Than Pe*.

7. ('38) AIR 1938 Nag 493 (495) : 40 Cr. L. J. 73, *Purshottam Rao v. Emperor*.

8. ('07) 6 Cri L Jour 431 (432) : 12 C W N 138, *Sobh Nath Singh v. Emperor*.

Section 350
Note 12

however, been held by the Oudh Chief Court that where the evidence of the witness who is only cross-examined before the second Magistrate has been discarded in arriving at the conclusion, there can be no prejudice to the accused caused by the omission of the prosecution to examine the witness and that the trial is not vitiated.⁹ The undermentioned decision¹⁰ lays down that non-compliance with the demand to have witnesses re-summoned and re-heard will not prejudice the accused when the witnesses are further cross-examined by the Magistrate who decided the case. (But there is a conflict of decisions as to whether non-compliance with accused's demand for re-hearing under proviso (a) is a curable irregularity: see Note 7.) Merely reading their depositions to the witnesses¹¹ or exhibiting them¹² is not re-hearing them.

When a superior Court directs an inquiry by a Magistrate other than the one who originally heard the case, the provisions of S. 350 debar it from directing that the case should be proceeded with from a particular stage.¹³ Where such a direction was made and on the case going back it was found that the original Magistrate had been transferred, it was held that the directions did not apply to his successor.¹⁴ The same may be said of transfers; the operation of S. 350 cannot be checked by any restrictions in the order of transfer.¹⁵ As to instances where the High Court has ordered re-inquiry from a particular stage where the accused undertakes not to ask for a *re-trial*, see the undermentioned cases.¹⁶ The right of the Magistrate under sub-s. (1) to re-commence the proceedings applies not only to trials but also to cases where the stage of trial has not been reached.¹⁷ It has been held that when a *de novo* trial is held the prosecution is not bound to examine all the witnesses who were examined at the original trial and that it is open to the prosecution to dispense with the evidence of any witness whom it regards as unreliable.¹⁸

9. ('38) AIR 1938 Oudh 212 (213) : 39 Cr. L. J. 854 : 14 Luck 172, *Sheo Ram v. Emperor*.

10. ('38) AIR 1938 Mad 721 (725) : 39 Cr L Jour 932, *In re Ramamuni Reddi*.

11. ('20) AIR 1920 Lah 311 (314) : 22 Cr. L. J. 119, *Mangal Singh v. Emperor*.

(18) AIR 1918 Low Bur 63 (63) : 9 L. B. R. 92 : 19 Cr. L. J. 321, *Hnin Yin v. Than Pe*.

12. ('23) AIR 1923 Mad 32 (33) : 46 Mad 117 : 23 Cri L Jour 748, *In re K. K. Ummar Haji*.

13. ('01) 28 Cal 591 (597), *Shcoprakash Singh v. W. D. Rawlins*.

14. ('98) 25 Cal 863 (864) : 2 C W N 465, *Gomer Sirda v. Queen-Empress*.

15. ('30) AIR 1930 Mad 983(984):32 Cr.L.J. 226, *Ramaswami Thevar v. M. Subban*.

16. ('04) 1 Cri L Jour 46 (49) : 8 C W N 77, *Kishori Gir v. Ram Narayan Gir*.

(25) AIR 1925 Cal 172 (173) : 26 Cri L Jour 313, *Nirmal Kumar Singh v. Commissioner of Income-tax, Bengal*.

(33) AIR 1933 Nag 269 (270) : 34 Cr.L.J. 1172, *Krishna Murari Lal v. Emperor*. (Case transferred by High Court — Order made under S. 561A that the proceedings must commence from examination of accused.)

17. ('36) AIR 1936 Nag 220 (221) : 38 Cr. L. J. 15 : ILR (1937) Nag 135, *Emperor v. Ganpat*.

18. ('38) AIR 1938 Oudh 212 (212) : 39 Cr. L. J. 854 : 14 Luck 172, *Sheo Ram v. Emperor*. (But Court will take into consideration the fact that a witness previously examined has not been examined.)

[See however ('35) AIR 1935 Mad 318 (319) : 36 Cr. L. J. 1265, *Mudda Vccrappa v. Emperor*. (Trial *de novo* — Prosecution dispensing with one prosecution witness — This is irregularity but can be cured under S. 537 if the accused has not been prejudiced.)]

13. From what stage inquiry may be re-commenced. — When a Magistrate succeeding another elects to conduct a *de novo* trial, he cannot summarily dismiss the complaint under S. 203, it being no longer a question of deciding whether or not proceedings should be taken on the complaint.¹ Nor can he refer the matter to the police under S. 202. The inquiry which he can re-commence is the inquiry as defined in S. 4 which does not include a reference to the police.²

It has been held by the High Court of Madras that a Magistrate who re-commences an inquiry or trial does not thereby modify its nature or the stage at which it has arrived. Thus, where the proceedings re-commenced are only an *inquiry*, they are re-commenced as an *inquiry*, and where they have developed into a *trial* stage they are re-commenced as a *trial*, i. e., a proceeding in which a charge has been framed; in other words, a charge once framed is not wiped out or cancelled by a *de novo* trial.³ A similar view has also been taken by the Allahabad High Court in a recent decision.^{3a} The Chief Court of Oudh has held that whatever might be the interpretation as regards cases falling under the first sub-section proper, this principle will apply to cases of re-hearing under proviso (a) and that a charge once framed is not wiped out by granting such a re-hearing.⁴ But the same Court has held in a subsequent case that if the Magistrate frames a new charge the accused cannot have any cause for grievance, inasmuch as under S. 227 (1) a Court can alter or add to any charge at any time before judgment is pronounced.^{4a} The Chief Court of the Punjab appears to be of the same view as the High Court of Madras.⁵ On the other hand, the Nagpur High Court,⁶ the Judicial Commissioner's

Note 13

1. ('94) 7 C P L R Cr 36 (37), *Baliram v. Baldeo*.
2. ('86) 9 Mad 282 (282) : 2 Weir 213, *Sadagopachariar v. Raghuvachariar*. (Enquiry under S. 202 is made before evidence for the complainant is taken and process issued.)
3. ('15) AIR 1915 Mad 23 (24) : 15 Cri L Jour 673 : 39 Mad 585, *Sriramulu v. Krishna Rao*. (Where proceedings are recommenced by second Magistrate after a charge has been framed by his predecessor his order of discharge is really one of acquittal.)
- ('33) AIR 1933 Mad 841 (811) : 35 Cri L Jour 79, *Ramanna v. Emperor*.
- ('16) AIR 1916 Mad 1048 (1049) : 17 Cri L Jour 1 (2), *Bugtha Sinhadri Naidu v. Behava Silarama Palrudu*.
[See however ('34) AIR 1934 Mad 475 (475) : 35 Cri L Jour 1363 : 57 Mad 1019, *Ramalingam v. Emperor*. (Grant of *de novo* trial has the effect of wiping out the prior proceedings.)]
- 3a. ('35) AIR 1935 All 834 (836) : 36 Cri L Jour 912, *Raza Husain v. Emperor*.
4. ('33) AIR 1933 Oudh 86 (88) : 8 Luck 286 : 34 Cr. L. J. 124, *Kunwar Sen v. Emperor*.
- 4a. ('38) AIR 1938 Oudh 247 (248) : 39 Cri L Jour 849, *Gajju v. Emperor*. (The accused is not prejudiced especially when he himself applies for a *de novo* trial before the subsequent Magistrate.)
5. ('03) 1903 Pun Re No. 14 Cr. p. 35 (38, 39) : 1903 Pun L R No. 175, *Crown v. Nathu*.
6. ('36) AIR 1936 Nag 153 (156) : ILR (1936) Nag 92 : 37 Cr. L. J. 983, *Tukaram Emperor*. (But where the Magistrate does not order a *de novo* trial but rehears the case at the request of the accused, the charge framed previously is not wiped out.)
- ('94) 7 C P L R Cr 36 (38), *Baliram v. Baldeo*. (When the witnesses have been examined again it will be open to the Magistrate dealing with the case to frame a charge or to discharge the accused as he may think fit.)
[Compare ('31) AIR 1931 Nag 89 (40) : 27 N. L. R. 13 : 32 Cr. L. J. 603, *Shecoraisai v. Dani*. (AIR 1915 Mad 23, dissented from.)]

Section 350
Notes 13-14a

Court of Peshawar⁷ and the Chief Court of Lower Burma,⁸ have taken the view that, where a trial is recommenced all the previous proceedings, including the charge framed, are wiped out. The Bombay High Court also held that in warrant-cases where a charge has been framed and the trying Magistrate is succeeded by another Magistrate, the latter can proceed with the case from the beginning and is not bound to recommence the proceedings only from the stage of the charge.⁹

Where a number of accused persons are proceeded against some of whom are discharged, and thereafter the proceedings are transferred to the file of another Magistrate, the order of discharge is not thereby cancelled.¹⁰

14. Case coming again before original Magistrate. — When a Magistrate is transferred and a case which was pending before him is taken up by his successor and the trial started afresh, the proceedings, which had already been taken before the transferred Magistrate are wiped out and such Magistrate has no jurisdiction on the case coming back to his file to proceed with the trial from the point where he himself had left it.¹ But where the second Magistrate has not ordered a new trial, the original Magistrate to whom the case comes back is not bound to grant a *de novo* trial. To such a case this section does not apply as the Magistrate is not 'another Magistrate'.² See also Note 2.

14a. Transfer of a case from a Bench of Magistrates to a Magistrate. — Where under Rule 6 of the rules framed by the Bengal

7. ('33) AIR 1933 Pesh 78 (79) ; 35 Cri L Jour 170, *Abdul Hakim v. Haji Abdul Aziz*. (Order of discharge under S. 259, Cr. P. C., after a *de novo* trial is correct and does not bar a fresh trial.)

8. ('03-04) 2 Low Bur Rul 17 (18), *King-Emperor v. Nga Pe*.

(18) AIR 1918 Low Bur 63 (63) : 9 Low Bur Rul 92 : 19 Cri L Jour 321, *Hnin Yin v. Than Pe*.

9. ('37) AIR 1937 Bom 55 (56) : 38 Cri L Jour 250 : ILR (1937) Bom 211, *Dagdu Govindshet v. Punja Vedu*. (He is not bound to recommence only from the stage of the charge—He has power to re-commence the proceedings from the beginning, and is competent to pass an order of discharge, and can pass an order of compensation under S. 250, Criminal P. C.—The fact that another Magistrate had already framed a charge does not make the order of the compensation or discharge illegal.)

10. ('99) 1 Bom L R 782 (783), *Queen-Empress v. Fakira*.

See also S. 528 Note 6.

Note 14

1. ('27) AIR 1927 Mad 81 (82) : 28 Cr. L. J. 23, *Sriranga Chettiar v. Subramania Asari*. ('36) AIR 1936 Nag 220 (221) : 38 Cri L Jour 15 : ILR (1937) Nag 135, *Emperor v. Ganpat*. (Even though the case may not have proceeded before the succeeding Magistrate beyond merely ordering *de novo* trial.)

(25) AIR 1925 Mad 174 (174) : 26 Cr. L. J. 510, *Sardar Khan Sahib v. Athaulla*. (The case will have to be tried *de novo*.)

(19) AIR 1919 Pat 311 (311) : 20 Cri L Jour 820, *Jago Singh v. Emperor*. ('19) AIR 1919 Pat 578 (580) : 20 Cr. L. J. 638, *Daroga Choudhury v. Emperor*.

(34) AIR 1934 Mad 475 (475) : 57 Mad 1019 : 35 Cr. L. J. 1363, *Ramalingam v. Emperor*. [See however ('37) 1937 M W N 1245 (1247), *Naddem Sahib v. Emperor*. (Transfer of Magistrate after recording prosecution evidence and framing of charge—Successor ordering *de novo* trial but before beginning it case again retransferred to original Magistrate—Magistrate's refusal to resubmit and rehear witnesses is only irregularity.)]

2. ('38) AIR 1938 All 536 (537) : 39 Cri L Jour 978 : ILR (1938) All 794, *Shyama Pado v. Sunder Das*. (Moreover as he has heard all the evidence for the prosecution there is no power in this section for him to rehear it even if he desired to do so — Hence there cannot be a *de novo* trial.)

Government under S. 16, on a difference of opinion between an even number of Honorary Magistrates, a case was referred back to the sub-divisional Officer, it was held that the provisions of this section applied and the sub-divisional Officer could continue the case from the stage at which it was when the transfer to him was made.¹ The Madras High Court has held that where a case is partly tried by a first class Bench under its summary powers and then is transferred to a second class Magistrate having no summary powers, the latter can try it only by means of a complete *de novo* trial and that this section has no application to the trial by the second class Magistrate subsequent to the transfer of the case to his file.²

15. Proviso (b) — Prejudice to the accused. — A judgment arrived at by a Magistrate upon evidence not wholly recorded by himself is considered by the framers of Code to be of such infirmity that it is liable to be set aside without an appeal, provided that the accused has been actually prejudiced thereby.¹

It does not matter whether the accused did or did not object to the procedure, nor is it necessary to consider whether or not he had a reasonable opportunity of entering a protest thereto; the real question is whether he was prejudiced by the course adopted.² If he was, the conviction will be set aside;³ if he was not, the High Court will refuse to interfere.⁴ See also Note 7.

In a case of defamation it was held that though the Magistrate's deciding the case upon evidence recorded by his predecessor was not without jurisdiction, still it was difficult to see how a Magistrate could adequately decide such a case without having had the complainant examined before him.⁵

Under this proviso a District Magistrate can set aside convictions by Magistrates subordinate to him. This would include first class

Note 14a

1. ('18) AIR 1918 Cal 304(305):19 Cr.L.J. 312, *Chand Tarafdar v. Shamsheer Fakir*.
2. ('32) AIR 1932 Mad 505 (507):55 Mad 79:33 Cr.L.J. 653, *Nannier v. Dasalier*.
(The reason is that a case cannot be tried partly according to the summary procedure and partly according to the ordinary procedure.)

Note 15

1. ('75) 23 Suth W R Cr 59 (60), *Queen v. Rughoonath Das*.
2. ('12) 13 Cri L Jour 218 (220): 39 Cal 781: 14 I C 314, *Kudrutullah v. Emperor*.
(Prejudice must be shown.)
2. ('18) AIR 1918 All 56 (59,60):41 All 116: 19 Cr.L.J. 1004, *Mathura v. Emperor*.
3. ('17) AIR 1917 Upp Bur 11 (12): 17 Cr. L. J. 401 (402): 2 Upp Bur Rul 108, *Barachi v. Emperor*.
4. (1900-02) 1 Low Bur Rul 238 (240), *Chit Tun v. Crown*. (In this case, however, absence of prejudice was presumed because there was no objection raised.)
5. ('92) 14 All 346 (347): 1892 A W N 19, *Queen-Empress v. Bashir Khan*. (Not acceding to the demand of the accused for resummoning witnesses.)
4. ('84) 1884 Pun Re No. 6 Cr, p. 7 (8), *Kesra Ram v. Empress*.
5. ('75) 24 Suth W R Cr 12 (13), *Ujal Mundul v. Namdar Mundul*.
6. ('89) 1889 All W N 161 (161), *Queen-Empress v. Bansi Singh*.
7. ('05) 9 Cal W N cclxxxv (cclxxxvi), *Sabil Sheik v. Moizuddeen Sheik*.
[See ('70) 13 Suth W R Cr 40 (41), *Purmessur Singh v. Soroop Audhikaree*.]
8. ('09) 10 Cr. L. J. 492 (493): 4 Ind Cas 67 (Cal), *Brindaban Chander Das v. Ishaqudin Choudhury*.

Section 350
Notes 15-17

Magistrates even though no appeal lies to the District Magistrate from convictions by the former; for, as pointed out in the undermentioned cases⁶ which discussed the meaning of the words "inferior" and "subordinate" occurring in Ss. 435 and 437, S. 17 makes all Magistrates in the district subordinate to the District Magistrate.

See also the undermentioned case.⁷

16. Sub-section (2). — It is a general principle of law that evidence taken by one Magistrate is not evidence in a trial before another, unless some provision of law expressly makes it so. There is nothing in S. 346 enabling a Magistrate to whom the case is referred, to act on the evidence recorded by the referring Magistrate¹ and sub-s. (2) of S. 350 expressly makes the provisions of the section inapplicable to proceedings stayed under S. 346.² Hence, it follows that a Magistrate hearing a case sent to him under S. 346, must hear the same *de novo* and cannot act on evidence already recorded by the Magistrate who transferred the case.³

Under S. 349 it is in the discretion of the superior Magistrate to whom a case is referred, to act or not to act upon evidence already recorded by the subordinate Magistrate.⁴ The addition of the words "or in which proceedings have been submitted to a superior Magistrate under S. 349" to the sub-section in 1923 makes it clear that nothing in this section will apply to cases submitted under S. 349. The discretion, therefore, that the superior Magistrate has under S. 349, is uncontrolled by the proviso to S. 350 and he cannot, therefore, be compelled to hold a *de novo* trial.⁵

17. Sub-section (3)—Transfer of cases. — The earlier view was that the provisions of this section did not apply where a change of Magistrates had occurred by a transfer or *withdrawal of a case* from the file of one Magistrate to that of another.¹ But latterly it

6. ('85) 7 All 853 (854): 1885 A W N 257 (F B), *Queen-Empress v. Lasgari*.

('86) 12 Cal 473 (477) (F B), *Opendro Nath Ghose v. Dukhini Bewa*.

('84) 8 Mad 18 (19) : 2 Weir 540 (F B), *In the matter of Padmanabha*.

See also S. 435 Note 8.

7. ('84) 9 Bom 100 (103), *Queen-Empress v. Pirya Gopal*. (Under S. 350 District Magistrate is empowered by the Code to set aside the convictions recorded by first class Magistrate.)

Note 16

1. ('23) AIR 1923 Mad 327 (327) : 24 Cri L Jour 413, *In re China Venku Naidu*.

('33) AIR 1933 Sind 191(191) : 27 SLR 266 : 34 Cr.L.J. 749, *Sher Khan v. Emperor*.

2. ('04) 1 Cri L Jour 1056 (1057) : 17 C P L R Cr 159, *Emperor v. Gokal*.

3. ('38) AIR 1938 Cal 415 (416) : 39 Cr.L.J. 606, *Sashti Gopal v. Haridas Bagdi*.
See Note 5 to S. 346.

4. ('92) 2 Weir 428 (429), *In re Raghava Naiko*.

5. ('38) AIR 1938 Cal 415 (416) : 39 Cr.L.J. 606, *Sashti Gopal v. Haridas Bagdi*.
(26) AIR 1926 Sind 48(48) : 18 SLR 216 : 26 Cr. L. J. 1363, *Emperor v. Dodo*.

See also Note 12 to S. 349.

Note 17

1. ('05) 2 Cri L Jour 820 (823) : 1 Nag L R 187, *Ladya v. Emperor*.

('90) 12 All 66 (68) : 1890 All W N 7, *Queen-Empress v. Radhe*.

('89) 1889 All W N 130 (130), *Queen-Empress v. Angnu*.

(1900-02) 1 Low Bur Rul 287 (288), *Crown v. Chit Te*.

(1900) 2 Weir 152 (153), *In re Tota Venkanna*.

('91) 2 Weir 690 (690), *In re Sundara Iyer*.

(1900-02) 1 Low Bur Rul 301 (301) (FB), *Crown v. Ta Lok*.

was recognized that the section applied even to such transfers or withdrawals.² The recent introduction of sub-s.(3) gives effect to the latter view.³

It has been pointed out that, though S. 350 is applicable to cases transferred or withdrawn from the file of one Magistrate to that of another, it is desirable that the second Magistrate should commence the hearing *de novo*.⁴

Section 350
Note 17

350A. No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

Section 350A

Changes in
constitution of
Benches.

Synopsis

1. Scope of the section.
2. "Duly constituted under sections 15 and 16."
3. "And the Magistrates constituting the same have been present . . . throughout the proceedings." See Note 4.
4. Non-compliance with the section — Effect of.
5. Transfer of a case from a Bench of Magistrates to a Magistrate. See Note 14a under S. 350.

Other Topics (miscellaneous)

Absence of some Magistrates but remaining enough to form the quorum. See Note 2. Absence of quorum—Effect. See Note 2. Judgment by Magistrate who had not heard. See Note 1.

1. **Scope of the section.** — Before the introduction of this section into the Code by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923, it was uniformly held that where a judgment was delivered by the necessary quorum of Magistrates who had been present

(197-01) 1 Upp Bur Rul 87 (87), *Queen-Empress v. Nga Po Min*.

(175) 24 Suth W R Cr 53 (54), *Queen v. Khan Mahomed*.

(107) 6 Cri L Jour 434 (438) : 12 Cal W N 140, *Deputy Legal Remembrancer v. Upendra Kumar Ghose*.

(102) 15 C P L R 66 (68), *Emperor v. Kasim*.

(104) 1 Cri L Jour 1056 (1057) : 17 C P L R Cr 159 (160), *Emperor v. Gokal*.

(118) AIR 1918 Nag 22 (25) : 19 Cri L Jour 657, *Jangilal v. Emperor*.

(170) 14 Suth W R Cr 3 (3), *Kopil Nath Sahi v. Koneeram*. (Transfer of case—No *de novo* trial—Conviction not set aside because no objection was raised.)

(103) 6 Oudh Cas 192 (193), *Puran v. King-Emperor*.

2. (109) 9 Cr.L.J. 146 (146) : 32 Mad 218 : 11 C. 54, *Palaniandi Goundan v. Emperor*.

(108) 7 Cri L Jour 220 (223) : 35 Cal 457 : 12 Cal W N 416 : 7 Cal L Jour 488, *Mohesh Chandra Saha v. Emperor*.

(112) 13 Cr .L. J. 218 (220) : 39 Cal 781 : 14 I. C. 314, *Kudrutullah v. Emperor*.

(117) AIR 1917 U.B. 11 (11) : 2 U.B.R. 108 : 17 Cr.L.J. 401 (401), *Barachi v. Emperor*.

(120) AIR 1920 Pat 693 (694) : 22 Cri L Jour 82, *Rupa Singh v. Emperor*.

(114) AIR 1914 All 45 (46) : 36 All 315 : 15 Cri L Jour 354, *Emperor v. Nanhua*.

(118) AIR 1918 All 279 (281) : 40 All 307 : 19 Cr. L. J. 378, *Ram Das v. Emperor*.

(119) AIR 1919 Low Bur 50 (50) : 20 Cri L Jour 496, *Ganga Chetty v. Emperor*.

(118) AIR 1918 Nag 142 (143) : 20 Cri L Jour 41, *Akbar Ali v. Emperor*.

(128) 29 Cr.L.J. 229 (229) : 107 I.C. 160 (Pat), *Chhanu Prasad Singh v. Emperor*.

3. (130) AIR 1930 Mad 983 (984) : 32 Cr.L.J. 226, *Ramaswami Thevan v. M. Subban*.

4. (119) AIR 1919 L. B. 50 (51) : 20 Cr. L. J. 496, *M. Rahman v. Abdul Samad*.

Section 350A Note 1

throughout the trial, the judgment would be perfectly valid though some other Magistrates had also been present at the earlier stages of the trial;¹ but there was a difference of opinion on the question whether a judgment delivered by a Bench of Magistrates some of whom had not heard the whole of the evidence could be considered to be a valid judgment. According to one view the fundamental principle of law is that no person who has not heard the whole of the evidence is competent to pass or take part in passing the judgment in the case, and that a judgment so passed is a nullity.^{1a} Another view was that the only question in each case was whether the accused was *prejudiced* by the course adopted.² In this view it was held that a Government Notification under S. 16, clause (c), which provided that "if any case is adjourned and the members at the adjourned sessions are not the same as sat at the first hearing of the case, the provisions of S. 350 of the Criminal Procedure Code will be held to apply to the case," was not *ultra vires*.³ A third view was that such a Government Notification was *ultra vires* of the powers of the Local Government under S. 16, clause (c).⁴

The present section now makes it clear that no change in the

Section 350A — Note 1

1. ('04) 6 Cr. L. J. 43 (44) : 3 N. L. R. 67, *Balbhadrani Bani v. Tribhuban Nath*. ('17) AIR 1917 All 379 (379) : 18 Cri L Jour 749 (749), *Khuda Buksh v. Emperor*. (Where no quorum was enjoyed, two were held sufficient.)
- ('14) AIR 1914 Mad 139 (139) : 38 Mad 797 : 15 Cri L Jour 549, *Venkatrama Iyer v. Swaminatha Iyer*.
- ('23) AIR 1923 Oudh 163 (164) : 25 Cr. L. J. 198, *Brij Bhukhan v. Ram Kirat*.
- 1a. ('19) AIR 1919 Sind 66 (66) : 13 S.L.R. 166 : 20 Cr.L.J. 769, *Emperor v. Nihchal*.
- ('21) AIR 1921 Lah 135 (136) : 2 Lah 237 : 22 Cr. L. J. 740, *Girdhari v. Emperor*.
- ('16) AIR 1916 Mad 810 (811) : 16 Cri L Jour 489 (489) : 38 Mad 304, *In re Subramania Ayyar*.
- ('19) AIR 1919 Upp Bur 29 (29) : 3 Upp Bur Rul 118 : 20 Cri L Jour 336, *Nga Paik v. Nga Saw Hlaing*.
- ('17) AIR 1917 L. B. 79 (79) : 8 L. B. R. 463 : 18 Cr. L. J. 96, *Itala v. Emperor*.
- ('96) 23 Cal 194 (195), *Damri Thakur v. Bhowani Sahoo*.
- ('22) AIR 1922 Lah 137 (138) : 22 Cri L Jour 511, *Abdul Ghani v. Emperor*.
- ('95) 18 Mad 394 (394) : 2 Weir 17, *Queen-Empress v. Basappa*.
- ('91) 2 Weir 13 (13), *In re Renganathan*.
- ('21) AIR 1921 Bom 44 (45) : 22 Cri L Jour 615, *Gangappa Irappa v. Emperor*. (Decided on the particular Government notification.)
- ('78) 3 Cal 754 (755), *Sufferuddin v. Ibrahim*.
- ('22) AIR 1922 Oudh 21 (22) : 25 Oudh Cas 182 : 23 Cri L Jour 696, *Sultan v. Shamsher*. (One Magistrate recording evidence, others attending to other work.)
- ('86) 12 Cal 558 (559), *Ram Sunder De v. Rajab Ali*.
- ('83) 13 Cal L Rep 212 (213), *Shumbhu Nath Sarkar v. Ram Kamal Guha*.
2. ('18) AIR 1918 All 56 (60) : 41 All 116 : 19 Cr. L. J. 1004, *Mathura v. Emperor*. [See also ('99) 2 Weir 18 (19), *In re Ramasami Aiyar*. (Six Magistrates constituting a Bench—Only three present throughout trial who delivered judgment in which the three absent concurred—Held that it was an irregularity not vitiating proceedings.)
- ('16) 14 All L Jour 22n (22n), *Padarath v. Ramdas*. (Bench of two Magistrates—One of them replaced by another on his absence—Judgment delivered by original two Magistrates—Held that since no objection was taken at the trial, it was not wholly illegal.)]
3. ('18) AIR 1918 All 56 (58) : 41 All 116 : 19 Cr.L.J. 1004, *Mathura v. Emperor*. [See ('14) AIR 1914 Oudh 345 (346) : 17 Oudh Cas 142 : 15 Cri L Jour 516, *Indar Dat v. Emperor*.]
4. ('93) 20 Cal 870 (874), *Hardwar Sing v. Khaga Ojha*.

constitution of the Bench during the progress of a trial will affect the validity of the judgment passed, provided—

Section 350A
Notes 1-2

firstly, that the Bench by which the judgment is passed is *duly constituted*, and

secondly, that the Magistrates constituting the same (*i. e.*, the Bench which passed the judgment) *have been present on the Bench throughout the proceedings*.

2. "Duly constituted under sections 15 and 16." — A Bench of Magistrates will be "duly constituted under Ss. 15 and 16" if—

- (1) the individuals sitting as a Bench have all been *authorized* by the Provincial Government under S. 15 to sit together as a Bench, and
- (2) the *number* of such individuals is not less than the *quorum* fixed by rules framed by the Provincial Government under S. 16, clause (c).

Suppose that A, B, C, D and E, are all authorized under rules framed under S. 15 to sit together as a Bench, and under the rules framed under S. 16, clause (c), the *quorum* for a valid Bench is declared to be *two*. If now A, B and C sit together to hear a case, but C is absent during subsequent hearings thereof and A and B finally deliver judgment in the case, the judgment is perfectly valid notwithstanding the change in the personnel of the Bench in the course of the trial, inasmuch as A and B form a duly "constituted" Bench (*i. e.* they form the necessary *quorum*) and they have been present throughout the proceedings.¹ In *Chiteshwar Dube v. Emperor*,^{1a} Niamatullah, J., however, took the view that *all* the Magistrates who began to hear the case must be present at all the hearings irrespective of the *quorum* in order to render the ultimate judgment valid. This view was dissented from by a Bench of the same High Court in *Dasrath Rai v. Emperor*;² but Sulaiman, C. J., in the latter case, observed as follows: "It is not easy to see how the constitution of the Bench can be changed and at the same time the Magistrates constituting the Bench be present on the Bench throughout the proceedings." In making this observation his Lordship does not appear to have laid the necessary emphasis on the words "duly constituted" used in the section. A Bench may be constituted by several Magistrates appointed under S. 15, and there may be a change in the constitution of such Bench. But if the *duly constituted* Bench under S. 16, *i. e.*, the *quorum fixed*, passes the judgment, it would be valid provided the Magistrates constituting such *quorum* have been present on the Bench throughout the proceedings.

Note 2

1. ('33) AIR 1933 All 355 (355): 34 Cr. L. J. 701: 55 All 459, *Mathura v. Emperor*. ('32) AIR 1932 Nag 95 (96): 28 Nag L. R. 190: 33 Cri L. Jour 559, *Nago v. Shankar*. (Magistrate absent at two hearings, assisting in and signing judgment—*Held* such judgment was illegal.)

[See also ('98) 21 Mad 246 (249): 2 Weir 17, *Karuppanna Naden v. Chairman, Madura Municipality*. (Bench of seven Magistrates begun a case and five of them convicted the accused—*Held* conviction not invalidated by absence of two Magistrates.)]

1a. ('32) AIR 1932 All 127 (127): 33 Cri L. Jour 200.

2. ('34) AIR 1934 All 144 (146, 147): 56 All 599: 36 Cri L. Jour 38.

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Notes 2-5

A Bench which consists of a number of Magistrates, which is less than the *quorum* fixed, is not a duly constituted Bench³ and evidence recorded by it is not recorded by a Court.⁴ See also the case cited below.⁵

3. "And the Magistrates constituting the same have been present . . . throughout the proceedings." — See Note 4.

4. **Non-compliance with the section — Effect of.** — Where some of the Magistrates constituting the Bench who pass the judgment or order have not been present throughout the proceedings, the judgment or order is invalid as contravening the provisions of this section.¹ A contrary view has, however, been held in the undermentioned cases² to the effect that this section is, in terms, a saving clause which does not directly prohibit or declare invalid the trial of a case in the absence of the conditions specified, but only indirectly or by implication assumes such trial to be irregular, and that non-compliance with the terms of the section is only irregularity curable by S. 537.

5. **Transfer of a case from a Bench of Magistrates to a Magistrate.** — See Note 14a under Section 350.

3. ('26) AIR 1926 Sind 192 (192): 20 Sind L R 134: 27 Cr.L.J. 542, *Emperor v. Gulu*. ('92) 16 Mad 410 (414): 2 Weir 14, *Queen-Empress v. Muthia*. (Quorum of three — Judgment by two—Illegal.)

('19) AIR 1919 Mad 274 (274): 20 Cri L Jour 823, *In re Bapiraju*.

4. ('26) AIR 1926 Sind 192 (192): 20 S L R 134: 27 Cr.L.J. 542, *Emperor v. Gulu*.

5. ('20) AIR 1920 Bom 300 (301): 21 Cr. L. J. 369: 44 Bom 400, *Mohidin Karim v. Emperor*. (Rules requiring that trial must be completed by the same Magistrates by whom it was begun—Trial continued and finished by two of the three Magistrates who constituted the Bench in the first instance is a trial held in contravention of the rules and hence is void.)

Note 4

1. ('34) AIR 1934 Oudh 85 (86): 35 Cri L Jour 417, *Rameshwar Datt Singh v. Bharath Singh*. (Evidence heard on several occasions by only one member of the Bench and only one member signing depositions on several hearings—Trial held wholly illegal.)

('32) AIR 1932 All 191 (192): 54 All 413: 33 Cr. L. J. 885, *Ram Khelawan v. Shco Nandan*. (One Magistrate absent during examination of witnesses but taking part in decision along with two others who had been present during whole trial —Invalid.)

('32) AIR 1932 All 127 (127): 33 Cr.L.J. 200, *Chiteshwar Dube v. Emperor*. (Presence of all the Magistrates constituting the Bench is necessary for a valid trial.)

('26) AIR 1926 Lah 304 (304): 27 Cr. L. J. 463: 7 Lah 122, *Banwari v. Emperor*. (Quorum of two—Only one present throughout proceedings—Trial held bad as contravening S. 350A.)

('32) AIR 1932 Nag 95 (96): 28 Nag L R 190: 33 Cr. L. J. 559, *Nago v. Shankar*. (Bench of three Magistrates—One remaining absent at two hearings but assisting in delivering judgment and signing it—Trial is illegal.)

('28) AIR 1928 Oudh 212 (214): 29 Cri L Jour 310, *Suraj Bali v. Emperor*. [See also ('20) AIR 1920 Bom 300 (301): 44 Bom 400: 21 Cr. L. J. 369, *Mohidin Karim v. Emperor*. (Trial in contravention of rule requiring that it must be completed before same Magistrate is void.)]

2. ('34) AIR 1934 All 144 (147): 56 All 599: 36 Cr.L.J. 38, *Dasrath Rai v. Emperor*. ('24) AIR 1924 All 674 (675), *Debi Prasad v. Emperor*. (Only one Magistrate trying the case—Irregularity, if any, held cured under S. 529 (e).)

('35) AIR 1935 All 814 (815): 36 Cri L Jour 907, *Emperor v. Jafar Khan*. (Where it appears that the Magistrate who had not been present at all the hearings was present on the date when the judgment was delivered and that he inadvertently signed it and that he had taken no real part, it cannot be said that any failure of justice has taken place.)

351.* (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.

1. Scope of the section. — The following conditions are necessary for the application of the section :—

- (1) An offence must appear to have been committed on the evidence in the case before the Court,
- (2) such offence must be one of which the Court can take cognizance, and
- (3) the person who appears to have committed the offence must be *present* in Court.¹

This section does not by itself *confer* any power of taking cognizance of the offence disclosed in the evidence. It only prescribes the procedure to be followed when an offence of which the Court can take cognizance is disclosed on the evidence in the case.

The ordinary procedure where any person is to be proceeded against for any offence judicially is to issue a process against him. This section is an exception to this general rule and enables the Court to, at once, *detain* the offender in custody without issuing any such process.

As to the principle on which cognizance is taken in such cases, see Notes 3, 5 and 10 to section 190.

There is, however, nothing in the Code which states that a Magistrate is bound at any stage of a trial, to stop the proceedings, arrest any person against whom he thinks there is a chance of getting a conviction, and start the original trial *de novo*.² As to the considerations to be borne in mind in exercising the discretion under this section, see the undermentioned cases.³

* 1882 : S. 351; 1872 : S. 104; 1861 : S. 206.

Section 351 — Note 1

1. ('11) 12 Cr. L. J. 92 (92) : 9 I. C. 492 : 5 S. L. R. 1, *Ahmed Khan v. Emperor*. (Where the accused is not in attendance, this section does not apply.)
2. ('25) AIR 1925 Rang 122 (126) : 3 Rang 11 : 26 Cr. L. J. 492, *A. V. Joseph v. Emperor*.
3. ('25) AIR 1925 Cal 104 (104) : 25 Cri L Jour 311, *In re Easatullanian*. (To order a fresh enquiry against a discharged co-accused, after examining and cross-

Section 352

352.* The place in which any Criminal Court. *Courts to be open.* is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

Synopsis

- | | |
|--|--------------------------------------|
| 1a. Courts to be open. | 3. Exclusion of police-officer. |
| 1. Evidence of pardanashin lady.
See S. 503 Note 6. | 4. Holding Court in a private place. |
| 2. Trial in jail. | 5. Trial in camera. |

Other Topics (miscellaneous)

Grounds for exclusion. See Note 3.

Private place turned into Court-room — Ss. 441 and 448, Penal Code, inapplicable. See Note 4.

1a. Courts to be open. — It is a fundamental principle of law and procedure that every Court of Justice should be open to every subject of the King. As was observed by their Lordships of the Privy Council in *McPherson v. McPherson*¹:

"Publicity is the authentic hall-mark of judicial as distinct from administrative procedure The actual presence of the public is never of course necessary. Where Courts are held in remote parts of the Province, as they frequently must be, there may be no members of the public available to attend. But even so the Court must be open to any who may present themselves for admission."

The proviso to this section, however, permits the presiding Judge or Magistrate to hold a trial in camera, if he thinks fit: see Note 5.

1. Evidence of pardanashin lady. — See Note 6 under Section 503.

2. Trial in jail. — Trial in jail is not illegal when there is nothing to show that admittance was refused to anyone who desired it.¹ It is within the discretion of the Magistrate to hold a trial at a place other than the court-house. But where he decides to hold the trial in the jail premises he should pass a formal order directing that the trial

* 1882 : S. 352; 1872 : S. 187; 1861 : S. 279.

examining him as a prosecution witness and thus gathering from his own mouth the evidence against him, is contrary to the traditions of justice in Criminal Courts.) ('89) 1889 Rat 477 (477, 478), *Queen-Empress v. Bhogilal*. (In absence of exceptional circumstances a Court ought not to suddenly transfer a witness from the witness-box to the dock and proceed against him along with the other accused, as such a course is likely to discourage the witnesses who follow, from telling the truth.)

Section 352 — Note 1a

1. ('36) AIR 1936 P C 246 (250); 161 I. C. 260; 1936 A C 177; 105 L J P C 41 (P C).

Note 2

1. ('17) AIR 1917 Lah 311 (312); 18 Cr. L. J. 852 (853), *Sahai Singh v. Emperor*. (Nor the prisoners were unable to communicate with their friends or counsel.)

should be held there. Such an order must invariably be passed, as otherwise if accused persons consider that they have a grievance in any matter, it would be difficult for them, in the absence of a formal order, to have recourse to higher authorities for redress. The absence of such a formal order is an irregularity.²

3. Exclusion of police-officer. — This section empowers the Court to order that a particular person shall not remain in the room used by the Court. It makes no exception in the case of a police-officer. When the accused person objects to the presence of a police-officer or other person, the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable, considering the intelligence and susceptibilities of the class to which he belongs and not merely whether the presence is convenient or helpful to the Court or the prosecution.¹

4. Holding Court in a private place. — To hold a Court in a private house, in spite of the protests from the accused and where he cannot get his pleader to attend or call his witnesses, is a material irregularity.¹ But where a case is tried in a Magistrate's private room instead of in the court-room without any objection by the parties, the trial is not illegal.²

Where a private place belonging to the Judge is turned into a court-room, such a place cannot be said to be "in the possession" of the Judge within the meaning of S. 441 of the Penal Code. Thus, where an accused entered the private room of the Judge, wherein a trial was proceeding, and even when asked to leave it, disobeyed the order, it was held that the accused could not be convicted under S. 448 of the Penal Code.³

5. Trial in camera. — The proviso to this section empowers the presiding Judge or Magistrate to hold a trial in camera if he thinks fit. Where he conducts a trial in camera in the exercise of his discretion and no objection is raised to such procedure, the proceedings cannot be upset unless one of the parties can be shown to have been in fact prejudiced.¹

2. ('40) AIR 1940 Rang 72 (73) : 41 Cri L Jour 497 : 1940 R. L. R. 122, *King v. U Khemein*. (Ordinarily trying Magistrate should take the initiative in the matter—If District Magistrate wants to take the initiative he is not to move the Local Government himself but must instruct the public prosecutor to make an application to the Magistrate asking that the trial should be held elsewhere—See para. 20 of the Burma Courts Manual.)

Note 3

1. ('25) AIR 1925 Nag 296 (296) : 26 Cri L Jour 1130, *Nathu Singh v. Emperor*. (It is, therefore, not advisable, that a police-officer interested in the case should receive exceptional treatment, as a seat on the dais, as it would breed suspicion in the mind of accused as to the independence of Magistrate.)

Note 4

1. ('18) AIR 1918 Pat 197 (199) : 3 Pat.L.J. 147 : 19 Cr.L.J. 249, *Mewalal v. Emperor*. See also S. 340 Note 4.

2. ('06) 3 Cri L Jour 433 (435, 436) (L. B.), *Narayanaswamy v. A. Blake*.

3. ('23) AIR 1923 Rang 145 (145, 146) : 25 Cr. L. J. 653, *Nga Po Ya v. Emperor*.

Note 5

1. ('36) AIR 1936 Rang 471 (471) : 38 Cri L Jour 48, *W. E. Gardner v. U Kha*.

OF THE MODE OF TAKING AND RECORDING EVIDENCE
IN INQUIRIES AND TRIALS.

Section 353

353.* Except as otherwise expressly provided, ^{Evidence to be taken in presence of accused.} all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. "All evidence."
4. "Shall be taken in the presence of the accused."
5. "When his personal attendance is dispensed with."
See Note 2 and Notes to S. 540A.
6. Evidence in criminal cases — General.

Other Topics (miscellaneous)

<p>Breach of the section—Not curable. See Note 4.</p> <p>Cases—Cross-cases. See Note 4.</p> <p>Consolidation with consent — Curable. See Note 4.</p> <p>Description in heading if part of deposition. See Note 3.</p> <p>Exceptions. See Note 2.</p>	<p>Extradition Act, 1870. See Note 2.</p> <p>Reading out prior statements—Insufficient. See Note 4.</p> <p>Same offence — Several trials—Section applies. See Note 4.</p> <p>Sections 32 and 33, Evidence Act. See Note 2.</p> <p>Sections 428, sub-s. (3), 512, 509 and 510. See Note 2.</p>
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1. Legislative changes.

There is no difference between the corresponding sections of the Codes of 1861 and 1872.

Difference between the Codes of 1872 and 1882 —

- (1) The corresponding provision of the Code of 1872 applied to primarily *inquiries in cases triable by a Court of Session* (now chapter XVIII) and was applied by another provision to warrant-cases (now chapter XXI). Section 353 of the Code of 1882 made the provision applicable, also, to trials and inquiries under chapters XX, XXII and XXIII.
- (2) Under the Codes of 1861 and 1872 this provision applied only to the evidence of the *complainant* and the *prosecution witnesses*. Under the Code of 1882 this provision applied to *all* evidence.

Code of 1898 —

There is no difference between the Codes of 1882 and 1898.

2. Scope and applicability of the section. — It is a general principle of law that all evidence in inquiries and trials should be taken in the *presence of the accused*. There are various provisions of the Code by which the presence of the accused may, under certain circumstances, be dispensed with. (See ss. 205 and 540A.) This section

* 1882 : S. 353; 1872 : S. 191; 1861 : S. 194.

requires that, in such cases, the evidence shall be taken in the *presence of his pleader*.¹

Section 353
Note 2

The general rule stated in this section is, however, not applicable where there is an *express provision to the contrary*. Thus, an appellate Court may, under S. 428, sub-s. (3), direct that the accused need not be present when additional evidence is taken. Similarly, where an accused person has absconded, the Court may, in his absence, take evidence under S. 512. Again, when witnesses are examined on commission under the provisions in chapter XL, the accused need not be present.

Under ss. 32 and 33 of the Evidence Act, the statements of persons who cannot be called as witnesses are admissible in evidence.^{1a} Under ss. 509 and 510 of this Code, the deposition of a medical witness and

Section 353 — Note 2

1. ('28) AIR 1928 Pat 143 (143, 144) : 6 Pat 691 : 29 Cr. L. J. 260, *Bigan Singh v. Emperor*.

('67) 8 Suth W R Cr 74 (78), *Queen v. Syed Hossein Ali*.

1a. See the following cases under S. 32 of the Evidence Act:

('71) 3 N W P H C R 212 (213), *Queen v. Ujaril*.

('01) 25 Bom 45 (47) : 2 Bom L R 331, *Imperatrix v. Rudra*. (Dying declaration.)

('02) 4 Bom L R 434 (435), *Emperor v. Rama*. (Person making dying declaration, chances to live — Declaration not admissible under S. 32, Evidence Act but may be relied on under S. 157 of that Act for corroboration.)

('01) 6 Cal W N 72 (75, 81), *Emperor v. Mathura*. (Dying declaration — S. 32 (1), Evidence Act.)

('82) 8 Cal 211 (213) : 10 C L R 11, *Empress v. Samiruddin*. (Do.)

('06) 5 Cr. L. J. 427 (429) : 34 Cal 698 : 11 G W N 666, *Jatindra v. Emperor*. (Do.)

('70) 1870 Pun Re No. 3 Cr, p. 4 (8), *Crown v. Ghazee*. (Do.)

('86) 1886 Pun Re No. 13 Cr, p. 22 (22), *Abdul Jally v. Empress*. (Do.)

('87) 1887 Pun Re No. 29 Cr, p. 58 (58), *Zardad v. Empress*. (Do.)

('86) 2 Weir 339 (339), *In re Singa*. (Do.)

('84) 2 Weir 750 (752), *In re Subbu Teran*. (Do.)

('87) 2 Weir 753 (754), *In re Kusal Singh*. (Do.)

('14) AIR 1914 Nag 70 (71) : 10 N L R 19 : 15 Cr. L. J. 243, *Bhagwan v. Emperor*. (Do.)

('30) AIR 1930 Cal 228 (229) : 31 Cr. L. J. 916, *Tafiz Pramanik v. Emperor*.

(1900) 1900 Pun Re No. 9 Cr, p. 21 (23) : 1900 P L R p. 69, *Hashim v. Empress*.

('72-92) 1872-1892 Low Bur Rul 157 (158), *Ram Loochun v. Queen-Empress*.

('20) AIR 1920 Nag 170 (171) : 16 N L R 30 : 21 Cri L Jour 486, *Mt. Ajodhi v. Emperor*. (S. 32 (2), Evidence Act.)

See also the following cases under S. 33 of the Evidence Act :

('19) AIR 1919 All 351 (351) : 20 Cri L Jour 625, *Debi Singh v. Emperor*. (Statement of deceased plaintiff examined as witness that the receipt filed by defendant accused, was forgery, is admissible in evidence in criminal prosecution of accused.)

('28) AIR 1928 All 140 (141) : 50 All 113, *Narsingh Das v. Gokul Prasad*. (Statement of witness in previous suit — Witness living — Parties to the suit different — Statement not admissible.)

('87) 1887 Rat 347 (348, 349), *Queen-Empress v. Bhabhutgar*.

('73) 20 Suth W R Cr 69 (69, 70), *Queen v. Mowjan*.

('74) 21 Suth W R Cr 12 (12), *Queen v. Etwaree Dharce*.

('13) 14 Cr. L. J. 70 (71) : 18 Ind Cas 406 (Cal), *Ibrahim v. Emperor*.

('29) AIR 1929 Cal 822 (824) : 31 Cri L Jour 809, *Emperor v. C. A. Mathews*.

('14) AIR 1914 Lah 159 (161) : 15 Cri L Jour 62, *Daim v. Emperor*.

('27) AIR 1927 Lah 332 (333) : 8 Lah 570 : 28 Cri L Jour 451, *Lakal v. Emperor*.

('33) AIR 1933 Lah 561 (567) : 34 Cri L Jour 735, *Diwan Singh v. Emperor*.

('68) 2 Weir 755 (755) : 4 Mad H C R App xv.

('16) AIR 1916 Mad 8 : 1 (852, 853) : 16 Cr. L. J. 294 : 39 Mad 449, *Annavi v. Emperor*.

('32) AIR 1932 Mad 559 (560) : 33 Cri L Jour 738, *Muthiah Pillai v. Emperor*.

('22) AIR 1922 Oudh 254 (255) : 25 Oudh Cas 142 : 24 Cr. L. J. 828, *Dwarka v. Emperor*.

('24) AIR 1924 Rang 209 (210) : 1 Rang 512 : 25 Cr. L. J. 257, *Nga Nyo v. Emperor*.

See S. 162 Note 21 and S. 512 Note 8.

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Notes 2-4

his report and the report of a chemical examiner are admissible in evidence without the medical officer or the chemical examiner being called. Similarly, under the Extradition Act, 1870 the deposition or statements on oath taken in a foreign State may, if duly authenticated, be received in evidence.² These provisions, however, are all exceptions to the general rule of evidence that all *evidence should be direct* (see S. 60, Evidence Act) and have no bearing on this section.

3. "All evidence." — The words "all evidence" will include the evidence for the *defence* as well as evidence for the prosecution.¹ See also Note 1.

As to whether the name, parentage, age, residence and profession given in the heading of the deposition form part of the deposition, see the undermentioned cases.²

4. "Shall be taken in the presence of the accused." — The section is imperative that all evidence shall be taken in the presence of the accused, or in certain circumstances, in the presence of his pleader. It is not sufficient under the section to read out to a witness his previous deposition in a former case and ask him if the statements made therein are true;¹ nor is it sufficient to read out to the accused

2. ('11) 12 Cri L Jour 505 (507, 518); 12 Ind Cas 273; 39 Cal 164, *In re Rudolph Stallmann*. (Where records of a German Court have been authenticated in the manner prescribed by Ss. 14 and 15, English Extradition Act which are applicable in this country, such records are admissible.)

Note 3

1. ('13) 14 Cr. L. J. 287 (288); 19 I. C. 719; 1912 Upp Bur Rul 152, *Nga Po Shem v. Emperor*.
2. ('04) 26 All 103 (118); 31 I A 38; 8 C W N 241; 6 Bom L R 233; 8 Sar 583 (P C), *Maqbulan v. Ahmad Husain*. (No.)
- ('24) AIR 1924 Cal 558 (560), *Lakshan Chandra v. Takim Dhali*. (No.)
- ('28) AIR 1928 Pat 420 (421); 7 Pat 361; 29 Cr. L. J. 804, *Chotan Singh v. Emperor*. (Yes.)

Note 4

1. ('70) 2 N W P H C R 100 (100), *Queen v. Halundar Dass*.
- ('06) 4 Cr. L. J. 89 (91, 92); 8 Bom L R 538, *Emperor v. Ghanaskam*.
- ('95) 1895 Rat 792 (793), *Empress v. Salu*. (Testimony, however, of a medical witness, especially in a case of murder, ought, when he is present, to be taken fully and not in the way stated above.)
- ('68) 1 Beng L R O Cr 37 (38), *Queen v. Raj Krishna*. (This mode of taking evidence deprives the Court and jury of the opportunity of observing the demeanour of witnesses.)
- (1864) 1864 Suth W R Gap Cr 1 (1), *Queen v. Sheikh Kyamut*.
- (1864) 1 Suth W R Cr 14 (14), *Queen v. Radhy*.
- ('64) 1864 Suth W R Gap Cr 38(38), *Queen v. Kanpe Sheikh*.
- (1868) 10 Suth W R Cr 56 (56), *In re Munger Bhooyan*.
- ('69) 12 Suth W R Cr 3 (3, 5); 3 Beng L R A Cr 20, *Queen v. Dishonath Pal*.
- ('69) 12 Suth W R Cr 54 (55); 3 Beng L R App 155, *In re Kalikant Roy*.
- ('71) 15 Suth W R Cr 6 (6); 6 Beng L R App 83, *In the matter of C. G. D. Betts*.
- ('71) 16 Suth W R Cr 36(36, 37); 8 Beng L R App 21, *Queen v. Zulfukar Khan*.
- ('74) 22 Suth W R Cr 33 (34), *Queen v. Bocha Chowkedar*.
- ('76) 25 Suth W R Cr 14 (14), *Ali Meah v. Magistrate of Chittagong*.
- ('23) AIR 1923 Cal 196(197); 50 Cal 223; 24 Cr. L. J. 198, *Mozahur Ali v. Emperor*.
- ('25) AIR 1925 Lah 19 (20); 5 Lah 396; 27 Cr. L. J. 170, *Lal Singh v. Emperor*.
- ('26) AIR 1926 Lah 378 (379); 27 Cr. L. J. 555, *Ahman v. Emperor*.
- ('33) AIR 1933 Lah 231 (232); 34 Cr. L. J. 687, *Sukhdev Raj v. Emperor*.
- ('99) 22 Mad 455 (456); 1 Weir 739, *Queen-Empress v. Ayyakannu*.
- ('99) 2 Weir 360 (361), *In re Duganna*.
- ('68) 2 Weir 755 (755).

the deposition of the complainant taken in the absence of the accused.² So also, merely recording a statement that what the witness has to say is contained in a document which is filed as an exhibit is not enough.^{2a} The examination of the witness must actually be made in the presence of the accused. It does not matter how often the same offence is the subject of a trial; every accused has a right to have the whole of the evidence given and recorded in his presence just as if the witness had never before given his testimony on the charge.³ A contravention of the provisions of this section is not a mere error, omission or irregularity and cannot be cured by s. 537.⁴ In cross-cases and cases which are intimately connected with

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Note 4

(192) 5 C P L R Cr 33 (35), *Empress v. Rampiare*.
(24) AIR 1924 Lah 17 (18, 19) : 4 Lah 382 : 25 Cr. L. J. 377, *John Thomas v. Emperor*.

(172-92) 1872-1892 Low Bur Rul 399 (399), *Nga Po Tum v. Empress*.

(17) AIR 1917 Low Bur 112 (113):17 Cr.L.J. 512 (513), *Nga Tha Ku v. Emperor*.

(28) AIR 1928 Rang 284 (285) : 30 Cr.L.J. 736, *Abdul Gaffor v. Govind Prasad*.

(66) 6 Suth W R Cr 7 (7), *Queen v. Kishen Dayal*.

[See also (72) 17 Suth W R Cr 5 (5) : 8 Beng L R App 63, *Queen v. Wazira*.]

See also S. 512 Note 2.

2. (69) 1869 Rat 24 (24), *Reg. v. Buldev Goomajee*.

(11) 12 Cri L Jour 585 (587) : 12 I. C. 961 : 36 Mad 457, *Jeremiah v. F. S. Vas*.
(Gaps in prosecution evidence not to be filled by answers given by accused.)

2a. (28) AIR 1928 Lah 69 (69) : 28 Cri L Jour 969, *Bhagsing v. Emperor*.

(25) AIR 1925 Lah 19 (20) : 5 Lah 396 : 27 Cr. L. J. 170, *Lal Singh v. Emperor*.

3. (1864) 1864 Suth W R Gap Cr 13 (13), *Queen v. Affazuddeen*.

(74) 22 Suth W R Cr 38 (38, 39), *Queen v. Mohun Banfor*. (A prisoner whose trial is supplemental to that of others is entitled to as full and complete an investigation of all the facts of the occurrences upon which the charge depends as if no previous trial of other persons for participation in these occurrences had ever taken place.)

[See (66) 1866 Pun Re No. 65 Cr, p. 70 (70), *Crown v. Topun Mull*. (Evidence cannot be taken by proxy.)]

4. (28) AIR 1928 Pat 143 (143, 144):6 Pat 691:29 Cr.L.J. 260, *Bigan v. Emperor*.

(13) 14 Cr.L.J. 287 (288):19 I.C. 719:1912 U B R 152, *Nga Po Shein v. Emperor*.

(66) 3 All L Jour 43n (43n), *Raja Ram v. Emperor*.

(70) 2 N W P H C R 49 (50), *Queen v. Lalla Chowbey*.

(67) 8 Suth W R Cr 17 (17), *Queen v. Rajcoomar Singh*. (Conviction and sentence in absence of the prisoner quashed.)

(68) 1 Beng L R 8n (8n), *Bihooram v. Allaho Kolita*.

(69) 11 Suth W R Cr 22 (22), *Queen v. Ramgolam Singh*. (Committal quashed.)

(69) 11 Suth W R Cr 35 (35), *Queen v. Ram Das Boistub*.

(76) 14 Suth W R Cr 25 (25), *Queen v. Chooramoni*.

(71) 16 Suth W R Cr 40 (41), *In re Grish Chunder Ghose*.

(75) 24 Suth W R Cr 76 (77), *Queen v. Russick Das*.

(01) 5 Cal W N 110 (113), *In re Surjya Narain Singh*.

(93) 20 Cal 857 (866), *Girish Chunder v. Queen-Empress*.

(67) 3 Mad H C R App xxxiv (xxxiv).

(25) AIR 1925 Nag 457 (458):26 Cr.L.J. 1289, *Narayan v. Chandrabhaga*. (An order under S. 145, Cr. P. C., is wholly illegal if based on evidence recorded behind the back of a party at a time when he was not a party to the proceedings at all.)

(27) AIR 1927 Oudh 353 (353) : 28 Cri L Jour 756, *Chhotelal v. King-Emperor*.

(34) AIR 1934 Mad 691 (692) : 58 Mad 285 : 36 Cri L Jour 319, *Belligowder v. Emperor*. (Commitment based on evidence recorded in absence of accused is illegal.)

(90) 2 Weir 259 (260), *In re Chinnappan*. (Do.)

(35) AIR 1935 Oudh 488 (489) : 11 Luck 343 : 36 Cri L Jour 1198, *Bishnath v. Emperor*. (Prosecution witnesses examined-in-chief when accused was absent — Their cross-examination conducted in his presence—Case proved in cross-examination—Still trial is illegal.)

[See (74) 21 Suth W R Cr 56 (57), *Queen v. Lukhun Santhal*.

(72) 1872 Rat 66 (66), *Reg. v. Jettha Ganesh*.]

[See also (06) 3 Cr. L. J. 42 (43) : 7 Bom L R 979, *Emperor v. Ningappa*.

curable under S. 537.⁶ See also Note 30 under S. 537. See also the cases cited below.⁷

Section 353:
Notes 4-6

5. "When his personal attendance is dispensed with." — See Note 2 and Notes to Section 540A.

6. Evidence in criminal cases—General.—See the undermentioned cases.¹

- [But see ('38) AIR 1938 Oudh 253 (255, 256) : 40 Cr. L. J. 1, *Taqi Mahomed v. Md. Jan.* (Witness's answer about his statement in cross-case recorded — Statement in cross-case not brought on record—Procedure adopted at request of accused — Held there could be no prejudice and irregularity cured by S. 537.)]
6. ('26) AIR 1926 Bom 231 (232) : 50 Bom 174 : 27 Cr. L. J. 1335, *Emperor v. Harjivan Valji.*
(30) AIR 1930 Mad 505 (506) : 53 Mad 775 : 31 Cr. L. J. 1191, *Krishnayya Naidu v. Emperor.*
(28) AIR 1928 All 593 (593, 595) : 50 All 457 : 30 Cr. L. J. 337, *Sukhai Ahir v. Emperor.* (Where parties consented to treat the evidence in one case as evidence in the other and no injustice followed from it, the trial is not bad.)
See also S. 423 Note 11 and S. 537 Note 30.
7. ('40) AIR 1940 Cal 59 (59) : 41 Cri L Jour 247, *Mrs. W. Waugh v. Emperor.* (Counter-cases—Magistrate is not entitled to use evidence given in one case in other case.)
(35) AIR 1935 Cal 548 (550) : 36 Cr. L. J. 1339, *Khitish Chandra v. Nanuram Malania.*
(16) AIR 1916 Cal 912 (913) : 17 Cri L Jour 439, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy.* (Connected criminal appeals—It is irregular to make cross-references in one case to evidence in other case.)
(28) AIR 1928 Lah 34 (35) : 29 Cri L Jour 521, *Mahomed Khan v. Emperor.* (Separate charges—Evidence must be separately recorded.)
(87) 14 Cal 358 (359, 360), *Bachu Mullah v. Sia Ram Singh.* (Cross-cases arising out of same facts—Examining as witnesses in one case accused in other case —Course irregular but irregularity curable under S. 537.)
(15) AIR 1915 Bom 14 (15) : 16 Cri L Jour 538, *Dosabhai v. Emperor.* (Trial of cross-complaints—Evidence in one case considered in the other—Illegal.)
(87) 9 All 609 (611) : 1887 A W N 143, *Queen-Empress v. Nandram.* (Depositions in prior trial arising out of same facts read out with consent of accused and witnesses cross-examined—Held that though course was irregular, irregularity was cured under S. 537.)
(16) AIR 1916 Low Bur 20 (20) : 17 Cri L Jour 503, *Ram Sarup v. Emperor.* (Two persons separately tried for same offence—Examination of one of them in the case against the other is irregular as it is likely to prejudice the Magistrate against him.)
(24) AIR 1924 Lah 228 (229) : 24 Cri L Jour 415, *Narain Singh v. Emperor.* (Several cases tried separately—Common witnesses not examined separately, but their evidence taken in one case read out to them in others with consent of accused's counsel and admitted as correct—Held procedure though irregular did not prejudice accused and did not affect validity of trial.)

Note 6

1. ('28) AIR 1928 Lah 69 (69) : 28 Cr. L. J. 969, *Bhag Singh v. Emperor.* (Merely recording statement that what the witness has to say is contained in a document which is filed as an exhibit is not enough.)
(25) AIR 1925 Lah 19 (20) : 5 Lah 396 : 27 Cr. L. J. 170, *Lal Singh v. Emperor.* (Do.)
(28) AIR 1928 Lah 152 (153) : 29 Cri L Jour 200, *Sirajud-Din v. Emperor.* (Recording of evidence piece-meal not proper.)
(17) AIR 1917 Oudh 200 (200) : 19 Oudh Cas 239 : 18 Cri L Jour 105, *Baldeo Prasada v. Emperor.* (Medical witness, statement of—Recording of statement in commitment proceedings—Careless mode of recording condemned.)
(19) AIR 1919 Cal 862 (871) : 19 Cri L Jour 753, *Venkataratnam v. Corporation of Calcutta.* (Expert witness — Evidence — Contradiction by reference to books cannot be allowed unless the relevant passages are put to the witness and he is given an opportunity to explain.)
(67) 1867 Pun Re No. 17 Cr, p. 35 (36), *Crown v. Sain Dass.* (Conviction and sentence on evidence recorded by a subordinate Magistrate is illegal.)

Section 354

354. * In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

1. "Other than summary trials." — See Note 3 to Section 355.
2. "Other than a Presidency Magistrate." — As to the manner in which the evidence of the witnesses is to be recorded by or before a Presidency Magistrate, see S. 362.
3. "In the following manner." — The words "*in the following manner*" refer to the manner as provided in Ss. 355 to 361.¹ If a person is before the Court as a *witness*, his evidence must be recorded only as the law directs, *viz.*, under the provisions of the following sections.²

Section 355

355.† (1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of

* 1882 : S. 354; 1872 : S. 332; 1861 — Nil.

† 1882 : S. 355; 1872 : S. 333; 1861 : S. 267.

(66) 1866 Pnu Re No. 65 Cr, p. 70 (70), *Crown v. Topun Mull.* (Evidence can never be taken by proxy.)

(21) 22 Cri L Jour 669 (670) : 63 Ind Cas 461 (462) (Lah), *Wadhawa Singh v. Emperor.* (Witnesses, whether they are Government officers or not, should give their evidence in the witness-box or other place in the court-room which is set apart for this purpose and it is not desirable that they should give their evidence on the dais by the side of the Magistrate.)

(83) 1883 All W N 145 (146), *Empress v. Gayadin.* (Number of accused committed to sessions—Judge must analyse evidence in respect of each accused.)

(18) AIR 1918 Bom 212 (213, 214) : 19 Cri L Jour 593, *Hari Ramji Parar v. Emperor.* (Evidence of children not competent to understand nature of oath or solemn affirmation—Necessity for administering oath—Oath when may be dispensed with—Precautions to be taken.)

(33) AIR 1933 All 690 (695) : 55 All 1040 : 34 Cri L Jour 967, *S. H. Jhabwala v. Emperor.* (Conspiracy trials—Evidence in.)

(26) AIR 1926 Bom 245 (245) : 27 Cri L Jour 1289, *In re Mangru Feku.* (Local inquiry—Procedure at—Questioning persons without recording their evidence or allowing their cross-examination is bad.)

(87) 1887 Pnu Re No. 41 Cr, p. 95 (99), *Hassan Khan v. Empress.* (Examination of pardanashin ladies as witnesses—Procedure.)

Section 354 — Note 3

1. (26) AIR 1926 Pat 58 (59) : 26 Cr. L. J. 1475, *Emperor v. Phagunia.* (S. 360.)
2. (67) 8 Suth W R Cr 11 (12), *Queen v. Phoolchand.*

the evidence of each witness as the examination of the witness proceeds.

Section 355
Notes 1-2

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

Synopsis

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|--|---|
| 1. Legislative changes. | 5. "Each witness." |
| 2. Scope of the section. | 6. "Signed by the Magistrate." |
| 3. Sub-section (1) of section 260, clauses (b) to (m). | 7. Reasons for inability to record as required. |
| 4. "Shall make a memorandum of the substance of the evidence." | |

Other Topics (miscellaneous)

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|---|--|
| Different modes of procedure in taking evidence under the Code. See Note 2. | Memo of evidence — Not vague but full. See Note 4. |
| Inapplicability to summary trials. See Note 3. | Notes of evidence in summary trials — If part of record. See Note 3. |
| Language of memo of evidence. See Note 4. | Omission to sign vitiates trial. See Note 6. |
| Memo of evidence need not be read over. See Note 4. | |

1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

The provisions of the corresponding section in the Code of 1861 applied only to summons-cases. The Code of 1872 extended the provisions also to cases of the kind referred to in section 222 of that Code (now section 260).

Difference between the Codes of 1872 and 1882 —

The words "otherwise than at a summary trial" after the words "Magistrate of the first or second class," occurring in the Code of 1872 were omitted in S. 355 of the Code of 1882, as they were thought to be redundant, since those words already occurred in section 354.

Difference between the Codes of 1882 and 1898 —

- (1) The words "clauses (b) to (m)" were substituted for "clauses (b) to (k)," in consequence of offences added in section 260.
- (2) The provisions of this section have been extended also to proceedings under section 514.

2. Scope of the section. — There are three different kinds of procedure prescribed by the Code in the matter of recording of evidence in the trial of cases :

- (1) In summary trials (ss. 260 to 265) *no evidence* need be recorded by the Magistrate.¹

Section 355 — Note 2

1. ('40) AIR 1940 Pat 272 (274): 41 Cr. L. J. 283, *Mohsin v. Emperor*. (Section 263 must be read as an exception to the general provision contained in S. 355 (1).)

Section 355
Notes 2-3

- (2) In *regular* trials of summons-cases by a Magistrate other than a Presidency Magistrate and of cases of offences mentioned in S. 260, clauses (b) to (m), and in proceedings under S. 514, the Magistrate shall make a *memorandum of the substance of the evidence of each witness* as his examination proceeds (S. 355). In such cases, however, under S. 358 it is open to the Magistrate, if he thinks fit, to take down the evidence of the witnesses in the manner provided by S. 356 or S. 357.
- (3) In *regular trials* of cases not falling within this section, the procedure prescribed by ss. 356 to 365 should be followed.

3. Sub-section (1) of section 260, clauses (b) to (m). — Section 351 makes it clear that this and the following sections do not apply to *summary* trials.¹ Thus, it does not apply to cases of the offences specified in sub-s. (1) of S. 260, clauses (b) to (m), if tried *summarily*, and therefore in such cases the Magistrate is not bound to make any memorandum of the substance of the evidence of each witness. Even if he makes such a memorandum, the notes do not form part of the record.² But, if the Magistrate does not try the offences under the provisions of S. 260 but tries them in the ordinary course, he is required under this section to make a memorandum of the evidence.³ The High Court of Calcutta has, however, held that such memorandum, if taken, would form part of the record and cannot be destroyed by the Magistrate.⁴ An offence of theft under ss. 379, 380 and 281, I. P. C., where the value of the property stolen does not exceed Rs. 50, is one falling under S. 260, Cl. (d), and when tried regularly, is governed by this section.⁵ But a charge of theft under the said sections combined with a charge of previous conviction for a similar offence has been held to be a *different offence* not falling within clause (d). Neither a summary procedure nor this section will apply to such a case.⁶

(135) AIR 1935 Rang 106 (107): 13 Rang 225: 36 Cr. L. J. 892, *Emperor v. Maung Po Saw*. (S. 355 has no application to summary trial of a case under Chap. XXII of the Code.)

(134) AIR 1934 Bom 157 (158): 58 Bom 298: 35 Cri L Jour 841, *In re Tippanna Koutya Mannaradhar*. (Do.)

Note 3

1. ('40) AIR 1940 Pat 272 (274): 41 Cri L Jour 283, *Mohsin Sheikh v. Emperor*.
- (136) AIR 1936 All 319 (319): 37 Cri L Jour 710, *Hafiz Mohd. v. Emperor*.
- (105) 2 Cri L Jour 375 (376): 3 Low Bur Rul 3, *Kuchi v. Emperor*.
- (127) AIR 1927 Bom 426 (427, 428): 28 Cri L Jour 537, *Chimanlal Maneklal v. Emperor*. (S. 355 does not apply to offences coming under S. 261, Cl. (b).)
- (127) AIR 1927 All 124 (124, 125): 49 All 261: 28 Cri L Jour 97, *Mantoo Tewari v. Emperor*. (The provisions of ss. 263 and 264, in cases in which these sections are applicable, are not controlled by S. 355.)
- [But see ('22) AIR 1922 Pat 5 (7): 23 Cr. L. J. 114, *Balkesar Singh v. Emperor*. (Submitted not correct.)]
2. ('27) AIR 1927 All 124 (124): 49 All 261: 28 Cr. L. J. 97, *Mantoo v. Emperor*.
3. ('36) AIR 1936 All 319 (319): 37 Cri L Jour 710, *Hafiz Mohd. v. Emperor*.
4. ('21) AIR 1921 Cal 165 (165, 166): 48 Cal 280: 22 Cr. L. J. 462, *Satish Chandra v. Manmath Nath*. (S. 263 must be read with S. 355.)
5. ('36) AIR 1936 All 319 (319): 37 Cri L Jour 710, *Hafiz Mohd. Rafiq Ahmad v. Emperor*. (A Magistrate trying summary case in ordinary way is not required to record the evidence in the language of the Court or have it so recorded.)
- (123) AIR 1923 All 432 (433), *Emperor v. Bulakhi*.
6. ('80) 2 Weir 432 (432, 433), *High Court Proceedings, 25th October 1880, No. 2110*.

4. "Shall make a memorandum of the substance of the evidence." — This section requires only a memorandum to be made of the *substance* of the evidence given. Such a memorandum should not, however, be inadequate or vague,¹ but must be full.²

The Code is silent as to the *language* in which such a memorandum is to be recorded; consequently, if a subordinate Magistrate, not authorized to take down evidence in English, records the memorandum of the substance of such evidence in English, there is nothing illegal in it.³

The memorandum under this section need not be read over to the witnesses inasmuch as it is not *evidence proper*. Section 360 does not apply to such cases.⁴

5. "Each witness." — The direction of the section that the Magistrate must make "a memorandum of the substance of the evidence of each witness," is not complied with by a mere statement that a witness deposed exactly as another.¹ See also section 356.

6. "Signed by the Magistrate." — It was held in the under-mentioned case¹ that an omission by the Magistrate to sign the memorandum of the substance of the evidence recorded by him vitiated the trial. But in view of the decision of the Privy Council in *Abdul Rahman v. Emperor*,² the failure of the Magistrate merely to sign the memorandum cannot be regarded as sufficient by itself to vitiate the conviction.³

7. Reasons for inability to record as required. — Sub-section (3) requires that the Magistrate must make a memorandum of the substance of the evidence with his own hand, unless he records valid reasons for not doing so. He is not entitled to attend to other work during the hearing of the case and to plead that other work as the reason for his inability to comply with this requirement.¹

('78) Weir 3rd Edition 921 (921): 2 Weir 324.

Note 4

1. ('83) 5 All 224 (226): 1882 A W N 240, *Laraili v. Ram Dial*.
2. ('24) AIR 1924 Cal 541 (541): 24 Cr.L.J. 688, *Ganoda Dassya v. Srimanta Ghosh*.
3. ('96) 19 Mad 269 (270): 2 Weir 433: 6 M L J 134, *Queen-Empress v. Gopal Goundan*. (Even if it is irregular, S. 537 applies.)
4. ('23) AIR 1923 Pat 157 (157): 23 Cr. L. J. 120, *Mohammad Ishaq v. Emperor*. ('94) 2 Weir 433 (433), *High Court Proceedings, 31st October 1894, No. 2078*.

Note 5

1. ('75) 24 Suth W R Cr 76 (77), *Queen v. Russick Das*.

Note 6

1. ('22) AIR 1922 Pat 5 (7): 23 Cri L Jour 114, *Balkesar Singh v. Emperor*. (The decision holds that S. 355 applies to summary trials—This is wrong—See N. 3.)
2. ('27) AIR 1927 P C 44 (47): 54 I A 96: 28 Cri L Jour 259: 5 Rang 53 (P C).
3. ('40) AIR 1940 Pat 272 (274): 41 Cri L Jour 283, *Mohsin Sheikh v. Emperor*. (Even otherwise in a case governed by S. 263 the Magistrate need not record the evidence of witnesses inasmuch as S. 263 must be read as an exception to the general provision contained in S. 355 (1).)

Note 7

1. ('37) AIR 1937 Oudh 126 (127): 38 Cr.L.J. 150, *Emperor v. Jagmohan Singh*. (The irregularity is clearly of much more than a technical nature.)

Section 356

356.* (1) In all other trials before Courts of Session and Magistrates (other than Record in other cases outside presidency-towns. Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge.

(2) When the evidence of such witness is given Evidence given in English. in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

(2A) When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.

(3) In cases in which the evidence is not taken Memorandum when evidence not taken down by the Magistrate or Judge himself. down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

* 1882 : S. 356; 1872 : S. 334; 1861 : S. 195.

Synopsis

Section 356
Notes 1-4

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| 1. Legislative changes.
2. Scope of the section.
3. "In all other trials." See Note 2.
4. Proceedings for security for good behaviour.
5. Record of evidence — Sub-section (1). | 6. Evidence of each witness shall be taken.
7. Language of the Court.
8. Shall be signed.
9. Record of oath.
10. Sub-section (2A).
11. Sub-section (3).
12. Sub-section (4). |
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Other Topics (miscellaneous)

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| Attestation in presence of the accused. See Note 8.
Deposition destroyed — Value of memo. See Note 5.
Desirability of shorthand notes in sessions. Note 11.
Irregularity in memorandum of evidence. See Note 11.
Provision mandatory. See Note 5.
Record in different language — Effect. See Note 5. | Refusal to sign—No offence. See Note 8.
Signature by presiding Judge and not all Judges. See Note 8.
Signature of deponent. See Note 8.
Sub-section (3) is supplementary to sub-section (1) and does not override it. See Note 11.
Vernacular record more reliable than notes. See Note 5. |
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1. Legislative changes. — Change made in 1923 — Sub-s.(2A) was newly added, by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

2. Scope of the section. — Section 355 provides for the manner in which evidence is to be recorded in certain specified cases. This section provides for the manner of recording of evidence in all *other trials* before Magistrates and Courts of Session and in all inquiries under chapters XII¹ and XVIII. This section applies only to cases to which the provisions of S. 355 do not apply.²

3. "In all other trials." — See Note 2.

4. Proceedings for security for good behaviour.—An inquiry in a proceeding for demanding security for good behaviour should, under the provisions of S. 117, be conducted and evidence recorded as in warrant-cases. The manner in which evidence is to be recorded in warrant-cases is that prescribed by this section and, consequently, evidence in inquiries under S. 117, on an order for security for good

Section 356 — Note 2

1. ('32) AIR 1932 Sind 145 (146) : 26 Sind L R 353 : 34 Cri L Jour 216, *Natho Khan v. Emperor*.
 ('94) 21 Cal 727 (730) *Bathoo Lal v. Domi Lall*. (Inquiry under S. 147.)
 ('03) 30 Cal 508 (514) : 7 C W N 404, *Surjya Kanta v. Hem Chander*. (S. 145, Cr. P. C.)
 ('25) AIR 1925 Cal 822 (826) : 52 Cal 721 : 26 Cri L Jour 1194 (FB), *Narendra Chandra v. Sabarali Bhuiya*. (Inquiry under S. 145—Also the question whether S. 360 applies to inquiry under S. 145 referred to Full Bench in this case answered in affirmative.)
 ('25) AIR 1925 Oudh 286 (286) : 26 Cri L Jour 70, *Mohammad Ayub v. Sarfaraz Ahamad*. (S. 145, Cr. P. C.)
 ('73) 20 Suth W R Cr 14 (14), *Khetromony Dasi v. Sreenath Sirkar*. (Do.)
 ('15) AIR 1915 Cal 664 (665) : 16 Cri L Jour 192 (192) : 42 Cal 381, *Sadananda Mandal v. Krista Mandal*.
 ('28) AIR 1928 Oudh 112 (112) : 29 Cri L Jour 70, *Sumran Singh v. Emperor*. See also S. 145 Note 39.
 2. ('36) AIR 1936 All 319 (319) : 37 Cr.L.J. 710, *Hafiz Md. Ra fiq Ahmad v. Emperor*.

Section 356
Notes 4-5

behaviour, should be taken in the manner prescribed by this section.¹

5. Record of evidence—Sub-section (1).—Under this section the entire evidence must be recorded fully,¹ either by the Magistrate himself or by somebody else under his direction and in his presence, in the language of the Court. This provision is mandatory and an omission to record the evidence in the manner provided is a material irregularity sufficient to set aside the proceedings.^{1a} But where evidence is recorded but not in the language of the Court, the defect is merely an irregularity and not an illegality which would vitiate the trial. The essence of the rule contained in sub-s. (1) is the taking down in writing of the evidence of each witness and not the taking down in writing of the same in the *language* of the Court as is shown by the provisions of S. 357 under which, if the Provincial Government so directs, the evidence may be taken down in the mother tongue of the Judge or in English.² So, where the error is only one of procedure and does not go to the root of the trial and neither causes prejudice to the accused nor occasions a failure of justice, it is cured by S. 537.³

Generally speaking where evidence is given by a witness in his own language, the vernacular record is always more reliable and entitled to greater weight than the memorandum which the Judge makes in English.⁴ Where, however, the deposition taken down in the language of the Court is destroyed and the memorandum in English made by the Magistrate under sub-s. (3) is very full and careful, a conviction based on such a memorandum is not invalid.⁵

Note 4

1. ('25) AIR 1925 Cal 720 (721) : 52 Cal 632 : 26 Cr. L. J. 1240, *Sanatan Bhattacharya v. Emperor*. (Case under S. 360 accepting the principle stated above.)

Note 5

1. ('22) AIR 1922 Pat 40 (41) : 23 Cri L Jour 218, *Lachmi Lal v. Emperor*. (In this case under S. 302, Penal Code, evidence of certain eye-witnesses was recorded perfunctorily.)
- 1a. ('15) AIR 1915 Cal 664 (665) : 16 Cri L Jour 192 (192) : 42 Cal 381, *Sadananda Mandal v. Krista Mandal*. (Case under S. 145, Cr. P. C.)
- ('90) 1890 All W N 164 (165), *Matai Lal v. Anant Ram*.
- ('19) AIR 1919 All 64 (64) : 21 Cri L Jour 28, *Udit Narain v. Emperor*.
[See ('66) 1866 Pun Re No. 65 Cr, p. 70 (70), *Crown v. Topun Mull*.
('36) 1936 All L J 667 (669), *Radhlal v. Emperor*. (Where the Magistrate did not allow more than such cross-examination as he thought to be necessary nor considered it necessary to have a record of the evidence in the language of the Court, his order of conviction is liable to be set aside.)]
2. ('03) 6 Oudh Cas 73 (75), *Harbakhsh Singh v. Emperor*.
[But see ('17) AIR 1917 Pat 41 (41) : 19 Cr. L. J. 235, *Janki Prasad v. Emperor*. (Recording evidence in language which is not language of Court amounts to illegality unless the Magistrate is empowered to act under S. 357, Cr. P. C.)]
3. ('31) AIR 1931 All 2 (3) : 32 Cri L Jour 368, *Sankatha Missir v. Bishwanath*. (Case under Ch. XII.)
- ('31) AIR 1931 All 3 (6) : 53 All 172 : 32 Cri L Jour 372, *Kallu v. Bashiruddin*. (Case under S. 145, Criminal P. C. — Mere breaking of imperative statutory rule is not enough to vitiate trial — The Court should consider the gravity of the irregularity or omission and whether it might have worked actual injustice to the accused.)
- ('32) AIR 1932 Sind 145 (146) : 26 Sind L R 353 : 34 Cri L Jour 216, *Nathokhan v. Emperor*.
See also S. 145 Note 39.
4. ('23) AIR 1923 Lah 167 (168) : 24 Cri L Jour 625, *Sadhu Singh v. Emperor*.
5. ('83) 1883 All W N 226 (226), *Empress v. Ashiq Husain*.

6. Evidence of each witness shall be taken. — Taking down evidence means taking down the statement of a witness *in full as he deposes*. Therefore, where a Magistrate, in recording the evidence of a medical witness, instead of taking down his statements, simply recorded that the injuries on the accused were fully detailed in the medical certificate, the procedure is improper.¹ The evidence of each witness must be taken as the examination proceeds; and this requirement is not complied with by a mere record that a witness “deposes as the last witness did”² or “corroborates” another witness.³

The practice of recording evidence piece-meal and not at a stretch is highly irregular.⁴

7. Language of the Court.—The language of the Court is that determined by the Provincial Government under S. 558.

8. Shall be signed. — The presiding officer of the Court must sign the deposition of the witness examined by him. The object is to ensure the accuracy of the record.¹

Where the Court is composed of more than one Judge, it is not necessary that all the Judges should sign the deposition. It is enough if the presiding Judge signs it.²

There is no provision of law which makes it obligatory on the Court to attest the deposition in the *presence of the accused*, though it is desirable that the depositions should be taken and attested in the presence of the accused and a few apt words written on the face of the deposition to make it apparent that this has been done.³ See S. 509 which makes such a thing obligatory for the purpose of that section.

The signature of the *deponent* is not made compulsory though it is desirable that such signatures also should be obtained. A refusal to sign a deposition, however, is not an offence under S. 180 of the Penal Code.⁴

9. Record of oath.—There is nothing in the Code or elsewhere which requires a Court examining a witness to record the fact that

Note 6

1. ('28) AIR 1928 Lah 69 (69) : 28 Cri L Jour 969, *Bhag Singh v. Emperor*.
2. (1863) 1 Bom H C R Cr 91 (92), *Reg. v. Byha*.
(1864) 1864 Suth W R Gap Cr 18 (18), *Queen v. Muttee Nushyo*.
3. (1900-02) 1900-02 Low Bur Rul 238 (241), *Chit Tun v. The Crown*.
(193-1900) 1893-1900 Low Bur Rul 626 (627), *Nga Ngyin Byu v. Queen-Empress*.
4. ('15) AIR 1915 Cal 558 (562) : 16 Cri L Jour 424 (429) : 42 Cal 313, *H. Meredith v. Sanjibani Dassi*.
(18) AIR 1918 Cal 588 (590) : 18 Cri L Jour 609 (611), *Mahomed Ibrahim v. Emperor*. (Examination of witnesses by batches on various dates at intervals — Illegal.)
(28) AIR 1928 Lah 152 (153) : 29 Cri L Jour 200, *Sirajuddin v. Emperor*. (Prosecution evidence recorded piece-meal.)

Note 8

1. ('28) AIR 1928 Lah 125 (127) : 29 Cri L Jour 212, *Taj Mohammad v. Emperor*.
(1859-96) Oudh Sel Cas No. 192, p. 248 (249), *Queen-Empress v. Nanhu*. (Mere initialling is not signing.)
2. ('28) AIR 1928 Lah 125 (127) : 29 Cri L Jour 212, *Taj Mohammad v. Emperor*.
3. ('88) 10 All 174 (178) : 1888 All WN 11, *Queen-Empress v. Pohp Singh*. (Case under S. 509, Cr. P. C.)
4. ('71) 1 Weir 112 (113), *High Court Proceedings, 9th January 1871, No. 40*.

Section 356
Notes 9-12

the oath was administered to him. Where the record does not show that the oath was administered to a witness, the reasonable presumption, in the absence of any suggestion to the contrary, would be that proper procedure was followed and the oath duly administered.¹

10. Sub-section (2A). — This sub-section was newly added in 1923. The reason is thus stated in the Statement of Objects and Reasons:

“Section 356 does not provide for evidence being taken down in any other language than that of the Court, or, if the language of the Court is not English, in English. The result is a certain loss of accuracy, whenever evidence is given in a third language, as it has to be translated into and taken down in the language of the Court or in English. The object of the amendment is to secure greater accuracy and to avoid waste of time in translation.”¹

11. Sub-section (3). — The provisions of this sub-section apply only to cases in which the evidence recorded under sub-s. (1) is not recorded in the Magistrate's own hand.¹ It is supplementary to the provisions in sub-s. (1) and cannot override the provisions therein.² Where, therefore, there is only a memorandum in English, and such a memorandum is not made as the examination of each witness is proceeding and it is not signed by the Judge, the irregularity is so serious that the conviction will be quashed.³ But where the evidence is recorded in the language of the Court and the Magistrate does not make a memorandum in English, the failure is only an irregularity which is curable by section 537.⁴

The Calcutta High Court has suggested in the undermentioned case⁵ that provisions should be made for recording full and accurate shorthand notes of proceedings at sessions trials.

12. Sub-section (4). — The Magistrate or the Sessions Judge, when he does not himself take down the evidence in writing, is bound, under sub-s. (3) to make a memorandum of the substance of the evidence and this must be written and signed by the Magistrate with his own hand unless he is prevented from doing so, in which case he must, under sub-s. (4), record the reason of his inability to make it. Pressure

Note 9

1. ('14) 15 Cr. L. J. 19 (20) : 35 All 575 : 22 I. C. 163, *Syed Ahmed v. Emperor*.

Note 10

1. Statement of Objects and Reasons, 1921.

Note 11

1. ('15) AIR 1915 Cal 664 (665) : 16 Cr. L. J. 192 (192) : 42 Cal 381, *Sadananda Mandal v. Krista Mandal*.
2. ('15) AIR 1915 Cal 664 (665) : 16 Cr. L. J. 192 (192) : 42 Cal 381, *Sadananda Mandal v. Krista Mandal*.
3. ('91) 1891 All W N 145 (145, 146), *Empress v. Barmajit*.
4. ('28) AIR 1928 Oudh 112 (112) : 29 Cr. L. J. 70. *Sumran Singh v. Emperor*.
[See also ('34) AIR 1934 Cal 636 (637, 638) : 61 Cal 399 : 35 Cr. L. J. 1479, *Nayeb Shahana v. Emperor*. (Evidence not recorded in Magistrate's own hand—But all evidence taken in presence and hearing and under personal direction and superintendence of Magistrate and read over to accused in presence of his pleader and admitted to be correct—*Held* failure to make memorandum under sub-s. (3) only an irregularity.)]
5. ('24) AIR 1924 Cal 257 (288) : 25 Cr. L. J. 817 (FB), *Emperor v. Barendra*. See also S. 271 Note 11.

of other work is not a valid reason within the meaning of this sub-section.¹

Section 356
Note 12

357.* (1) The *Provincial Government*^a may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court.

Section 357

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the *Provincial Government*^a may direct the Sessions Judge or Magistrate to take down the evidence in the English language or in the language of the Court, although such language is not his mother-tongue.

a. Substituted by A. O. for "Local Government."

1. Scope of the section. — This section applies only to evidence taken under S. 356.¹ The authority conferred under this section is personal to the particular officer on whom it is conferred and is in force only while he is in the district or part of the district in which it is conferred.² But where such an officer is transferred to another district and he takes down depositions in his own handwriting without authority for that district, and commits the accused, the commitment, although irregular, is not invalid unless the accused is prejudiced thereby.³

* 1882 : S. 357; 1872 : S. 335; 1861 : S. 196.

Note 12

1. ('37) AIR 1937 Oudh 126(127): 38 Cr. L. J. 150, *Emperor v. Jagmohan*. (Held that Magistrate having failed to pay undivided attention to case, trial was vitiated.)

Section 357 — Note 1

1. ('96) 19 Mad 269 (270) : 2 Weir 433 : 6 M L J 134, *Queen v. Gopal Goundan*.

2. ('69) 2 Weir 434 (434), *H. C. Proceedings, 25th November 1869, No. 2330*.

('83) 2 Weir 434 (435), *In re Chathanadiyil Kedu Nayar*.

3. ('83) 2 Weir 434 (435), *In re Chathanadiyil Kedu Nayar*.

Section 358

358.* In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section 356, or, if within the local limits of the jurisdiction of such Magistrate the *Provincial Government*^a has made the order referred to in section 357, in the manner provided in the same section.

Option to Magistrate in cases under section 355.

a. Substituted by A. O. for "Local Government."

1. "If he thinks fit." — Even in cases of the kind specified in S. 355, the Magistrate may take down the evidence in the manner mentioned in S. 356 *if he thinks fit* to do so, as for example, where it appears that a witness is giving false evidence and that it is likely to be necessary to start criminal proceedings against him.

Section 359

359.† (1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

Mode of recording evidence under section 356 or section 357.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

1. **Scope of the section.** — This section prescribes the mode of recording evidence under Ss. 356 and 357. It directs that the evidence shall ordinarily be taken down in the form of a *narrative*. In doing so, the Judge should adhere, as far as possible, to the words actually used either in the question or in the answer given by the witness. The provisions of law cannot be said to be complied with by recording a *paraphrase* of the evidence given by the witness.¹ The ordinary, proper and convenient way of recording the evidence is to take it down in the first person, exactly as spoken by the witness.²

* 1882 : S. 358; 1872 : S. 336; 1861 : S. 268.

† 1882 : S. 359; 1872 : S. 338; 1861 : S. 198.

Section 359 — Note 1

1. ('05) 2 Cri L Jour 133 (142) : 11 Bur L R 8, *Nga Saw v. Emperor*. (But the Court is not bound to record everything that a witness says whether relevant or not.)

('93-1900) 1893-1900 Low Bur Rul 626 (627), *Nga Ngyin Byu v. Empress*.

[See also (1900) 3 Oudh Cas 72 (77, 78), *Shankar v. Queen-Empress*. (The words in which a witness identifies a prisoner should be recorded as part of witness's deposition.)]

2. ('71) 16 Suth W R Cr 36 (37) : 8 Beng L R App 21, *Queen v. Zoolfakar Khan*. (Recording of evidence in third person causes awkwardness, confusion and waste of time.)

('83) 1883 All W N 12 (12), *Empress v. Balwant Singh*.

The Judge is not bound to make *verbatim* record of any particular question and answer. It is left to the discretion of the Judge, if either side specially requests him to do so.

A Judge may also himself question the witness and record his question and answer under S.165 of the Evidence Act, but this power should be exercised with discretion and within limits as it is unfair to the accused to anticipate or break the thread of his cross-examination.³

2. Recording of questions disallowed. — Sections 356 to 360 do not require that when a Magistrate disallows questions in cross-examination he must make a note of this on the record. It has been held that if the Magistrate notes on the record each question that is disallowed, the procedure defeats its own object which is to get on with the case, but when a question disallowed is important, or there is a reasonable doubt whether it should not be allowed, it may be useful for the Magistrate to note the question and his reasons for disallowing it. This is, however, entirely a matter for the discretion of the Magistrate.¹ A contrary view has however been taken in the undermentioned cases² to the effect that if a question is disallowed on the ground of irrelevancy or on other grounds, the deposition should show what the question is and the reason for disallowing it.

Section 359
Notes 1-2

360.* (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

Section 360

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which

* 1882 : S. 360; 1872 : S. 339; 1861 : S. 198.

3. ('05) 2 Cri L Jour 133 (143, 144) : 11 Bur L R 8, *Nga Saw v. Emperor*.

Note 2

1. ('40) AIR 1940 Lah 527 (528) : 42 P L R 589 (590), *Dewan Singh Maftoon v. Emperor*. (If the accused or the prosecutor is dissatisfied, it is always open to him to put in an application to be placed on the record saying that such and such a question was put but not allowed.)

2. ('20) AIR 1920 Pat 25 (28) : 21 Cr.L.J. 321, *Rameshwar Dusadh v. Emperor*. [See also ('18) AIR 1918 Low Bur 22 (23) : 9 L B R 88 : 19 Cr. L. J. 54, *Deja v. Emperor*.]

ction 360
otes 1-2

it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and applicability of the section. 3. Shall be read over to the witness—Sub-section (1). 4. In the presence of the accused or of his pleader. | <ol style="list-style-type: none"> 5. "As the evidence of each witness . . . is completed." 6. "And shall, if necessary, be corrected." 7. Shall be interpreted to the witness. 8. Non-compliance with the section—Effect of. 9. Revision. |
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Other Topics (miscellaneous)

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| <p>Accused not entitled to suggest corrections. See Notes 2 and 4.</p> <p>Applicability to Defence of India Act, 1915. See Note 2.</p> <p>Applicability to Chapters 8 and 12. See Note 4.</p> <p>Failure to read over. See Note 8.</p> <p>Handing over deposition—Insufficient. See Note 3.</p> <p>Interpretation to accused. See Note 7.</p> <p>Interpretation without reading over. See Note 7.</p> <p>Not to be read over as each sentence is recorded. See Note 5.</p> <p>Presence and not hearing. See Note 4.</p> | <p>Prosecution of witness for perjury. See Note 8.</p> <p>Reading over after all witnesses are examined. See Note 5.</p> <p>Reading deposition before vakil of one of several accused. See Note 4.</p> <p>Reading over during examination of another witness. See Note 3.</p> <p>Read over after cross-examination on another day. See Note 5.</p> <p>Record of 'read over.' See Notes 3 and 8.</p> <p>Section, if mandatory. See Notes 2, 3, 7 and 8.</p> <p>Swearing interpreters. See Note 7 and S. 543.</p> |
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1. Legislative changes.

There was no difference between the corresponding sections of the Codes of 1861 and 1872.

Difference between the Codes of 1872, 1882 and 1898 —

- (1) The words "or of his agent, when his personal attendance is dispensed with and he appears by agent" were replaced in the 1882 Code by the words "or of his pleader."
- (2) Section 339 of the Code of 1872, provided that the witness "may require his evidence to be interpreted to him." The Code of 1882 and the present Code provide that the evidence "shall be interpreted to him."

2. Scope and applicability of the section. — Sections 356 and 357 prescribe the manner of taking evidence in the cases mentioned therein. This section enacts the procedure to be followed after the evidence is *completed*. The evidence should be *read over* to the witness or *interpreted* to him if it has been taken down in a language which the witness does not understand. Such reading over or interpretation should be done in the *presence of the accused or of his pleader* if the accused appears by pleader.

The object of the provision is to obtain an accurate record from the witness of what he really means to say and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken

down.¹ It is not to enable the *accused* or his advocate to suggest corrections.² See also Note 4.

The section applies also to proceedings before Commissioners under the Defence of India Act, 1915.³

3. Shall be read over to the witness — Sub-section (1). — Under S. 199 of the Code of 1861 it was necessary that a *memorandum should be signed* and attached to the deposition of each witness to the effect that the evidence was read over to him and that he acknowledged the same to be correct.¹ This provision has not been enacted in the present Code. It is, therefore, not imperative, though desirable, under the present Code that a record be made by the Magistrate that the deposition was read over to the witness in the presence of the accused.²

It was held in the undermentioned cases³ that the section is *mandatory* and not merely *directory* and the evidence of a witness must be *read over to him* in the presence of the accused or of his pleader, though it may take a considerable time to do so. The view that this section is *mandatory* cannot however, be said to be correct after the decision of their Lordships of the Privy Council in *Abdul*

Section 360 Notes 2-3

Section 360 — Note 2

1. ('27) AIR 1927 P C 44 (47) : 5 Rang 53 : 54 I A 96 : 28 Cr. L. J. 259 (PC), *Abdul Rahman v. Emperor*.
[See ('40) AIR 1940 Nag 410 (413) : 41 Cr. L. J. 697 : 1940 N L J 165 (170): 188 I. C. 885 (889), *Sheoshankar Dhondaji v. Emperor*. (This section is intended to protect the accused as well as the witnesses.)]
[See also ('26) AIR 1926 Rang 53(61):27 Cr.L.J. 669, *Abdul Rahman v. Emperor*. ('25) AIR 1925 Pat 378(379):4 Pat 231:26 Cr.L.J.932, *Bhagwat Singh v. Emperor*. ('71) 1871 Rat 54 (54), *Reg. v. Bal Krishna*.]
2. ('27) AIR 1927 P C 44 (47) : 54 I A 96 : 5 Rang 53 : 28 Cr. L. J. 259 (PC), *Abdul Rahman v. Emperor*.
The following cases holding that the object is to give the accused an opportunity of checking the correctness of the deposition must be taken to be no longer law:
('12) 13 Cr. L. J. 569(572): 15 I C 985: 1 U B R 123, *Nga San Myin v. Emperor*. ('24) AIR 1924 Cal 889 (890, 891) : 52 Cal 159 : 26 Cr. L. J. 201, *Hiralal Ghose v. Emperor*.
3. ('28) AIR 1928 Lah 125 (128) : 29 Cr. L. J. 212, *Taj Mohammad v. Emperor*.

Note 3

1. (1870) 13 Suth W R Cr 1 (7) : 4 Beng L R App 1, *In re Mohesh Chunder*. ('67) 8 Suth W R Cr 63 (64), *Queen v. Issur Raut*. (1870) 2 N W P H C R 132 (137), *Queen v. Lekhranj*. ('71) 16 Suth W R Cr 61 (61), *Queen v. Mudun Mundle*. (Memorandum was a sufficient proof, until the contrary was shown, that the deponent understood all that was written down.)
(1870) 13 Suth W R Cr 17 (18), *Queen v. Hossein Sirdar*.
[See also ('69) 12 Suth W R Cr 44 (45) : 3 Beng L R App Cr 59, *Queen v. Radhoo*.]
2. ('25) AIR 1925 Pat 723 (725) : 26 Cr. L. J. 927, *Rameshar Singh v. Emperor*. ('27) AIR 1927 Pat 100 (102) : 28 Cr. L. J. 77, *Arjun Kurmi v. Emperor*. ('25) AIR 1925 Pat 378 (380) : 4 Pat 231 : 26 Cr. L. J. 932, *Bhagwat v. Emperor*.
3. ('26) AIR 1926 Cal 157 (158) : 27 Cri L Jour 375, *Abdul Mallick v. Emperor*. ('24) AIR 1924 Cal 889 (889, 891) : 52 Cal 159 : 26 Cr.L.J. 201, *Hiralal Ghosh v. Emperor*. ('21) AIR 1921 Pat 149 (150) : 22 Cri L Jour 568, *Barhmdeo Singh v. Emperor*. ('09) 10 Cr. L. J. 581 (583) : 36 Cal 955:4 I. C. 416, *Jyotish Chandra v. Emperor*. ('70) 14 Suth W R Cr 13 (14), *Queen v. Parbutty Churn*. ('25) AIR 1925 Mad 1206 (1206) : 49 Mad 71 : 26 Cri L Jour 1587, *In re Kuppa Mudaliar*. (Non-compliance was held an illegality.) ('25) AIR 1925 Pat 378 (379) : 4 Pat 231 : 26 Cri L Jour 932, *Bhagwat Singh v. Emperor*. ('29) AIR 1929 Mad 862 (863) : 52 Mad 995 : 31 Cri L Jour 273, *Damodaran v. Emperor*.

Section 360
Notes 3-4

Rahman v. Emperor,⁴ in which it has been held that the provisions of this section are not absolutely prohibitory and that a non-compliance with the section is curable under S. 537 when it is unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned. It is not a sufficient compliance with the section to merely hand over to the witness his deposition so that he may read it over himself.⁵ It was held in the undermentioned cases⁶ that it would not be a compliance with the section if the evidence is read over to the witness while another witness is being examined, the reason being that the accused cannot at one and the same time listen to the evidence that is being read over and to the evidence of a fresh witness that is being recorded. On this question their Lordships of the Privy Council have held in *Abdul Rahman v. Emperor* above cited, that although it will be a better course if depositions other than mere formal ones were read over so that the accused or his pleader could hear them and give his undivided attention to them, yet it would be no violation of the provisions of this section if the deposition of one witness is read over while other stages of the case are proceeding, as "the primary object is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down from his lips."

4. In the presence of the accused or of his pleader. — The evidence must be read over in the *presence of the accused*, if he is in attendance, or of his pleader. Where, however, there are *several accused* in the case, the evidence of a witness read over in the presence of the pleader of *one* only of such accused is not inadmissible in a case of perjury against such witness, merely because it was not read over in the presence of all the *other* accused or their pleaders.¹

It is only where the accused "appears by a pleader" that a reading over of the evidence in the presence of such pleader is sufficient.² The words "if he appears by a pleader" cannot be restricted to cases in which a pleader is allowed to represent one accused whose personal

4. ('27) AIR 1927 P C 44 (49) : 54 I A 96 : 28 Cri L Jour 259 : 5 Rang 53 (P C). See also Note 8 under this section and Note 6 under S. 537.

5. ('27) AIR 1927 P C 44 (48) : 54 I A 96 : 5 Rang 53 : 28 Cri L Jour 259 (P C), *Abdul Rahman v. Emperor*. (Though it may be allowed if the Magistrate's pronouncement is defective or the witness is deaf.)

('25) AIR 1925 Cal 1120 (1120) : 26 Cri L Jour 951, *Sahorali Molla v. Emperor*.

('25) AIR 1925 Cal 782 (783):52 Cal 431:26 Cr.L.J. 1178, *Md. Yasin v. Emperor*.

('14) AIR 1914 Cal 789 (790) : 42 Cal 240:15 Cr. L. J. 483, *Emperor v. Jogendra*.

('25) AIR 1925 Pat 723 (725) : 26 Cri L Jour 927, *Rameshar Singh v. Emperor*.

('27) 28 Cr. L. J. 651 (651) : 103 I. C. 107(Lah), *Kesar Singh v. Sultan-ul-Mulk*.

('25) AIR 1925 Cal 729 (732) : 26 Cri L Jour 1009, *Jessarat v. Emperor*.

[But see ('26) AIR 1926 Pat 232 (233) : 5 Pat 63:27 Cr.L.J. 484, *Jagwa Dhanuk v. Emperor*. (In view of the Privy Council decision in AIR 1937 P C 44, this case cannot be taken as laying down correct law.)]

6. ('25) AIR 1925 Cal 831 (832):52 Cal 499:26 Cr.L.J. 1213, *Dargahi v. Emperor*.

('25) AIR 1925 Cal 933 (933) : 26 Cri L Jour 1267, *Manik v. Emperor*.

('26) AIR 1926 Cal 423 (423) : 26 Cri L Jour 1016, *Adiladdi v. Emperor*.

('94) 2 Weir 435 (435), *In re Singiri Eradu*.

('05) 2 Cri L Jour 133 (143) : 11 Bur L R 8, *Nga Saw v. Emperor*.

('11) 12 Cri L Jour 44 (45) : 9 Ind Cas 262 (Mad), *In re Muthu Kumara Reddy*.

Note 4

1. ('09) 10 Cr. L. J. 150 (154, 155) : 36 Cal 808 : 2 I. C. 697, *Rakhal v. Emperor*.

2. ('26) AIR 1926 Cal 528 (528) : 27 Cri L Jour 509, *Kasim Ali v. Sarada Kripa*.

attendance has been dispensed with. The natural meaning of the words is that if an accused person has engaged a pleader, who is in attendance, the reading over of the deposition in his presence will be a full compliance with the provisions of this section.³

The evidence must be read over only in the *presence* of the accused or of his pleader. It is not necessary that it should be within their *hearing*. The reason is that the accused is only entitled to be sure that the evidence has been read over, and that the witness has had an opportunity of correcting the written words. But he is not necessarily entitled to the opportunity of *suggesting corrections*.⁴

Does this section apply to proceedings under chapter XII of the Code? It has been held by a Full Bench of the High Court of Calcutta that the persons proceeded against under that chapter are not "accused" persons, but that the first clause of this section should be read as meaning that the evidence is to be read over in the presence of the accused if *there is one* and that, therefore, the evidence should be read over to the witness in such proceeding though not in the presence of the persons proceeded against.⁵ The High Court of Patna has come to the same conclusion.⁶

5. "As the evidence of each witness . . . is completed." —

The evidence of each witness must be read over to him *immediately* after it is completed. The section is not complied with if the deposition is read over at the end of the day after all the witnesses are examined.¹ Where a Magistrate examined a number of witnesses and asked them to be in a room and then had the depositions read over to them, it was held that the procedure was illegal and not merely irregular.² Again, the section is not complied with if the evidence is read out as each *sentence* of it is being recorded. It must be read out only after it is *completed*.³ But where the evidence is read over to a witness some days after his examination-in-chief but immediately after his *cross-examination*, it was held that this section was sufficiently complied with.⁴

3. ('28) AIR 1928 Cal 27 (32): 29 Cr.L.J. 49, *Hari Narayan Chandra v. Emperor*.

4. ('27) AIR 1927 P C 44 (48): 54 Ind App 96: 5 Rang 53: 28 Cri L Jour 259 (PC), *Abdul Rahman v. Emperor*.

('27) AIR 1927 Pat 100 (102): 28 Cri L Jour 77, *Arjun Kurmi v. Emperor*.
See also Note 2.

5. ('40) AIR 1940 Nag 410 (413): 1940 Nag L J 165 (169): 41 Cri L Jour 697: 188 Ind Cas 885 (887), *Sheshankar Dhondaji v. Emperor*.

('25) AIR 1925 Cal 822 (823, 831): 52 Cal 721: 26 Cr. L. J. 1194 (FB), *Narendra Chandra Rudra Pal v. Sabarali Bhuiya*. (In view of this case, A I R 1925 Cal 678 (F B) and AIR 1925 Cal 1040, holding contra, are no longer law.)

6. ('22) AIR 1922 Pat 371 (371): 23 Cr. L. J. 125, *Ram Narain v. Dhonrai Gope*.
See also S. 145 Note 39.

Note 5

1. ('26) AIR 1926 Cal 157 (158): 27 Cri L Jour 375, *Abdul Mullick v. Emperor*.
(26) AIR 1926 Cal 563 (564): 53 Cal 129: 27 Cr.L.J. 688, *Samserali Hazi v. Emperor*.
(Read over during mid-day interval.)

2. ('25) AIR 1925 Mad 1206 (1206): 49 Mad 71: 26 Cr. L. J. 1587, *In re Kuppa Madaliar*. (This view, however, requires reconsideration in the light of the Privy Council decision in AIR 1927 P C 44 holding that a non-compliance with this section is only an irregularity curable under S. 537 — See Note 8.)

3. ('21) 22 Cr.L.J. 669 (671): 63 I.C. 461 (463) (Lah), *Wadhawa Singh v. Emperor*.

4. ('29) AIR 1929 Cal 390 (391): 31 Cri L Jour 373, *Kamini Kumar v. Emperor*,
(Evidence is ordinarily completed after examination-in-chief, cross-examination, and if necessary, re-examination.)

Section 360
Notes 6-8

6. "And shall, if necessary, be corrected." — Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain.¹

7. Shall be interpreted to the witness. — Under the Codes of 1861 and 1872, when the evidence was taken down in a language different from that in which it was given, the witness *might require* that his evidence should be interpreted to him.¹ Under this Code it is *obligatory* on the Court in all such cases, whether the witness requires it or not, to interpret his evidence to him. It is, however, not necessary to first read out the deposition to the witness in the language in which it is taken and then to interpret it to him. It is sufficient if it is merely interpreted to him.²

Should the evidence in such cases be interpreted to the accused? In *Abdul Rahman v. King-Emperor*,³ their Lordships of the Privy Council observed as follows :

"The distinction between S. 360 and S. 361 is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his pleader, it is to be interpreted into their language, while under the former section, when it is read over, it is to be interpreted to the *witness* in his own language; but there is no provision for its being interpreted to the *accused*. Thus, if the depositions are taken down in English, and the language of the accused is Hindi, and the language of a witness is Burmese, . . . the depositions will have to be *taken* by getting the witness's answers in Burmese, having them interpreted to the Court so that they may be taken down in English, and further interpreted to the accused, so that he may understand them, in Hindi. When, however, the deposition comes to be read over, as it will be, in English, it will be interpreted to the *witness* in Burmese, but not to the accused in Hindi; and if the accused knew neither English nor Burmese, he will be none the wiser."

As to whether a sworn interpreter is necessary for interpreting the evidence to the witness, see S. 543, Note 1.

8. Non-compliance with the section — Effect of. — It has now been settled by the Privy Council that non-compliance with the strict provisions of this section is only an irregularity which is cured by S. 537 of the Code in the absence of prejudice.¹ Thus, a failure to

(¹18) AIR 1918 Pat 448 (450) : 19 Cri L Jour 169, *Ramdhari Singh v. Emperor*.
[But see (²26) AIR 1926 Pat 58 (60) : 26 Cri L Jour 1475, *Emperor v. Phagunia Bhuian*. (Which seems to suggest that it should be read over at the end of the examination-in-chief.)]

Note 6

1. (¹90) 1890 Rat 502 (502), *Queen-Empress v. Gopal*.
- (¹71) 1871 Rat 54 (54), *Reg. v. Balkrishna*.
- (¹16) AIR 1916 Bom 49 (51) : 18 Cri L Jour 480, *In re Pandu Namaji*.
[See (¹72) 18 Suth W R Cr 57 (57), *Queen v. Tulsi Dosadh*.]

Note 7

1. (¹81) 7 Cal L R 393 (394), *In the matter of Okhoy Kumar*.
2. (¹28) AIR 1928 Cal 27 (31) : 29 Cr. L. J. 49, *Hari Narayan Chandra v. Emperor*.
3. (¹27) AIR 1927 P C 44 (47, 48) : 54 I A 96 : 5 Rang 53 : 28 Cri L Jour 259 (PC).

Note 8

1. (¹40) AIR 1940 Nag 410 (413) : 1940 N L J 165 (170) : 41 Cr. L. J. 697, *Sheo-shankar Dhondbaji v. Emperor*. (Accused not raising any objection—Witness admitting it was read over to him and correctly recorded—Objections to its admissibility in subsequent proceedings are not sustainable.)
- (¹27) AIR 1927 P C 44 (49) : 54 Ind App 96 : 5 Rang 53 : 28 Cri L Jour 259 (PC), *Abdul Rahman v. Emperor*.

read over the evidence to the witness would not necessarily vitiate the trial of the *accused*.²

Section 360
Note 8

There is a conflict of opinion as to whether the *witness* can be prosecuted on the basis of evidence, the procedure regarding which has not been followed as laid down in this section. On the one hand, it has been held that non-compliance with the section renders the evidence *inadmissible* under the Evidence Act, that no *other* evidence can be admitted by virtue of the provisions of s. 91 thereof, and that, therefore, a conviction on such evidence cannot be sustained.³ A contrary view has, on the other hand, been taken in the undermentioned cases⁴ to

See also the following cases which have taken the view expressed by the Privy Council:

- (27) AIR 1927 All 755 (755) : 28 Cr.L.J. 606, *Sher Mohammad Khan v. Bihari*.
- (26) AIR 1926 Rang 53 (61, 63) : 27 Cri L Jour 669, *Abdul Rahman v. Emperor*.
- (24) AIR 1924 Pat 786 (787) : 25 Cri L Jour 89, *Sondi Singh v. Govind Singh*.
(Omission to read over the evidence to the witness.)
- (27) AIR 1927 Cal 575 (575) : 28 Cri L Jour 751, *Fatlar Bap v. Emperor*.
- (25) AIR 1925 Cal 928 (929) : 26 Cri L Jour 1276, *Abdur Rahim v. Emperor*.
(Case remanded for reading over the depositions.)
- (25) AIR 1925 Pat 414 (419) : 4 Pat 488 : 26 Cr.L.J. 811, *Mohiuddin v. Emperor*.
The following cases cannot be considered to be good law after the Privy Council case (AIR 1927 P C 44):
- (27) AIR 1927 Pat 315 (315) : 6 Pat 478 : 28 Cri L Jour 772, *Fazlur Rahman v. Emperor*. (Assumption that evidence not read over cannot be used in the case in which it was given is not correct.)
- (25) AIR 1925 Cal 933 (933) : 26 Cri L Jour 1267, *Manick v. Emperor*. (Quashing of commitment on ground that depositions were read over while other witnesses were examined.)
- (26) AIR 1926 Cal 423 (423) : 26 Cri L Jour 1016, *Adiladdi v. Emperor*.
- (26) AIR 1926 Cal 563 (563) : 53 Cal 129 : 27 Cr.L.J. 688, *Samserali v. Emperor*.
- (25) AIR 1925 Cal 816 (816) : 52 Cal 470 : 26 Cr.L.J. 1233, *Nawab Ali v. Emperor*.
- (24) AIR 1924 Cal 889 (889, 893) : 52 Cal 159 : 26 Cri L Jour 201, *Hira Lal Ghosh v. Emperor*. (View that violation of S. 360 is incurable under S. 537.)
- (24) AIR 1924 Cal 182 (183) : 25 Cr.L.J. 289, *Haro Nath Malo v. Ala Buz*. (Do.)
- 2. (25) AIR 1925 Pat 414 (419) : 4 Pat 488 : 26 Cr.L.J. 811, *Mohiuddin v. Emperor*.
- (27) AIR 1927 All 757 (758) : 28 Cri L Jour 596, *Bajai v. Ram Sarup*.
- (27) AIR 1927 All 764 (765) : 28 Cri L Jour 514, *Jiwan Singh v. Sheodan Singh*.
- (24) AIR 1924 Pat 786 (787) : 25 Cri L Jour 89, *Sondi Singh v. Govind Singh*.
(Failure to read over deposition—Decision cannot be said to be on no evidence.)
- 3. (19) AIR 1919 Mad 45 (47) : 42 Mad 561 : 20 Cr. L. J. 379, *In re Nalluri Chenchiah*.
- (28) AIR 1928 Lah 125 (128) : 29 Cr. L. J. 212, *Taj Mohammad v. Emperor*.
(Not read over to witness.)
- (14) AIR 1914 Cal 789 (790) : 42 Cal 240 : 15 Cr. L. J. 483, *Emperor v. Jogendra Nath Ghose*. (Handing over deposition to be read by witness.)
- (09) 10 Cr. L. J. 581 (583) : 36 Cal 955 : 4 I. C. 416, *Joytish Chandra v. Emperor*.
- (12) 13 Cr. L. J. 569 (571) : 15 I. C. 985 : 1 Upp Bur Rul 123, *Nga San Myin v. Emperor*. (Read over but not in the presence of the accused.)
- (21) AIR 1921 Pat 149 (150) : 22 Cri L Jour 568, *Barhmdeo Singh v. Emperor*.
(Not read over in the presence of accused or pleader.)
- (18) AIR 1918 Low Bur 129 (130) : 18 Cr. L. J. 966, *Kadir Pakiri v. Emperor*. (Do.)
- (08) 8 Cr. L. J. 116 (118, 119) : 12 C W N 845, *Mohendra Nath v. Emperor*. (Do.)
- (75) 23 Suth W R Cr 28 (29), *Queen v. Mungul Dass*.
- (28) AIR 1928 Cal 271 (271), *Choyenuddin Paramanik v. Emperor*. (Trial under S. 211, Penal Code.)
- 4. (40) AIR 1940 Nag 410 (413) : 41 Cr. L. J. 697 : 188 Ind Cas 885 (888), *Sheo-shankar Dhondbaji v. Emperor*. (Statement not read over and not interpreted in the presence of accused—Statement is not inadmissible as no prejudice caused—A I R 1927 P C 44, followed.)
- (21) AIR 1921 Sind 151 (154) : 16 Sind L R 255 : 26 Cr. L. J. 657, *Pitoomal v. Emperor*.
- (21) AIR 1921 Sind 16 (18) : 18 Sind L R 342 : 26 Cr.L.J. 1137, *Pitumal v. Emperor*.

Section 360
Notes 8-9

the effect that non-compliance with the section does not render the evidence inadmissible but only prevents a presumption being raised as to its correctness under S.80 of the Evidence Act. In view of the decision of the Privy Council in *Abdul Rahman v. King-Emperor*,⁵ that non-compliance with the section is not fatal to the conviction, it is submitted that the latter view is correct. See S.476 Note 11.

Where the accuracy of the deposition was challenged and it was clear that a relevant statement of a witness was omitted from the record which was not read over to the witness, it was held that the conviction should be quashed.⁶

The absence of a memorandum subjoined to a deposition, and stating the fact of compliance with the section, does not of itself prove that the provisions of this section have not been complied with.⁷

As to the witness's liability to be proceeded against for perjury, see S.193 of the Penal Code and S.476 Note 11.

9. Revision.—The question whether a deposition was read over to the witness in accordance with this section is one of fact and cannot be raised for the first time in revision before the High Court.¹

Section 361

361.* (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

1. Legislative changes (omitted)

2. Distinction between this section and S.360. — See Note 7 to S.360.

3. "Evidence," meaning of.— The word "evidence" in sub-s. (1) means *oral* evidence. Documents are separately mentioned in sub-s. (3).

* 1882 : S. 361; 1872 : S. 340; 1861 : S. 200.

(19) AIR 1919 Low Bur 129 (130) : 10 Low Bur Rul 16 : 20 Cr. L. J. 506, *Tun Ya v. Emperor*.

(10) 11 Cr. L. J. 482 (482) : 34 Mad 141 : 7 I. C. 414, *In re Bogra*. (Read over but not in the presence of the accused.)

(11) 12 Cr. L. J. 44 (45) : 9 I. C. 262 (Mad), *In re Muthukumara Reddy*. (Read over while another witness was being examined.)

5. (27) AIR 1927 P C 44 (48) : 54 Ind App 96 : 5 Rang 53 : 28 Cr. L. J. 259 (PC).

6. (26) AIR 1926 Rang 78 (79) : 3 Rang 612 : 27 Cr. L. J. 857, *Mayeth v. Emperor*.

7. (25) AIR 1925 Pat 378 (380) : 4 Pat 231 : 26 Cr. L. J. 932, *Bhagwat v. Emperor*.

Note 9

1. (25) AIR 1925 Pat 414 (419, 421) : 4 Pat 488 : 26 Cr. L. J. 811, *Mohiuddin v. Emperor*.

4. Interpretation to accused and his pleader. — It has been held in the undermentioned case¹ that sub-sections (1) and (2) are not mutually exclusive and that even where the accused appears by a pleader, it is necessary to interpret the evidence to the accused. The non-compliance with this requirement is, however, only an irregularity which can be cured under S. 537.²

Section 361
Notes 4-6

5. Interpreters. — See Section 543.

6. Interpretation of documents. — Sub-section (3) gives effect to the undermentioned case¹ decided under S. 200 of the Code of 1861 which did not contain a provision similar to sub-s. (3).'

362.* (1) In every case tried by a Presidency Magistrate in which an appeal lies, such Magistrate shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

Section 362

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(2A) In every case referred to in sub-section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.

(3) Sentences unless they are sentences of imprisonment ordered to run concurrently passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

* 1882 : S. 362; 1872 : Ss. 335 and 338; 1861 : Ss. 196 and 198.

Section 361 — Note 4

1. ('30) AIR 1930 Mad 186 (186) : 31 Cri L Jour 827, *Erappa v. Emperor*.
2. ('30) AIR 1930 Mad 186 (186) : 31 Cri L Jour 827, *Erappa v. Emperor*.
[See ('75) 24 Suth W R Cr 50 (51), *Queen v. Bhoobun Mohun Dey*. (Evidence of Civil Surgeon given in English not interpreted to accused was held an irregularity of small importance.)]

Note 6

1. ('71) 15 Suth W R Cr, 25 (27) : 7 Beng L R 63, *Queen v. Ameeroddeen*. (This is so only in cases where a document is put in for purpose of merely giving formal proof of that which is an incontestable fact.)

Section 362
Notes 1-2

(4) In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.

The words "tried by a such Magistrate" in sub-s. (1) were substituted for the words "in which a Presidency Magistrate imposes a fine exceeding two hundred rupees or imprisonment for a term exceeding six months, he" and sub-ss. (2A) and (4) and the words "unless they are . . . concurrently" after the word "sentences" in sub-s. (3) were inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

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|---|--|
| <ol style="list-style-type: none"> 1. Scope of the section. 2. Record of evidence in appealable cases. 3. Record of evidence in non-appealable cases. 4. Mode of recording evidence. 5. Memorandum of the substance of the examination of the accused. | <ol style="list-style-type: none"> 6. Framing of charges by Presidency Magistrates. 7. Sentence of imprisonment — Meaning of. See Notes under S. 411. 8. Sentences on conviction for several offences at the same trial. 9. Right of parties to get copies of depositions. |
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Other Topics (miscellaneous)

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| <p>Compared with Ss. 263 and 264. See Note 2.</p> <p>Duty to record all material facts. See Note 2.</p> <p>Inapplicability to references of cases under S. 110. See Note 1.</p> <p>Legislative changes. See Notes 2, 3, 5 and 6.</p> <p>Narrative in indirect form. See Note 4.</p> <p>Petty cases or "morning cases." See Note 3.</p> | <p>Refusal of copies and S. 45 of the Specific Relief Act. See Note 9.</p> <p>Section 364 and sub-s. (2A) of this section. See Note 5.</p> <p>Section 370 — Effect. See Note 5.</p> <p>Section 411. See Note 2.</p> <p>Section 254. See Note 6.</p> <p>Select Committees of 1916 and 1922. See Note 2.</p> |
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1. Scope of the section.—This section enacts that in appealable cases Presidency Magistrates should take down the evidence of witnesses in their own hand, or cause it to be taken down, in open Court to their dictation. They are also required to make a memorandum of the substance of the examination of the accused in such cases. In other cases, *i. e.*, non-appealable cases, they need not record any evidence, or even frame a charge.

This section does not apply to cases under section 110, where it becomes necessary to make a reference to the High Court, in regard to the sentence of imprisonment.¹

2. Record of evidence in appealable cases.—In cases coming under S. 362, sub-s. (1), *i. e.*, in appealable cases, the Magistrate is bound to record the evidence with his own hand or cause it to be taken down in writing from his dictation in open Court. In doing so, it is the duty of the Magistrate to take note of all the material facts, whether they appear in the examination-in-chief or in the course of cross-examination.¹

Section 362 — Note 1

1. ('09) 10 Cri L Jour 122 (123) : 2 I. C. 651 (Cal), *Emperor v. Nepal Sikary*. (Evidence of reputation.)

Note 2

1. ('19) AIR 1919 Cal 696 (700, 701) : 46 Cal 411 : 20 Cri L Jour 24, *Ah Foong Chinaman v. Emperor*.

Before the amendment of 1923, sub-s. (1) applied to cases in which the Magistrate imposed a fine of Rs. 200, or imprisonment for a period exceeding six months. The taking of evidence precedes the sentence, and it is on the evidence given that the sentence is based. Therefore, the language was clearly faulty as it is unreasonable to suppose that the Magistrate should make up his mind as to the sentence he would pass, before the evidence was recorded.² This defect of language was noticed, and in regard to it, the Select Committee of 1916 observed :

"We think that the opening words of sub-s. (1) of S. 362 require amendment. As the section stands, it seems to imply that a Presidency Magistrate before he commences his enquiry must make up his mind as to the maximum limit of the sentence he will impose. We think that the sub-section would read better as amended by us ; compare the wording of S. 264."

The amendment made is that in cases in which an appeal lies, the Presidency Magistrate shall either record the evidence himself, or have it recorded. It is not clear how the defect of language noticed above has been remedied by the amendment. If the section as it stood before the amendment implied that the Magistrate should make up his mind as to the maximum limit of sentence he would pass, the same implication still continues, for, under S. 411, only a sentence of imprisonment for more than six months and a fine exceeding Rs. 200 are appealable. In short, to make up his mind to award an appealable sentence is to make up his mind as to the maximum limit of the sentence he would pass. In regard to this criticism, the Select Committee in 1922, observed :

"We are inclined to agree with those critics who point out that the re-draft proposed in sub-s. (1) of S. 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We cannot see how this difficulty can be got rid of ; but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of Ss. 263 and 264 and we would, therefore, retain this sub-clause."

Apart from the uniformity of the language, it is not clear what "advantage" is gained by using language similar to that in Ss. 263 and 264. It must in this connexion be noted, that the language in S. 264 is appropriate and presents no difficulties similar to those in S. 362 (1), for a judgment does usually precede the sentence. It is the language in S. 263 that presents difficulties similar to those in S. 362 (1) and in regard to it, it was observed :

"It may be difficult for a Magistrate to determine at the initial stage whether he will or will not pass an appealable sentence. In such a case the course he has to adopt is to make a memorandum of the evidence of each witness as the examination of the witness proceeds. If, on the other hand, even at the initial stage he can make up his mind that in any event the sentence to be passed by him will not be appealable, he need not record the evidence."³

Where the Magistrate finds that he has tried a case without recording the evidence and that a longer sentence than six months ought

2. ('06) 33 Cal 1036 (1038, 1039) : 4 C. L. J. 408 : 4 Cri L Jour 368, *Shaik Babu v. Emperor*.

3. ('21) AIR 1921 Cal 165 (165, 166) : 48 Cal 280 : 22 Cr. L. J. 462, *Satish v. Manmatha*. (Evidence recorded becomes part of record and must not be destroyed.)

Section 362
Notes 2-3

to be passed, his course is to record the evidence afresh.⁴ This happens generally in cases where after he has convicted the accused, he is informed for the first time that the accused is an old criminal with many previous convictions. In such cases it has been held that though the prosecution should not inform the Magistrate about previous convictions, they may indicate to the Magistrate that they think that the case is one in which it is desirable that the evidence should be recorded, so as to avoid recording of evidence afresh.⁵

3. Record of evidence in non-appealable cases. — Sub-section (4) was newly introduced in 1923. The section as it stood before 1923 having provided the procedure to be adopted in *appealable cases* only, there was uncertainty as to the procedure to be followed in *non-appealable cases*.¹ It was held by the High Court of Calcutta in the undermentioned case² that it was left to the *discretion* of the Magistrate to record or not, evidence in such cases and that the High Court felt unable to prescribe a procedure which the law did not render obligatory. In another case³ the same High Court remarked that though the Magistrate was not *bound* to record evidence in such cases, it was *desirable* that he should keep some record of the statements made by witnesses or that their judgments should indicate what the statements were, so that the High Court may judge as a Court of revision of the propriety or legality of the orders passed by them. A similar view was expressed in the undermentioned cases also.⁴

In *Emperor v. Harischandra*⁵ the High Court of Bombay held that the Magistrate had a *discretion* to take evidence or not in such cases, but that such discretion had to be exercised *reasonably and not arbitrarily*; it was observed:

"But the discretion like all discretionary powers, should be exercised judicially, in a reasonable spirit and not arbitrarily. For instance, in cases of petty offences, such as 'nuisances' or what are called in police parlance 'morning cases,' there may be no necessity to record any evidence. But in a case of this kind, where an educated man holding a comparatively respectable status in life is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to have been some record of evidence to enable him in a case of conviction to come up to this Court in revision and satisfy it that the conviction is wrong."

This view was adopted by the same High Court in the under-mentioned cases⁶ which arose after the introduction of sub-s.(4) of

4. ('35) AIR 1935 Bom 37 (38) : 36 Cri L Jour 527, *Emperor v. Ahmad Ibrahim*.

5. ('35) AIR 1935 Bom 37 (38) : 36 Cri L Jour 527, *Emperor v. Ahmad Ibrahim*.

Note 3

1. Statement of Objects and Reasons (1914).

2. ('04) 31 Cal 983 (988) : 8 C W N 839, *Emaman v. Emperor*.

3. ('06) 33 Cal 1036 (1038, 1039) : 4 Cr. L. J. 368 : 4 C. L. J. 408, *Shaik Babu v. Emperor*.

4. ('86) 13 Cal 272 (274), *In re Yacoob*.

[See ('75) 15 Beng L R App 14 (15), *Re Louis*. (Obiter).]

5. ('08) 7 Cri L Jour 194 (195) : 10 Bom L R 201.

6. ('25) AIR 1925 Bom 147 (147) : 26 Cr. L. J. 454, *Mahomed v. Emperor*. (Strict compliance is necessary even where accused is to be sent to Dharwar Juvenile Jail.) ('31) AIR 1931 Bom 142 (143) : 32 Cr. L. J. 276, *Hanifabai v. Mahomed Yakub*. (Presidency Magistrates should record evidence as in summons-cases.)

this section. In *D'Souza v. Emperor*,⁷ however, the said view was dissented from. Beaumont, C. J., observed as follows:

"Section 362 is perfectly plain; it says that in cases which are not appealable, it shall not be necessary for a Presidency Magistrate to record the evidence. There is no distinction drawn between what the learned Judges refer to as 'morning cases' and any other cases. Nor is any distinction drawn between charges against people occupying a respectable status in life and people who occupy some other status. Nor in terms has any discretion been conferred upon the Magistrate. It is no doubt true that in one sense he has a discretion, because it is not illegal for him to record evidence if he likes to do so. But his right to refuse to record evidence is, in my opinion, absolute, and as long as the case falls within the cases excepted under S. 362, sub-s. (4), the Magistrate is not bound to record the evidence, and this Court has no jurisdiction to require him to do what the Statute says it is not necessary for him to do. If he likes to record the evidence, that is another matter: and probably if he was hearing a case which involved a question of serious consequence to the accused, and the accused asked him to make a record of those portions of the evidence on which he wished to rely on an application in revision, the Magistrate would, in a proper case, comply with that request. But in my opinion, the exercise of any such discretion would be *ex gratia*, and not subject to review in this Court."

4. Mode of recording evidence. — Under sub-section (2) it is required that the evidence shall ordinarily be recorded in the form of a narrative, but that the Magistrate may, in his discretion, take down any particular question or answer. But mere irregularities in the mode of recording evidence will not, unless failure of justice has been occasioned thereby, vitiate the trial. Thus, where a Presidency Magistrate recorded certain portions of the depositions of some of the witnesses which were of a more or less formal nature in the form of indirect narration as "P. W. 4 speaks to the identification by P. W. 1 of some of the jewels," and "P. W. 3 proves his signature to the search lists," it was held that the trial was not vitiated, as this mode of recording evidence occasioned no failure of justice.¹ But where in recording the examination-in-chief of two witnesses the Magistrate merely recorded the words "corroborates P. W. 1," it was held that what is required is not merely the opinion of the Magistrate regarding the evidence given by the witnesses but a correct record of the evidence given by them, that the Magistrate had failed to follow the directions given by this section so far as these witnesses were concerned and that the conviction could not be upheld.²

5. Memorandum of the substance of the examination of the accused. — Sub-section (2A) which was newly added in 1923 requires the Presidency Magistrates to record the substance of the examination of the accused *in appealable cases*. Simultaneous with the introduction of this sub-section, sub-s. (4) of S. 364 was amended so as to make the provisions of S. 364 as to the recording of the examination of the accused inapplicable to Presidency Magistrates in appealable cases.

7. ('32) AIR 1932 Bom 180 (181); 56 Bom 200; 33 Cri L Jour 404. (7 Cri L Jour 194, dissented from.)

Note 4

1. ('18) AIR 1918 Mad 1197 (1198); 18 Cr L J 336, *In re Gulab Chand*.
2. ('39) AIR 1939 Cal 623 (624); 41 Cri L Jour 40, *Ghulam Dastgir v. Emperor*. (It is for the appellate Court to decide whether the evidence contradicts or corroborates other evidence.)

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Thus, in appealable cases Presidency Magistrates need only make a memorandum of the examination of the accused and are not required to take down the examination of the accused in the manner provided in S. 364. As to why this new sub-section was introduced, the Select Committee say :

"In order to meet difficulties that have arisen, we have introduced a sub-section (2A) laying down that Presidency Magistrates, in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused,"

There is no provision as to the mode of recording the examination of the accused in *non-appealable cases*, which are now severely left alone confined to the protection that S. 370, by its own terms, would afford. Thus in non-appealable cases the only record of the examination of the accused is what is filled up under clause (f) of S. 370. As to the manner of filling up of this column, however, S. 370 is silent and it has been held that in a case where the accused, both at the time he took the plea and when he was examined, denied that he committed the offence, the entry "denies" is sufficient.¹

6. Framing of charges by Presidency Magistrates. — Sub-section (4) which has been newly added relieves Presidency Magistrates from the duty of framing charges in non-appealable cases. But in appealable cases where charges have to be framed under S. 254, the Presidency Magistrates are bound to frame charges.¹ Thus, to try an accused for an offence punishable under S. 420/75 of the Penal Code, without framing a charge, is a defect of procedure, for, S. 254 applies to Presidency Magistrates and it is mandatory.

7. Sentence of imprisonment — Meaning of. — See Notes under S. 411.

8. Sentences on conviction for several offences at the same trial. — Sub-section (3) provides for cases where at the same trial sentences for conviction for several offences are passed. The Select Committee observed : "It is provided that when sentences in excess of one are passed which are ordered to run concurrently, it is the heaviest sentence that determines the applicability of S. 362."¹ The one exception to the rule that sentences passed under S. 35 are to be considered as one is the case when the sentences passed are sentences of imprisonment ordered to run concurrently.

9. Right of parties to get copies of depositions. — Parties to criminal proceedings are entitled to get copies of depositions taken by Presidency Magistrates. Where on the dismissal of a complaint the complainant asked for copies of depositions, and they were refused, the High Court under S. 45, Specific Relief Act, had those records sent for and kept with the Registrar so that the party might take copies of them.¹

Note 5

1. ('29) AIR 1929 Cal 406 (406): 56 Cal 1067: 30 Cr.L.J. 526, *Sadagar v. Emperor*:

Note 6

1. ('32) AIR 1932 Cal 865 (865): 33 Cr. L. J. 828, *Raghubir Khahar v. Emperor*.

Note 8

1. Statements of Objects and Reasons (1914).

Note 9

1. ('11) 11 Ind Cas 499 (499) (Cal), *Emperor v. Sailendra Nath Mukerjee*. (Party applying for certified copies of Presidency Magistrate's notes.)

363.* When a Sessions Judge or Magistrate**Section 363**

Remarks respecting demeanour of witness. has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Synopsis

1. Remarks on demeanour of witness.

2. Remarks on substance of deposition of witness.

Other Topics (miscellaneous)

Appellate Court's duty to consider facts independently. See Note 1.	Demeanour when material. See Note 1.
Attestation of Magistrate as to physical capacity of witness to answer. See Note 1.	Improbabilities and discrepancies. See Note 1.
Demeanour not sure test. See Note 1.	Note as to credibility after whole evidence taken. See Note 2.
Demeanour of accomplice. See Note 1.	Note as to falsity of witness during examination — Ground for transfer. See Note 2.

1. Remarks on demeanour of witness. — A mere record of the deposition of a witness in a language different from that in which it was deposed and in a narrative form is but a very imperfect representation of what passes between a witness and a counsel, more especially in cross-examination.¹ It cannot give the look or the manner of the witness, his hesitation, his doubts, his variation of language, his confidence, or precipitancy, his calmness or consideration. It has therefore been said that "it is, in short, or it may be the dead body of the evidence without its spirit which is supplied when given openly or orally to the ear and to the eye of those who receive it."² This "spirit" which is "supplied . . . to the ear and to the eye" consists in the manner in which the evidence is given or in the language of this section "demeanour. . . whilst under examination." This demeanour may be such as is not calculated to inspire confidence,³ or it may be such as to lead to the inevitable conclusion that the witness is perjuring himself.⁴ It is for this reason that when the credibility of a witness turns upon his manner and demeanour,⁵ or where the issue is simple and depends

*1882 : S. 363; 1872 : S. 341; 1861 : S. 267.

[See also ('81) 8 Cal 166 (170) : 10 C L R 190, *Empress v. Dimonath Roy*. (All prosecutors whose charges are dismissed by the Presidency Magistrate are entitled under S. 170 of the Presidency Magistrates' Act (IV of 1877) to obtain copies of, order of and depositions made before, the Magistrate.)]

Section 363 — Note 1

1. ('74) 21 Suth W R Cr 13 (14), *Queen v. Madhub Chander Giri Mohunt*.
2. ('69) 12 Suth W R Cr 3 (3, 4): 3 Beng L R App Cr 20, *Queen v. Bishonath Pal*.
3. ('28) AIR 1928 Cal 769 (770): 30 Cri L Jour 825, *Ambar Ali v. Emperor*.
4. ('30) AIR 1930 Pat 58 (59), *Beas Singh v. Khedu Mian*. (No Court is entitled to discard evidence on grounds which are merely speculative.)
5. ('26) AIR 1926 P C 29 (30, 31): 4 Rang 513 (PC), *Kyi Oh My. v. Ma Thet Pon*. (But not where he is disbelieved on inherent probabilities of story.)
- ('27) AIR 1927 Rang 200 (200), *Ma Lon Ma v. S. R. M. M. R. M. Firm*. (Where finding is based upon supposed discrepancies Court of first appeal can give its own findings.)
- ('17) AIR 1917 All 35 (39): 39 Ind Cas 666 (671): 39 All 426, *Mauladad Khan v. Abdul Sattar*. (But other circumstances may warrant appellate Court in differing from trial Court even on question of fact turning on credibility of witnesses whom the Court has not seen.)

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Note 1

on the credit which attaches to one or other of conflicting witnesses,⁶ or where the evidence is all oral and its credibility is a matter of opinion,⁷ the opinion of the Magistrate who heard and saw the witnesses is not lightly set aside and it may even be said that it is generally taken as conclusive. Thus, where a Sessions Judge of experience stated that the demeanour of the eye-witnesses was evasive, that they inspired him with no confidence and no man could be convicted on their testimony, the appellate Court could not and would not accept the evidence of those eye-witnesses as true, unless the appellate Court is assured in the most positive and convincing manner that the criticism of the Sessions Judge was not justified.⁸ The High Court was prepared to accept the evidence of a girl of six years who was the only eye-witness to the murder as the Sessions Judge stated that "her evidence was given without hesitation and without the slightest suggestion of tutoring or anything of that sort."⁹ The demeanour of witnesses whilst under examination is thus very important on the question of credibility of oral evidence and hence the Magistrate or the Sessions Judge, as the case may be, is required by this section to record such remarks as he thinks material regarding the demeanour of the witnesses, so that the appellate Court might take these remarks into consideration in assessing the value to be attached to the oral evidence adduced in the case.

While the appellate Court should be guided by the remarks made by Magistrates about the demeanour of the witnesses, yet it is bound to, independently, consider the facts of the case.¹⁰ As a matter of fact, where the opinion of the lower Court is based not so much on the demeanour of the witness as on the inherent improbabilities of the story deposed to,¹¹ or the supposed discrepancies in the case as put forward by a party,¹² the appellate Court is in as good a position as the Magistrate, Sessions Judge or the trial Court to note the improbabilities or the discrepancies, and hence is not very much bound by the opinion of the trial Court.

Unsatisfactory demeanour, however, is not always a sure indication of falsehood. It has been said that it is dangerous to reject on the ground of unsatisfactory demeanour *statements in themselves probable* made under the sanction of an oath by witnesses of good reputation.¹³

6. ('15) AIR 1915 P C 1 (2): 39 Bom 386 : 42 Ind App 110 (P C), *Bombay Cotton Manufacturing Co. v. Motilal Shivalal*.

7. ('14) AIR 1914 Lah 427 (431): 15 Cri L Jour 203, *Emperor v. Bishen Singh*.

8. ('14) AIR 1914 Lah 427 (429, 431): 15 Cr.L.J. 203. *Emperor v. Bishen Singh*. ('04) 1 Cri L Jour 781 (787) : 1904 Pun Re No. 7 Cr, *Emperor v. Chattar Singh*. (Indications of error in judgment of acquittal ought to be clearer and more palpable.)

9. ('21) AIR 1921 Pat 109 (110, 111): 22 Cr.L.J. 417: 6 Pat LJ 147, *Fatu Santal v. Emperor*.

10. ('98) 1898 Pun Re No. 6 Cr, p. 15 (18), *Moula Baksh v. Empress*. (Sessions Judge perplexed by difficulties and incongruities of case upholding conviction on ground that appellate Court should not interfere with finding of first Court unless it is clearly erroneous. *Held*, judgment of subordinate Judge must be set aside and appeal heard *de novo*.)

11. ('26) AIR 1926 P C 29 (30): 4 Rang 513 (P C), *Kyi Oh Mg. v. Ma Thet Pon*.

12. ('27) AIR 1927 Rang 200 (200), *Ma Lon Ma v. S. R. M. M. R. M. Firm*.

13. ('09) 9 Cri L Jour 261 (264): 1 Sind L R 20, *Crown v. Fazul Muhammad*.

Nor is good or satisfactory demeanour always a real test of truth. A good demeanour on the part of an accomplice cannot be sufficient corroboration of his evidence. Impressions as to demeanour of an accomplice "are too ephemeral in their character to take the place of corroboration in material particulars to make the testimony of an accomplice worthy of credit."¹⁴

The attestation of a Magistrate that at the time the deposition of a certain witness was taken, he was in such a weak state of mind that the Magistrate was unable to proceed with his examination and that the witness could not answer more than two questions is *prima facie* proof of those facts and can be put before the jury.¹⁵

2. Remarks on substance of deposition of witness. — A Magistrate is not authorized under this section to record any remarks about the credibility or the *substance of the deposition* of the witness until the whole evidence has been taken.¹ The reason is that this will amount to *prejudging* the case and the parties are entitled to claim that he shall not do so until the case has been fully and finally presented to the Magistrate by the parties or their counsel after the entire evidence has been recorded.² Where a Magistrate, while recording the evidence of a witness, made a note not only as to his demeanour, but also that he had not spoken the truth, it was held that there was sufficient ground for transfer of the case to some other Magistrate.³

364.* (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of Oudh, or the Chief Court

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Section 364

Examination
of accused how
recorded.

* Code of 1882 : S. 364 — Same as that of 1898 Code.

Code of 1872 : S. 346.

346. Whenever an accused person is examined, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers.

When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

14. ('25) AIR 1925 Oudh 1 (4); 27 Oudh Cas 40; 25 Cr.L.J. 49, *Manna v. Emperor*.

15. ('69) 12 Suth W R Cr 51 (51), *Queen v. Rasookoollah*.

Note 2

1. ('28) AIR 1928 Lah 975 (978) : 10 Lah 778 : 30 Cri L Jour 129, *Sikandar Lal Puri v. Emperor*.

('83) 2 Weir 435 (486), *In re Palani Nadan*.

2. ('28) AIR 1928 Lah 975 (978) : 10 Lah 778 : 30 Cri L Jour 129, *Sikandar Lal Puri v. Emperor*.

3. ('25) AIR 1925 Cal 480 (480); 26 Cri L Jour 852, *Golam Bari Gazi v. Yar Ali Khan*. (Pungent remarks on conduct of witness—Transfer was directed.)

See also S. 526 Note 5.

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of Sind the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, * * * as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the district, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record his inability to do so.

The accused person shall sign or attest by his mark, such record.

Code of 1861 : S. 205.

205. The examination of the accused person, including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers; and when the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

Examination of the accused how to be recorded.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 or in the course of a trial held by a Presidency Magistrate.

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Note 1

In sub-s. (1) the words "or the Chief Court of Oudh" were inserted by the Oudh Courts (Supplementary) Act, 32 of 1925. The words "or the Chief Court of the Punjab" and the words "or the Chief Court of Lower Burma" were repealed by the Repealing and Amending Acts 18 of 1919 and 11 of 1923 respectively.

The words "or the Chief Court of Sind" were inserted by the Sind Court (Supplementary) Act 34 of 1926 which Act came into force on the 15th of April 1940 [see Sind Government Gazette, Notification (Home Department, Political) No. 1499 H/39 dated 28th March 1940.]

In sub-s. (3) the words "unless he is a Presidency Magistrate" after the words "be bound" were omitted and *in sub-s. (4)* the words "or in the course of trial held by a Presidency Magistrate" at the end, were substituted for the words "or S. 362 sub-s. (2A)" by the Code of Criminal Procedure (Second Amendment) Act 37 of 1923. The words "or S. 362 sub-s. (2A)" were originally inserted by the Code of Criminal Procedure (Amendment) Act 18 of 1923.

Synopsis

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| 1. Scope and applicability of the section. | 6. The record shall be signed. |
| 2. Record of examination should be full. | 7. "Shall certify under his own hand." |
| 3. Language of the record. | 8. Sub-section (3). |
| 4. "Shall be shown or read or interpreted to him." | 9. Sub-section (4). |
| 5. "To explain or add to his answers." | 10. Non-compliance with the section — Effect of. See S. 533 and Notes thereto. |

Other Topics (miscellaneous)

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| Examination in handwriting of Magistrate not needed. See Note 8. | Section obligatory. See Note 4. |
| Irrelevant questions and answers thereto. See Note 2. | Section 164. See Note 1. |
| Questions and answers to be recorded in full. See Note 2. | Section 202, enquiry. See Note 1. |
| Record of confessions in different language. See Note 3. | Signature and not handwriting of certificate. See Note 7. |
| Record of exact words. See Notes 2 and 3. | Signature not in immediate presence. See Note 6. |
| Refusal to sign by accused. See Note 6. | Whole examination to be conformable to truth according to accused. See Note 5. |

1. Scope and applicability of the section. — This section prescribes the manner in which the examination of an accused person (under S. 342) is to be recorded,¹ but is not applicable to the following cases :

- (1) Where the person examined is not an *accused* person,² *e. g.*, a person examined under S. 202 of the Code.³
- (2) Where the accused is not examined at all and a note is made by

Section 364 — Note 1

1. ('02) 4 Bom L R 461 (462), *Emperor v. Nagar Purshotam*.
(1900) 1900 All W N 183 (183), *Queen-Empress v. Jagannath*. (Case under the Prisons Act.)
[See also ('75) 23 Suth W R Cr 16 (16), *Queen v. Jetoo*.]
2. ('17) AIR 1917 Mad 316 (317, 318) : 17 Cri L Jour 195 : 39 Mad 977, *In re Ramaniyamma*.
3. ('06) 3 Cri L Jour 138 (140) : 32 Cal 1085 : 10 Cal W N 51. *Sat Narain*

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the Magistrate that the accused is unwilling to be examined and on that ground is not examined.⁴

(3) Where the accused is examined under S. 263 (summary trials),⁵ or in the course of a trial held by a Presidency Magistrate: see sub-s. (4).

By virtue of sub-s. (2) of S. 164, a confession recorded under that section is to be recorded in the manner prescribed by this section.⁶ See also the undermentioned case.⁷

2. Record of examination should be full. — The whole examination of an accused person including every question put to him and every answer given by him must be recorded in full.¹ As far as possible the record should be made in the exact words used by him.² The section does not except even irrelevant questions from being taken down. The Magistrate or Court is responsible for putting such questions, but if they *are* put, they must be recorded as also the answers given.³ Even where the accused gives an answer, but says that it should not be taken down in his statement, the Magistrate should record it under this section.⁴

4. ('17) AIR 1917 Sind 24 (24) : 11 S L R 52 : 18 Cr.L.J. 913, *Emperor v. Dosu*.

5. ('36) 37 Cri L Jour 1098 (1100) : 165 Ind Cas 154 (Cal), *Banka Nath v. Abdul Kadir*. (Summary trials — Record of statements in English at close of prosecution case — This is sufficient.)

('35) AIR 1935 Sind 193 (193) : 36 Cri L Jour 1484, *Devjimal v. Emperor*.

6. ('40) AIR 1940 Nag 186 (190) : I L R (1940) Nag 232 : 41 Cri L Jour 757, *In re Dinanath Ganpat Rai*. (Statements made by accused to Magistrate cannot be used against them unless they had been formally recorded as confessions under S. 164 read with S. 364.)

('17) AIR 1917 Mad 316 (317) : 17 Cri L Jour 195 : 39 Mad 977, *In re Ramaniyamma*. (Inculpatory statements by person not treated as an accused nor subsequently tried for any offence is not a confession—Failure to record it in the manner prescribed in S. 364 does not preclude its being used in evidence.)

('83) 1883 All W N 243 (243), *Empress v. Gajadhar*.

('87) 1887 Pun Re No. 52 Cr, p. 139 (141), *Buta v. Empress*.

7. ('35) AIR 1935 Oudh 416 (420) : 36 Cri L Jour 927, *Sheo Prasad v. Emperor*. (Section does not apply where no evidence has as yet been produced against the accused.)

Note 2

1. ('31) AIR 1931 Oudh 166 (170) : 32 Cri L Jour 854, *Mata Din v. Emperor*.

('21) AIR 1921 Pat 109 (113, 114) : 6 Pat L J 147 : 22 Cri L Jour 417, *Fatu Santal v. Emperor*.

('15) AIR 1915 Lah 16 (45) : 1915 Pun Re No. 17 Cr : 16 Cri L Jour 354, *Balmookand v. Emperor*. (This matter, however, is not of very great importance.)

('02) 4 Bom L R 461 (462), *Emperor v. Nagar Purshotam*.

('69-70) 5 Mad H C R App iv (iv).

('22) AIR 1922 Mad 40 (41) : 45 Mad 230 : 23 Cr. L. J. 680, *Tangedupalle Pedda Obigadu v. Pullasi Pedda*.

('34) AIR 1934 Pat 651 (652) : 36 Cri L Jour 447, *Ramsakhia v. Emperor*. (Incompleteness of record — Effect.)

2. ('25) AIR 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761, *Emperor v. Nani Mandal*. (Questions put not disclosed — Retrial was ordered.)

('75) 24 Suth W R Cr 54 (55), *Queen v. Moonsai Bibee*.

('03) 5 Bom L R 999 (1000), *Emperor v. Abdul Hossain*.

('35) AIR 1935 Cal 489 (490) : 62 Cal 1127 : 36 Cri L Jour 1460, *Sailabala Das v. Emperor*. (Especially when a statement is made in answer to questions but by the Court under S. 342.)

3. ('71) 15 Suth W R Cr L 3 (3).

4. ('32) AIR 1932 Bom 279 (282) : 56 Bom 434 : 33 Cri L Jour 613, *Wasudeo Balwant v. Emperor*.

3. Language of the record. — The examination of an accused person should be taken down in the language in which the person is examined, the object being to represent the very words and expressions used so as to ensure accuracy and prevent misrepresentation or misconstruction of what was said.¹ If, however, such a record is *not practicable*, the law directs that the statement or confession shall be recorded in the language of the Court or in English.²

As to the effect of non-compliance with this rule with regard to the record of *confessions*, see Notes under S. 533.

4. "Shall be shown or read or interpreted to him." — It is obligatory on the Court to show or read the record of the statements of an accused person to him or to have it interpreted to him if it is in a language not understood by him, so that he might be assured that his words have been correctly taken down and, if necessary, have it corrected.¹

In the undermentioned case² the statement of the accused was not read over to him and his signature taken immediately after the close of the prosecution but when this was brought to the notice of the Magistrate the accused was given an opportunity of making a further statement although it was not asserted that the original statement was not correct. It was held that the trial could not be impeached as being illegal. See also Notes under S. 342.

Note 3

1. ('37) AIR 1937 Oudh 425 (426) : 38 Cr. L. J. 169, *Jagannath Sah v. Emperor*. ('25) AIR 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761, *Emperor v. Nani Mandal*. (Examination under S. 342.)
 ('94) 21 Cal 642 (660), *Queen-Empress v. Sagal Samba*. (Do.)
 ('75) 24 Suth W R Cr 54 (55), *Queen v. Moonsai Bibee*. (Do.)
 ('93) 1893 Rat 633 (633) *Queen-Empress v. Surmal* (Do.)
 ('72) 4 N W P H C R 16 (22), *Queen v. Bheebbee Kce*. (Confession.)
 [See ('36) AIR 1936 Oudh 405 (407) : 37 Cr.L.Jour 955 : 12 Luck 261, *Mahomed Anis v. Emperor*. (Practice of receiving written statements from accused condemned.)]
 [See also ('40) AIR 1940 Pat 163 (170) : 19 Pat 301 : 41 Cr. L. J. 533, *Emperor v. Kommoju Brahman*. (Where a Magistrate has not recorded the confession in the language of the accused though he could have done so, but has recorded it in English the defect is curable under S. 533.)]
2. ('94) 21 Cal 642 (659, 660), *Queen-Empress v. Sagal Samba*. (Examination under S. 342.)
 ('88) 15 Cal 595 (607, 608) (F B), *Queen-Empress v. Nilmadhub Mitter*. (Do.)
 ('90) 17 Cal 862 (870), *Jai Narayan Rai v. Queen-Empress*. (Do.)
 ('91) 1891 All W N 55 (56) *Queen-Empress v. Bachanna*. (Confessions.)
 [See ('80) 5 Cal 826 (829), *Empress v. Vaimbilee*.]

Note 4

1. ('37) AIR 1937 Oudh 425 (425,426) : 38 Cr.L.J.169, *Jagannath Sah v. Emperor*. (Conviction set aside, there being nothing to show that the statements were read out to the accused.)
 ('25) AIR 1925 Cal 575(576):52 Cal 403 : 26 Cr.L.J.761, *Emperor v. Nani Mandal*.
 ('21) AIR 1921 Pat 109 (113, 114): 6 Pat L J 147: 22 Cri L Jour 417, *Fatu Santal v. Emperor*.
 ('23) AIR 1923 Pat 13 (15, 16) : 24 Cri L Jour 497, *Emperor v. Dewan Kahar*. (Statement of accused not read over to accused — Statement is inadmissible in evidence.)
 ('67) 7 Suth W R Cr 49 (50), *Queen v. Mt. Niruni*.
 ('75) 24 Suth W R Cr 29 (30), *Queen v. Kala Chand*.
2. ('36) 37 Cr. L. J. 1089 (1089) : 165 I.C.150 (Cal), *Jogendra Nath v. Rabindra*.

Section 364.
Notes 3-4.

Section 364
Notes 5-8

5. "To explain or add to his answers."— When the record of an examination of an accused person is shown or read over to him, he is entitled to explain or add to his answers,¹ so that the whole shall be made conformable to what the accused declares to be the truth.² It is the statement as *finally declared* by him to be true that is to be accepted as representing his statement.³

6. The record shall be signed.— The record of the examination of an accused must be signed both by the accused and by the Magistrate or Judge making the record.

The signature of the accused person to a statement should be made in the *immediate presence* of the Magistrate himself. To take a signature in an adjoining room before a clerk, and not in the Magistrate's immediate presence, is not a proper compliance with the provisions of the section.¹

As to the effect of refusal by the accused to sign, see Note 10.

7. "Shall certify under his own hand."— The certificate need not be in the *handwriting* of the Magistrate or Judge. It is sufficient if it is under his hand only, i. e. signed by him.¹ When duly recorded, the certificate is sufficient *prima facie* proof of such examination and it is to be presumed that the proceedings were regular.²

8. Sub-section (3).— The examination need not be taken down in the Magistrate's *own handwriting*. It is enough if it is taken down in his presence and hearing.¹ In such cases, however, the Magistrate is bound to make a *memorandum* of the examination in his own hand and annex it to the record.

Note 5

1. ('29) AIR 1929 Lah 382 (384) : 10 Lah 223 : 29 Cr. L. J. 769, *Fakir Singh v. Emperor*. (Magistrate while examining accused under S. 342, putting questions by way of cross-examination and not allowing accused to add to his statement when read out to him under S. 364 — Circumstances justified transfer.)
- ('21) AIR 1921 Pat 109 (113, 114) : 6 P L J 147 : 22 Cr. L. J. 417, *Fatu Santal v. Emperor*.
- ('25) AIR 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761, *Emperor v. Nani Mandal*. (Examination under S. 342 — Only indications contained in order sheet — Questions put not disclosed — Retrial was ordered.)
2. ('02) 4 Bom L R 461 (462), *Emperor v. Nagar Purushotam*.
3. ('29) AIR 1929 Lah 382 (384) : 10 Lah 223 : 29 Cr. L. J. 769, *Fakir Singh v. Emperor*.

Note 6

1. ('94) 1894 Rat 687 (687, 688), *Queen-Empress v. Bhika*.

Note 7

1. (1900) 1900 All W N 203 (204), *Empress v. Riaz Ali*. ('67) 8 Suth W R Cr 55 (56), *Queen v. Rezza Hossein*.
2. ('71) 15 Suth W R Cr 68 (68, 69) : 7 Beng L R App 62, *Queen v. Goshto Lall Dutt*. (Attestation at the foot of examination is sufficient proof of such examination.) (1864-66) 2 Bom H C R Cr 125 (125, 126), *Reg. v. Timmi*. ('69) 11 Suth W R Cr 39 (39) : 7 Beng L R 67n, *Queen v. Jaga Poly*.

Note 8

1. ('97) 21 Bom 495 (500), *Queen-Empress v. Visram Baba ji*. ('73) 20 Suth W R Cr 50 (50), *Queen v. Lucky Narain Dutt*.

9. Sub-section (4). — Sub-section (4) provides that this section shall not apply to two classes of cases —

Section 364
Notes 9-10

- (1) Cases coming under S. 263, i. e. cases tried *summarily*.¹
- (2) Cases tried by a Presidency Magistrate.

Before the amendment of the Code in 1923, the procedure as to the recording of an examination of the accused applied to all Magistrates including Presidency Magistrates and it was held that it was obligatory upon the Presidency Magistrates to record the examination of the accused in the manner provided by the section, but that it was desirable that the Legislature should relieve the Presidency Magistrates altogether from this obligation.² The amending Acts of 1923 gave effect to this view and omitted the words "unless he is a Presidency Magistrate" in sub-s.(3) and added the words "or in the course of a trial held by a Presidency Magistrate" in sub-s.(4) and sub-s.(2A) to S. 362, in order "to make it clear that in cases where an appeal lies, the Presidency Magistrate shall take down a memorandum of the examination of the accused person as provided by the new sub-s.(2A) of S. 362 and that in non-appealable cases no record of the examination of the accused need be made."

Thus the effect of sub-section (4) as amended is that:

- (1) In the case of Presidency Magistrates, no record of the examination of the accused need be made in non-appealable cases and only a memorandum of the examination need be made in appealable cases.
- (2) In the case of Magistrates other than Presidency Magistrates, the examination must be recorded in full as provided by the section in all cases except those that come under S. 263 and in cases under S. 263, the examination must be recorded but need not be in *full* as provided in this section. In other words, some notes must be made of the examination of an accused person in a summary trial if he is examined.³

10. Non-compliance with the section — Effect of. — See S. 533 and Notes thereto.

Note 9

1. ('36) 37 Cr.L.J. 1098 (1100) : 165 I.C. 154 (Cal), *Banka Nath v. Abdul Kadir*. (Summary trial — Record of statements in English at close of prosecution case — Fact that vernacular statement is not put in till after conclusion of trial does not vitiate trial.)
- ('27) AIR 1927 Oudh 42 (48) : 28 Cr. L.J. 76, *Bhawani Bhik v. Emperor*. (Charge under S. 379, Penal Code.)
- ('27) AIR 1927 Pat 369 (370) : 6 Pat 504 : 28 Cr. L. Jour 1037, *Parsotim Das v. Emperor*. (Offences under S. 121, Indian Railways Act.)
2. ('22) AIR 1922 Bom 290 (291, 292) : 46 Bom 441 : 23 Cr. L.J. 45, *Emperor v. Gulab Jan*. (Summons case—Omission to examine accused as required by S. 342 held vitiated conviction.)
- ('21) AIR 1921 Bom 374 (375, 376) : 45 Bom 672 : 22 Cr. L. Jour 17, *Fernandez v. Emperor*. (Words "if any" used in cl. (f) do not control S. 342.)
3. ('36) AIR 1936 Oudh 16 (17) : 36 Cr. L. Jour 1303 : 11 Luck 461, *Emperor v. Karuna Shanker*.

Section 365

365.* Every High Court established by Royal Charter and the Chief Courts of Oudh and Sind shall from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the evidence shall be taken down in accordance with such rule.

Record of evidence in High Court. The word "and" after the word "charter" was omitted by the Lower Burma Courts Act VI of 1900. The words "the Chief Court of the Punjab" and the words "the Chief Court of Lower Burma" were repealed by the Repealing and Amending Acts XVIII of 1919 and XI of 1923 respectively. The word "shall" was substituted for the word "may" and the words "and the evidence . . . such rule" at the end were substituted for the words "and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed" by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

The words "and the Chief Court of Oudh" were inserted by the Oudh Courts (Supplementary) Act XXXII of 1925.

The words "Courts of Oudh and Sind" were substituted for the words "Court of Oudh" by the Sind Courts (Supplementary) Act, XXXIV of 1926 which Act came into force on 15th April 1940 [see Sind Government Gazette Notification (Home Department, Political) No. 1499H/39 dated 28th March 1940.]

CHAPTER XXVI.

OF THE JUDGMENT.

Section 366

366.† (1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained, —

Mode of delivering judgment.

(a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and

(b) in the language of the Court, or in some other language which the accused or his pleader understands :

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend, to hear judgment delivered, except where his

* 1882 : S. 365; 1872 and 1861 — Nil.

† 1882 : S. 366; 1872 : Ss. 211, 462; 1861 — Nil.

personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader.

Section 366
Note 1

(3) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 537.

Synopsis

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|--|--|
| 1. Scope and applicability of the section. | 7. "In open Court." |
| 2. "Judgment," meaning of. See Notes to Ss. 367 and 369. | 8. Time of pronouncing judgment. |
| 3. Delivery of judgment cannot be delegated. | 9. Pronouncing predecessor's judgment. |
| 4. Judgment must be pronounced. | 10. Presence of accused when pronouncing judgment — Sub-section (2). |
| 5. Substance of judgment to be explained. | 11. Sentence or release to be after judgment. |
| 6. Effect of loss of records. | |

Other Topics (miscellaneous)

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| Absence of accused—Judgment—Whether illegal. See Note 10. | Judgment — Before pronouncement is inoperative and can be altered. See Note 4. |
| Bench of Magistrates — Presiding officer's judgment in absence of other members — Not proper judgment. See Note 3. | Loss of records—Judge can write judgment from memory. See Note 6. |
| Judgment — Not in Court hall — Not necessarily illegal. See Note 7. | Magistrate — On leave or transferred cannot pronounce judgment. See Note 3. |
| Judgment—To be pronounced only after termination of trial without delay. See Note 8. | Section 366 — Not applicable to orders in trials. See Note 1. |
| | Section 366 and S. 367—Provisions must be obeyed. See Note 1 and S. 367. |
| | Sentence—To follow judgment—Breach of rule. See Note 11. |

1. Scope and applicability of the section. — This and the following sections deal with judgments in *trials*. This section deals with the mode of delivering a judgment and the next section with the language and contents of such judgments.

The requirements of this section and the next are not mere matters of form; the provisions are based upon good and substantial grounds of public policy and must be obeyed.¹

Section 366 — Note 1

1. ('92) 14 All 242 (272) : 1892 A W N 83, *Queen-Empress v. Har Gobind*. See also S. 367 Note 1.

Section 366
Notes 1-7

The section does not apply to orders which are not judgments in *trials*. Thus, the section is not applicable to an order under S. 195 of the Code² or to an order dismissing a complaint under S. 203.³

2. "Judgment," meaning of. — See Notes to Sections 367 and 369.

3. **Delivery of judgment cannot be delegated.** — The judgment must be pronounced by the Judge or Magistrate who held the trial. The latter cannot delegate this function to others.¹ A Magistrate, who has gone on leave, or who has been transferred to another district and has handed over charge, has no jurisdiction to pronounce judgment in a trial held by him.² Where the Court consists of a Bench of Magistrates, a judgment prepared and delivered by the presiding officer in the absence of the other members of the Bench is not a proper judgment.³

4. **Judgment must be pronounced.** — The section specifically requires that every judgment ought to be *pronounced* by Court in accordance with the section.¹ Till then it is inoperative as a judgment and is nothing more than the private expression of an opinion by the Judge which can be changed and altered.² See also S. 350 Note 6.

5. **Substance of judgment to be explained.** — It is not obligatory on the Court to pronounce the *whole* of the judgment. It is enough if the substance of such judgment is explained. Where, however, the prosecution or the defence requests the Court to read the whole of the judgment the presiding officer should comply with the request.

6. **Effect of loss of records.** — Where a portion of the material records in a case is lost, it is open to the Judge to re-write the judgment from memory and from the materials before him and place it on the record.¹

7. **"In open Court."** — The judgment should be ordinarily pronounced in *open Court*. Where, however, a judgment is pronounced

2. ('04) 1 Cr. L. J. 969 (970) : 6 Bom L R 897 (899), *In re Nagappa Sutyappa*.

3. ('06) 4 Cr. L. J. 234 (284, 285) : 1906 Upp Bur Rul Cr P C 49, *King-Emperor v. Nga Sein Gyi*.

Note 3

1. ('89) 1889 All W N 181 (184), *Empress v. Jia Lal*.

2. ('81) 3 All 563(565) : 1881 A W N 37 (FB), *Empress of India v. Anand Sarup*. ('32) AIR 1932 All 582 (582) : 34 Cr. L. J. 112, *Ram Ratan v. Emperor*.

('24) AIR 1924 Cal 192 (193) : 25 Cr. L. J. 192, *Jagat Bandhu v. Jagabandhu*. (Order under S. 145.)

('79) 1879 Pun Re No. 20 Cr, p. 59 (60), *Empress v. Sharif*.

('17) AIR 1917 Cal 310 (310) : 36 I. C. 842 (843) : 18 Cr. L. J. 10, *Chandra Kishore v. Emperor*.

('24) AIR 1924 Cal 55 (55) : 50 Cal 664 : 24 Cr. L. J. 489, *Baishnab Charan Das v. Amin Ali*. (S. 350 does not give Magistrate jurisdiction to deliver judgment written by his predecessor.)

See also S. 12 Note 7 and S. 350 Note 6.

3. ('28) AIR 1928 Mad 1172 (1173) : 52 Mad 237 : 29 Cr. L. J. 973, *Ramakotiah v. Subba Rao*. See also S. 265 Note 2.

Note 4

1. ('92) 14 All 242 (272) : 1892 A W N 83, *Queen-Empress v. Hargobind*.

2. ('29) AIR 1929 Lah 692 (694) : 31 Cr. L. J. 675, *Sikandar Lal v. Emperor*.

('92) 1892 All W N 157 (157), *Empress v. Abdul Majid*.

('13) 14 Cr. L. J. 562 (563) : 21 I. C. 162 (All), *Ramdhari Rai v. Emperor*.

Note 6

1. ('15) AIR 1915 Mad 1038(1039) : 14 Cr. L. J. 595 (596) : 38 Mad 498, *Kamakshamma v. Emperor*.

by a Magistrate in his private house instead of in the usual Court hall by reason of his illness, the judgment is not necessarily illegal and will not be set aside in the absence of proof of prejudice.¹

Section 366
Notes 7-11

8. Time of pronouncing judgment. — The judgment should be pronounced only after the closing of the case; if pronounced before, it is a nullity.¹ But there should be no unreasonable delay in pronouncing the judgment after the closing of the case. Such delay is not only unjust to the accused as it prevents them from appealing against the sentence, but is also opposed to the general principles of law.²

9. Pronouncing predecessor's judgment. — See Note 6 to Section 350.

10. Presence of accused when pronouncing judgment — Sub-section (2). — Where the accused was not required to attend to hear the judgment delivered and could not be so required as he had absconded before judgment, it was held by the High Court of Lahore that the judgment pronounced in his absence was wholly illegal and should be set aside.¹ See also the undermentioned case.² Where an accused person absconded before judgment and on his re-arrest, the Magistrate re-pronounced the judgment which he had pronounced in his absence, it was held that the defect was one which was cured under S. 537.³ It has been seen in Note 10 to S. 205, that where the accused is convicted and the sentence is not one of fine only, the Court must, under sub-s. (2) of this section, direct the personal attendance of the accused for hearing the judgment.

11. Sentence or release to be after judgment. — A sentence in the case of conviction, or a direction to set the accused at liberty in the case of an acquittal can only *follow* the judgment and not *precede* it. A breach of this rule is, however, only an irregularity which can be cured under the provisions of S. 537.¹ The High Court of Patna has,

Note 7

1. ('66) 1 Agra Cr 17 (18), *Government v. Holasee Singh*.

Note 8

1. ('32) 1932 Mad W N 648 (649), *Srinivasachariar v. Emperor*.
2. ('92) 5 C P L R Cr 24 (24) *Empress v. Baldeo*.

Note 10

1. ('27) AIR 1927 Lah 870 (870) : 28 Cri L Jour 971, *Abdullah v. Emperor*.
2. ('70) 7 Bom H C R Cr 31 (34), *Reg. v. Ragha Naranji*. (When the proceedings in a case tried by a Subordinate Magistrate are submitted under S. 277 (corresponding to present S. 349) to a District Magistrate to pass sentence upon the accused, the accused is entitled to be present at the passing of such sentence before the District Magistrate—The order so passed in his absence is illegal.)
3. ('87) 1887 Rat 325 (325), *Queen-Empress v. Ghotiram*.

Note 11

1. ('33) AIR 1933 All 660 (662): 55 All 886: 34 Cri L Jour 1036, *Dhonda Kandoo v. Sitaram*. (Distinguishing 14 All 242.)
- ('96) 23 Cal 502 (505), *Tilak Chandra v. Baisagomoff*.
- ('94) 21 Cal 121 (126), *Damu Senapati v. Sridhar Rajwar*.
- ('11) 12 Cri L Jour 457 (458, 459) : 11 Ind Cas 993 (Bom), *Emperor v. Thaver Issaji Boree*. (Distinguishing 1 Bom L R 160.)
- ('25) AIR 1925 Lah 137 (137) : 25 Cri L Jour 705, *Ata Ahmad v. Emperor*. (Dissenting from 14 All 242.)
- ('22) AIR 1922 Mad 502 (503) : 45 Mad 913 : 23 Cri L Jour 583 (FB), *Sankaralinga Mudaliar v. Narayana Mudaliar*.

Section 366
Note 11

however, in the undermentioned case² held that pronouncing judgment before completing the judgment makes the sentence illegal. The decision follows the view expressed in *Queen-Empress v. Har Gobind*,³ which has been explained in later decisions of the Allahabad High Court. See section 537 Note 12.

Section 367

367.* (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

(3) When the conviction is under the Indian Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him

* 1882 : S. 367; 1872 : Ss. 255, 287, 461, 463 and 464;
1861 : Ss. 379, 380, 381, 429 and 430.

(¹⁵) AIR 1915 Mad 1038 (1039) : 14 Cri L Jour 595 (596) : 38 Mad 498, *Kamakshamma v. Emperor*.

(⁷⁹) 2 Weir 438 (439). (A Magistrate passed sentence and then died before writing judgment—Held it was only an irregularity.)

(³⁰) AIR 1930 Rang 77 (78):7 Rang 370:30 Cr. L. J. 1166, *Mad. Hayat v. Emperor*.

(¹¹) 12 Cr. L. J. 610 (610):12 I. C. 986:5 Sind L R 131, *Emperor v. Moria Khan*.

[But see (⁹²) 1892 All W N 157 (157, 158), *Queen-Empress v. Abdul Majid Khan*. (⁰³) 27 Mad 237 (238), *Bandanu Atchayya v. Emperor*.

(⁰⁹) 19 Mad L Jour 9 (NRC).

2. (³⁰) AIR 1930 Pat 148 (149):8 Pat 904:31 Cri L Jour 416, *Jhari Lal v. Emperor*.

3. (⁹²) 14 All 242 (272) : 1892 A W N 83.

to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed :

Section 367

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

(6) For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment.

The words "or from the dictation of such presiding officer" and the words "and where it is not written be signed by him," in sub-s. (1) and sub-s. (6) were inserted by the Code of Criminal Procedure (Amendment) Act XVIII of 1923.

Synopsis

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| <ol style="list-style-type: none"> 1. Object and applicability of the section. 1a. Judgment — Meaning of. 2. Language of judgment. 3. "Written by the presiding officer." 4. Contents of judgment—General. 5. Points for determination. 6. "Decision thereon"—Appreciation of evidence. 7. Reasons for decision. 8. Remarks in the judgment. 9. Offence to be specified. 10. "Punishment to which he is sentenced." | <ol style="list-style-type: none"> 11. "Shall be dated and signed by the presiding officer . . . at the time of pronouncing it." 12. Judgment in the alternative — Sub-section (3). 13. Judgment in cases of acquittal. 14. Judgment in capital cases — Sub-section (5). 15. Trial by jury—Heads of charge .. to the jury — Proviso. 16. Judgment not in conformity with section — Procedure in appeal. 17. Sub-section (6). 18. Effect of non-compliance with the section. See Note 12 to S. 537. |
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Other Topics (miscellaneous)

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| <p>Accused's action — Open to two constructions—Presumption of innocence to prevail. See Note 6.</p> <p>Alibi evidence. See Note 6.</p> <p>Bench of Magistrates — President of Bench in minority—Member of majority to write judgment. See Note 3.</p> <p>Circumstantial evidence — When sufficient. See Note 6.</p> <p>Discharge order — Not judgment. See Note 1a.</p> <p>Evidence — Only quality and weight material — And not number of witnesses. See Note 6.</p> <p>Evidence — Appreciation and effect — Difference in civil and criminal proceedings. See Note 6.</p> <p>Finding of guilty—Some sentence necessary. See Note 10.</p> <p>Guilt of accused — Onus on prosecution — To be proved in accordance with law. See Note 6.</p> <p>Heads of charge — To be written soon after delivery of charge to jury. See Note 15.</p> | <p>Judge—Not to act on matters not made evidence on record. See Note 6.</p> <p>Judgment — Not in English or Court language — Only irregularity. See Note 2.</p> <p>Judgment—Contents. See Notes 6 and 9.</p> <p>Judgment of acquittal — Detention of accused after pronouncement — Illegal — Formal warrant of release not necessary. See Note 13.</p> <p>Judgment not according to law — <i>De novo</i> trial to be ordered. See Note 16.</p> <p>Legislative changes. See Notes 3 and 17.</p> <p>Medical witness, experts, etc.—Evidence not to be blindly accepted. See Note 6.</p> <p>Prosecution evidence trustworthy — Failure to prove motive immaterial. See Note 6.</p> <p>Section — Not applicable to orders on petitions. See Note 1.</p> <p>Sentence — Cannot be postponed after judgment. See Note 10.</p> <p>"Sign" — Meaning. See Note 11.</p> <p>Signature—Not to be with stamp—But if with stamp, only irregularity. See Note 11.</p> |
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Section 367
Notes 1-3

1. Object and applicability of the section. — As has been already mentioned in Note 1 to S. 366, the provisions of this section also are based upon good and substantial grounds of public policy.¹

This section applies to such judgments as are referred to in S. 366, that is to say, to judgments in *trials*.² It does not apply to orders on petitions.³ It has been held by the Chief Court of Oudh that this section has no application to appeals.⁴ This view, it is submitted, is not correct as it goes against the express provisions of S. 424. See also section 424 and Notes thereon.

As to whether the section applies to orders under Ss. 118 and 123, see Note 17.

1a. Judgment — Meaning of. — The word “judgment” has not been defined in this Code. The wording of S. 366, as well as this section shows that the word “judgment” means a decision in a *trial* which decides a case finally so far as the Court trying the case is concerned, and terminating in either a conviction or acquittal of the accused.¹ Thus, an order of discharge is not a final order and is not, therefore, a judgment within the meaning of the section.² For further discussion, see Notes 2 and 3 to S. 369. See also the undermentioned cases.³

2. Language of judgment. — The judgment should be written in the language of the Court or in English.¹ Writing the judgment in any other language is, however, only an irregularity which can be cured by the provisions of section 537.²

3. “Written by the presiding officer.” — Prior to the amendment in 1923 this section provided that the judgment must be written by the presiding officer. It was, therefore, held that the judgment should be written by the Court itself and not by somebody else to the dictation of the officer.¹ The amendment of 1923 now allows such a procedure.

Section 367 — Note 1

1. ('92) 14 All 242 (272) : 1892 A W N 83, *Queen-Empress v. Hargobind Singh*.
2. ('04) 1 Cri L Jour 969 (970) : 6 Bom L R 897, *In re Nagappa*. (Order under S. 195—Record of reasons not necessary.)
3. ('72) 1872 Rat 61 (61), *Reg v. Pandurang*.
See also S. 494 Note 5.
4. ('40) AIR 1940 Oudh 369 (371) : 41 Cr. L. J. 711, *Jodha v. Emperor*.

Note 1a

1. ('01) 28 Cal 652 (660) : 5 C W N 457 (F B), *Dwarka Nath v. Beni Madhab*.
- ('09) 9 Cr.L.J. 80 (82) : 31 Mad 543 : 4 I C 1113, *Emperor v. Maheswara Kondaya*.
2. ('01) 28 Cal 652 (660) : 5 C W N 457 (F B), *Dwarka Nath v. Beni Madhab*.
- ('07) 5 Cri L Jour 255 (256) : 9 Bom L R 250, *Emperor v. Nabi Fakira*. (Though record of reasons is not compulsory, it is desirable to record reasons.)
- ('09) 9 Cr.L.J. 80 (82) : 31 Mad 543 : 4 I C 1113, *Emperor v. Maheswara Kondaya*.
3. ('40) AIR 1940 Oudh 396 (397) : 41 Cr. L. J. 725 (726), *Emperor v. Madho Singh*. (Order of appellate Court requiring trial Court to take evidence of certain witnesses is not judgment.)
- ('02) 29 Cal 726 (733) : 6 C W N 633 (F B), *Mir Ahwad Hossein v. Mahomed Askari*.

Note 2

1. ('06) 4 Cr.L.J. 162 (163) : 4 C L J 232, *Dhanukdhari Singh v. Harihar Singh*.
[See also (1865) 4 Suth W R Cr 19 (19), *Queen v. Bhobunneshur Gossamy*.]
2. ('06) 4 Cri L Jour 162 (163) : 4 C L J 232, *Dhanukdhari v. Harihar*.
See also S. 537 Note 12.

Note 3

1. ('06) 4 Cr.L.J. 394 (395) : 4 C L J 411, *Manik Lal v. Corporation of Calcutta*.

Where in the case of a trial by a Bench of Magistrates the President of the Bench is in a minority as to conviction or acquittal, the judgment should be written by some member of the majority.² See also Notes 2 and 3 to section 265.

Section 367
Notes 3-4

4. Contents of judgment—General.—This section requires that a judgment must contain the points for determination, the decision thereon and the reasons for the decision.¹ The object of these provisions is that a Criminal Court should consider the case before it in all its bearings and should, on such consideration, arrive at definite conclusions after considering the evidence in the case.² Thus, a judgment which consists of a few notes on the arguments of the counsel and a somewhat vague conclusion is no judgment at all.³ But the section does not lay down any particular form which a judgment must take; and a failure to strictly conform to the provisions of this section would be a mere irregularity curable under S. 537 if it can be gathered from the body of the judgment itself that there has been substantial compliance with the provisions of the section.⁴

Where there are separate trials, separate judgments must be recorded. Where, however, two cases are closely connected together, the Court may write a detailed judgment containing a complete recital of the facts in the more important of the two cases and it would not be objectionable to refer to such recital in the separate judgment recorded in the less important case. At the same time the Court should always be careful to see that evidence which is only admissible in one of the two cases is not referred to or put forward as a reason for a conviction or acquittal in the other case in which it is not relevant.⁵

(91) 1891 Rat 545 (546), *Queen-Empress v. Lakshmi Bai*.

(91) Oudh Sel Cases No. 192 p. 248 (249), *Queen-Empress v. Nanhu*.

2. ('28) AIR 1928 Mad 197 (197): 51 Mad 338: 29 Cr.L.J. 207, *Lalamma v. Emperor*.

(26) AIR 1926 Mad 354 (355): 27 Cri L Jour 90, *In re Seetharamayya*.

Note 4

1. ('40) AIR 1940 Sind 113 (114): 41 Cr. L. J. 724, *Abdul Karim v. Emperor*.

(37) AIR 1937 Nag 122 (122): ILR (1936) Nag 217: 39 Cr. L. J. 370, *Sukhdayal v. Mt. Saraswati*.

2. ('97) 19 All 506 (507): 1897 A W N 142 (FB), *Queen-Empress v. Pandeh Bhat*. ('32) AIR 1932 Sind 180 (180): 34 Cri L Jour 163, *Gul Sheru v. Emperor*. (Intention of S. 367 is that the Magistrate should direct his own attention to every material question of fact or law.)

3. ('30) AIR 1930 Lah 1054 (1055): 32 Cr.L.J. 252, *Mahomed Balhsh v. Emperor*. [See also ('36) AIR 1936 Nag 160 (160): ILR (1937) Nag 38: 39 Cri L Jour 349, *Bapurao v. Emperor*. (Court instead of writing judgment merely recording order of a few brief sentences in order-sheet—No legal judgment.)]

4. ('37) AIR 1937 Nag 122 (122): ILR (1936) Nag 217: 39 Cr. L. J. 370, *Sukhdayal v. Mt. Saraswati*.

5. ('20) AIR 1920 All 79 (79, 80): 21 Cri L Jour 442, *Bhola Nath v. Emperor*. [See ('27) AIR 1927 Mad 56 (57): 27 Cr.L.J. 1164, *Thangaya Nadar v. Emperor*. (Where in a joint trial of several accused persons for various offences, some triable by jury and others triable with the aid of assessors, the Judge summed up the case at some length to the jury with regard to all the charges, but when he came to write his judgment with regard to the charges triable by himself with the aid of assessors, he merely referred to the charge to the jury without giving any reasons for agreeing with the jury — *Held*, there was no sufficient compliance with the requirements of S. 367 in respect of the offences triable with the aid of assessors and the judgment was therefore defective.)]

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Notes 4-5

A judgment once delivered cannot be supplemented by means of an explanation furnished to the superior Court.⁶

When a case is forwarded to a superior Magistrate under S. 349, with the opinion of the forwarding Magistrate, the superior Magistrate must write an independent judgment and cannot merely adopt the opinion of the Magistrate by whom the case was forwarded.⁷

It is undesirable to make a document, prepared by a party, part of a judgment unless the Court has checked the document and found it to be correct.⁸

A judgment should specifically set forth facts and orders necessary to give authority to the Court in the particular case.⁹

A judgment should not be unnecessarily long.¹⁰ But it should be written in such a way that it would be easy to summarily dismiss an appeal against it on a perusal of the judgment alone.¹¹

In a trial with the aid of assessors, merely recording a finding on facts and evidence as explained to the assessors in summing up the evidence to them is not sufficient compliance with the section.¹²

5. Points for determination. — This section lays down that every judgment must contain the point or points for determination. To ascertain and define distinctly these points is the very ground stone of a sound and stable judgment.¹ A judgment which does not set forth the points for determination is defective.²

[See also ('40) AIR 1940 Cal 59 (59): 41 Cr.L.J. 247, *Mrs. W. Waugh v. Emperor*. (Counter cases — Magistrate using evidence in one case as evidence in other — Conviction based upon such evidence cannot be upheld.)

('97) 1 Cal W N 426 (427), *Asimaddi v. Govinda Baidya*.]

6. ('08) 7 Cri L Jour 312 (312) : 7 Cal L J 238, *Jurakhan v. King-Emperor*.

('05) 2 Cal L J 524 (529) : 3 Cr.L.J. 160, *Ramanath Kalapahar v. King-Emperor*.

('98) 25 Cal 625 (626) : 2 C W N 289, *Abhoy Charan Das v. Municipal Ward Inspector*.

('03) 7 Cal W N 859 (860), *Madhu Sudan Das v. Sasti Prasad Nandy*.

[See ('01) 6 Cal W N 118 (120), *Nazir Malita v. Hari Charan*.

('30) AIR 1930 Cal 379 (379) : 32 Cri L Jour 18, *Mani Krishna Sen v. Emperor*.

(Trying Magistrate is not entitled to make any suggestion or representation in the explanation which is not founded on the record before him.)]

7. ('39) AIR 1939 Oudh 35 (36) : 39 Cri L Jour 1005, *Lallu Ram v. Emperor*.

('19) AIR 1919 Pat 290 (290) : 20 Cri L Jour 444, *Thakur Singh v. Emperor*.

8. ('20) AIR 1920 Cal 87 (89) : 47 Cal 154 : 21 Cri L Jour 386, *Kasem Ali v. Emperor*. (Certain statements prepared by the Public Prosecutor.)

9. ('87) 1887 Rat 325 (326), *Queen-Empress v. Yeshwant*. (Mamlatdar is not an officer to whom under S. 12 of Act V of 1879 the powers of a collector under S. 87 of the Act are delegated.)

('86) 1886 Rat 310 (310), *Queen-Empress v. Kana*. (S. 47 of Bombay Act V of 1879 does not make the possession of more than one gallon of liquor penal.)

('66) 1866 Pun Re No. 111 Cr, p. 108 (108), *Mahramon behalf of his brother Bahwul*.

10. ('33) AIR 1933 Mad 233 (239) : 56 Mad 231 : 34 Cr. L. J. 481, *Narayana v. Emperor*.

11. ('93-1900) 1893-1900 Low Bur Rul 626 (627), *Nga Ngyin Baju v. Empress*.

12. ('09) 10 Cri L Jour 325 (334) : 3 I. C. 625 (Cal), *Khudiram Bose v. Emperor*.

Note 5

1. ('34) AIR 1934 Sind 89 (92) : 28 S L R 12 : 36 Cr. L. J. 53, *Mitho v. Emperor*.

2. ('34) AIR 1934 Sind 89 (92) : 28 S L R 12 : 36 Cr. L. J. 53, *Mitho v. Emperor*.

(When there are six several prisoners, accused of seven separate offences, it is a perfunctory and perilous compliance with the law to raise no more than one point for decision.)

6. "Decision thereon"—Appreciation of evidence.—Though the rules of evidence are the same in civil and criminal proceedings, there is always a marked difference between the effect and appreciation of evidence in the two cases. In civil cases a mere *preponderance* of probability or greater probative value is sufficient to warrant a conclusion; while in criminal cases, before the accused can be convicted, there should be such a *moral certainty* of his guilt as convinces the mind of the tribunal as reasonable men, beyond the possibility of doubt or suspicion.¹ Thus, it is primarily the duty of the prosecution to establish the guilt of the accused to the satisfaction of the Court,^{1a} and it is certainly not the province or the duty of the accused to establish his own innocence.² The prosecution should establish the case against the accused by *positive affirmative* evidence of his guilt; and suspicion, however grave, does not take the place of proof.³ The

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('96) 1896 Rat 844 (845), *Queen-Empress v. Shidlingappa*.

[See ('91) 15 Bom 11 (12), *In re Shivappa*.]

[See also ('32) AIR 1932 Sind 143 (144) : 33 Cr.L.J. 900, *Udharam v. Emperor*. (Court should set forth points of decision in such a shape that at the first glance it may be apparent to itself and the appellate tribunal that nothing which is material has been overlooked.)]

Note 6

1. See ('17) AIR 1917 Pat 111 (113) : 19 Cri L Jour 344, *Luchmi v. Emperor*.

('29) AIR 1929 Nag 113 (114) : 30 Cri L Jour 789, *Ramdayal v. Emperor*.

('95) 1895 Rat 772 (773), *Queen-Empress v. Ganesh Bhikaji*. (Court ought not to adjudge criminal case on mere probabilities as if it were a civil action.)

1a. ('26) AIR 1926 Lah 375 (376) : 27 Cri L Jour 593, *Emperor v. Sain Das*.

('32) AIR 1932 Cal 293 (294) : 59 Cal 136 : 33 Cr. L. J. 441, *Trailokya Nath Das v. Emperor*. (A Civil Court's decision is not binding on a Criminal Court.)

('28) AIR 1928 Oudh 373 (373) : 29 Cr. L. J. 763, *Rameshwar v. Emperor*. (Case for prosecution must be proved by evidence of crown witnesses and cannot be based on partial admission of accused in defence.)

('33) AIR 1933 Oudh 372 (373) : 35 Cr. L. J. 66, *Emperor v. Parameshwar Din*. (The gravest suspicion is insufficient.)

('30) AIR 1930 Oudh 321 (323) : 31 Cr. L. J. 1078 : 6 Luck 68, *Rangilal v. Emperor*.

[See ('32) AIR 1932 Cal 833 (833), *Khurshid Chik v. Raniganj Municipality*.

(Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that the liability has been incurred to prove that the things prescribed in the Act have been actually done.)]

[See also ('33) AIR 1933 Oudh 299 (301) : 34 Cri L Jour 838, *Nibar v. Emperor*. (Where prosecution fails completely to prove motive, and evidence regarding commission of crime is not clear, accused cannot be convicted.)]

2. ('33) AIR 1933 Cal 532 (534) : 60 Cal 656 : 34 Cri L Jour 1059, *Nishi Kanta Chatterji v. Behari Kahar*.

('20) AIR 1920 Pat 553 (555) : 20 Cr. L. J. 253, *Ram Sunder Sahay v. Emperor*. (Prosecution cannot rely on weakness of defence.)

('66) 1866 Rat 5 (5), *Reg. v. Jenkoo*.

('18) AIR 1918 Nag 123 (124) : 20 Cri L Jour 747, *Gulzarsha Fakir v. Emperor*. (A moral conviction of guilt is no sufficient foundation for a verdict of guilty, unless it is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty.)

3. ('31) AIR 1931 Lah 406 (408) : 32 Cr. L. J. 1049, *Amarnath v. Emperor*.

('23) AIR 1923 Lah 42 (43) : 26 Cr. L. J. 28, *Surat Singh v. Emperor*.

('14) AIR 1914 Oudh 275 (278) : 15 Cr. L. J. 643 : 17 Oudh Cas 276, *Abbas Gul Khan v. Emperor*.

('33) AIR 1933 Oudh 148 (151) : 34 Cr. L. J. 498 : 8 Luck 301, *Ratan v. Emperor*.

('27) AIR 1927 Lah 862 (864) : 29 Cr. L. J. 532, *Lila Ram v. Emperor*.

('29) AIR 1929 Pat 112 (113) : 30 Cr. L. J. 835, *Basudeb Mandar v. Emperor*.

('30) AIR 1930 Lah 84 (86) : 31 Cr. L. J. 141, *Emperor v. Soopi*.

('28) AIR 1928 Lah 272 (273) : 9 Lah 531 : 29 Cr. L. J. 481, *Dula v. Emperor*.

('30) AIR 1930 Oudh 321 (323) : 31 Cr.L.J. 1078 : 6 Luck 68, *Rangi Lal v. Emperor*.

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onus cast on the prosecution is not discharged by any absence of explanation or weakness on the part of the accused,^{3a} or even by the

- (15) AIR 1915 Low Bur 115 (118): 16 Cr. L. J. 25 (28), *Nga Po Thein v. Emperor*.
 (33) AIR 1933 Pesh 28 (30): 34 Cr. L. J. 386, *Rahmat Shah v. Emperor*.
 (34) AIR 1934 Lah 693 (694): 36 Cr. L. J. 778, *Sardar Ahmad v. Emperor*.
 (18) AIR 1918 Pat 146 (151): 19 Cr. L. J. 789, *Ritbaran Singh v. Emperor*. (Conduct of accused in giving false name and false residence on arrest is not sufficient in itself for conviction.)
 (27) AIR 1927 Lah 581 (590): 28 Cr. L. J. 625, *Barkati v. Emperor*. (Mere fact that accused was last seen with deceased together, even coupled with strong motive for crime, is not sufficient proof of guilt.)
 (32) AIR 1932 Lah 195 (195, 196): 33 Cr. L. J. 501, *Dila Ram v. Emperor*. (Mere motive cannot be considered as sufficient evidence of the commission of a crime by a particular person.)
 (27) AIR 1927 Lah 74 (75): 28 Cr. L. J. 118, *Arjan v. Emperor*. (Do.)
 (26) AIR 1926 Lah 88 (90): 7 Lah 84: 27 Cr. L. J. 709, *Rannun v. Emperor*. (Do.)
 (33) AIR 1933 All 394 (395): 34 Cr. L. J. 754, *Mt. Gajrani v. Emperor*. (Do.)
 3a. (24) AIR 1924 All 299 (300): 25 Cr. L. J. 327: 46 All 64, *Umed Singh v. Emperor*. (Accused's conduct may affect his credibility but cannot affect his right to compel prosecution to prove its case.)
 (31) AIR 1931 Lah 361 (361): 32 Cr. L. J. 1233, *Mela Ram v. Emperor*. (Prosecution cannot derive merit from failure of defence to cross-examine witnesses or even to take part in proceedings.)
 (22) AIR 1922 All 24 (25): 23 Cri L Jour 193, *Ramhit v. Emperor*. (Because accused loses his head or gets frightened and does not tell truth, he cannot on that account be prosecuted.)
 (32) AIR 1932 Lah 243 (244): 33 Cr. L. J. 411, *Hayat v. Emperor*. (Murder — Two persons seen together and shortly afterwards one of them found to have been murdered—No onus rests on survivor to explain how deceased met with his death.)
 (33) AIR 1933 Oudh 226 (228): 8 Luck 397: 34 Cr. L. J. 935, *Har Dayal v. Emperor*.
 (33) AIR 1933 Oudh 257 (258): 34 Cr. L. J. 661, *Ramamurthi v. Jai Indra Bahadur Singh*.
 (25) AIR 1925 Oudh 78 (88): 26 Cr. L. J. 225: 27 Oudh Cas 188, *Hira Lal v. Emperor*.
 (05) 2 Cr. L. J. 352 (353): 2 A L J 411, *Abdul Ganni v. King-Emperor*.
 (33) AIR 1933 Oudh 333 (338): 8 Luck 570: 35 Cr. L. J. 45, *Ratan Lal v. Emperor*.
 (04) 1 Cr. L. J. 390 (395): 28 Bom 533: 6 Bom L R 379, *Emperor v. Dankatram*.
 (19) AIR 1919 Oudh 160 (174): 20 Cr. L. J. 465, *Sushil Chandra v. Emperor*.
 (28) AIR 1928 Nag 257 (259, 260): 29 Cr. L. J. 561, *Mt. Shevanthi v. Emperor*.
 (23) AIR 1923 Mad 365 (367): 24 Cr. L. J. 426, *Ramudu Ayyar v. Emperor*.
 (22) AIR 1922 Nag 87 (88): 23 Cr. L. J. 345, *Domar Singh v. Emperor*. (Omission of true and available defence—Substitution of falsehood—Magistrate's duty is to find out guilt or innocence of accused and not to decide about soundness of plea.)
 (20) AIR 1920 Pat 553 (555): 20 Cr. L. J. 253, *Ram Sunder Sahay v. Emperor*.
 (94) 1894 Rat 686 (686), *Queen-Empress v. Jethmal Narayan*. (Prisoner on his trial is merely on the defensive and owes no duty to anyone but himself.)
 (33) AIR 1933 Lah 871 (875): 35 Cr. L. J. 137, *Emperor v. Rai Singh*.
 (33) AIR 1933 Lah 808 (808): 35 Cr. L. J. 69, *Piran Ditta v. Emperor*.
 (14) AIR 1914 Sind 111 (112): 7 Sind L R 109: 15 Cr. L. J. 497, *Isarsing Sawansing v. Emperor*. (But where onus is discharged, the duty is cast upon the accused to explain himself.)
 (25) AIR 1925 Sind 289 (292): 19 Sind L R 71: 26 Cr. L. J. 1063, *Bahadur v. Emperor*. (Do.)
 (10) 11 Cr. L. J. 222 (234): 6 I. C. 51 (Mad), *In re Chukkapalli Ramayya*.
 (24) AIR 1924 Cal 323 (325): 51 Cal 418: 25 Cr. L. J. 776, *Mamfru v. Emperor*.
 (27) AIR 1927 Pat 257 (260): 28 Cr. L. J. 497, *Devendra v. Emperor*.
 (27) AIR 1927 Sind 85 (87): 27 Cr. L. J. 1265, *Bukshan v. Emperor*. (But when a *prima facie* case is made out, the presumption of innocence is displaced and the force of suspicious circumstances is augmented, when accused offers no explanation.)
 (15) AIR 1915 Lah 95 (97): 16 Cr. L. J. 152, *Lachman Das v. Emperor*.
 [See (30) AIR 1930 Sind 211 (215): 24 Sind L R 252: 31 Cr. L. J. 1046, *Baksho v. Emperor*. (General criminality of tribe cannot be imputed to the individual members.)]

fact that the defence put forward by the accused was found to be false.⁴

It is not only necessary that the guilt of the accused should be proved beyond a possibility of doubt but also that it should be proved strictly in accordance with law.⁵ Thus it is improper for a Judge to make inquiries after a case is closed and to act upon statements and matters not made evidence on record.⁶ Similarly, he ought not to

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(19) AIR 1919 Pat 534 (536) : 4 Pat L J 289 : 20 Cr. L. J. 375, *Ram Prasad Mahlon v. Emperor*. (Prosecution story believed to be in substance unfounded — Judge can in his discretion determine whether he believes witnesses.)]

4. (16) AIR 1916 All 63 (64) : 17 Cri L Jour 23 (24), *Abdul Aziz v. Emperor*.

(21) AIR 1921 Lah 89 (90) : 22 Cri L Jour 595, *Hari Ram v. Emperor*.

(15) AIR 1915 Lah 95 (97) : 16 Cri L Jour 152 (151), *Lachhman Das v. Emperor*.

(25) AIR 1925 Lah 282 (283) : 26 Cri L Jour 949, *Natha Singh v. Emperor*.

(25) AIR 1925 Lah 42 (43) : 26 Cri L Jour 393, *Tabri v. Emperor*. (The fact that the accused made an effort to concoct false evidence of an alibi does not go to prove that he committed the offence charged.)

(33) AIR 1933 Lah 946 (947) : 35 Cri L Jour 79, *Parbhu v. Emperor*.

(11) 12 Cri L Jour 584 (584) : 12 Ind Cas 848 (LB), *Kyaw Hla U v. Emperor*.

(21) AIR 1921 Cal 531 (532) : 23 Cri L Jour 220, *Gouri Narain v. Tilbhikaram Chetri*. (Prosecution case false — Accused is entitled to acquittal whether his defence be true or false.)

(33) AIR 1933 Cal 603 (605) : 34 Cri L Jour 1073, *Tarapada Mitra v. Emperor*. See also S. 256 Note 10 and S. 290 Note 5.

5. (21) AIR 1921 Pat 406 (408), *Dhannu Beldar v. Emperor*.

(32) 33 Cri L Jour 514(516) : 137 Ind Cas 290 (Oudh), *Puttu v. Emperor*. (Where evidence is unreliable and appears to have been manufactured to prove prosecution story, it cannot form basis of conviction.)

(32) 33 Cri L Jour 677 (677) : 138 Ind Cas 704 (Lah), *Sher Md. v. Emperor*. (Suspicion entertained by police-officer cannot be treated as evidence against accused.)

(25) AIR 1925 Oudh 676 (676) : 26 Cr. L. J. 1012, *Bishambhar Nath v. Emperor*. (Matters irrelevant to charge against accused should be eliminated.)

6. (28) AIR 1928 Lah 1 (3) : 9 Lah 537 : 29 Cri L Jour 815, *Chiranji Lal v. Emperor*. (Magistrate consulting his superior in disposing of bail application.)

(28) AIR 1928 Lah 125 (131) : 29 Cri L Jour 212, *Taj Muhammad v. Emperor*. (Magistrate holding private conferences with prosecuting officers in respect of case he had to adjudicate.)

(89) 1889 All W N 181 (184), *Empress v. Jia Lal*. (Judge, after close of trial and taking opinions of assessors, discussing mental condition of accused with Civil Surgeon out of Court.)

(85) 1885 All W N 31 (31), *Empress v. Indar Singh*. (Accused charged of rape — Judge, after trial, ascertaining age of girl from her father who produced horoscope of her birth.)

[See (27) AIR 1927 Pat 37 (38) : 27 Cri L Jour 1112, *Jai Singh v. Emperor*. (Conviction cannot be based on police-officer's report when he has not been examined.)

(87) 1887 All W N 54 (54), *Empress v. Hardewa*. (Magistrate in determining guilt or sentence allowing himself to be impressed by vague and general considerations unsupported by any proof.)

(85) 1885 All W N 264 (265), *Empress v. Sarfaraz Ali*. (Magistrate making inquiries of various people while making local inquiry.)

(33) AIR 1933 Cal 36 (39) : 34 Cr. L. J. 36, *Jagadesh Narain Tewari v. Emperor*. (In dealing with trials of criminal cases extraneous considerations are to be excluded.)

(75) 24 Suth W R Cr 28 (28), *Queen v. Ram Churn Kurmoker*. (Sessions Judge should not import into his judgment opinion of assessor derived from personal knowledge and unsupported by evidence on record.)

(70) 7 Bom H C R Cr 50 (54), *Reg. v. Vyankatray Srinivas*. (Magistrate should not import into case before him previous knowledge of character of accused.)

(70) 1870 Pun Re No. 10 Cr, p. 16 (17), *Crown v. Ghusseeta*. (Magistrate in his judgment referring to something that was told to him verbally.)

(09) 10 Cri L Jour 321 (325) : 3 Ind Cas 622 (Lah), *Muzammal v. Emperor*. (It is improper to introduce private opinion of a person in judgment.)]

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allow himself to be influenced by proceedings which have taken place in another trial,⁷ or by evidence taken in any connected case or proceeding before him.⁸ Before recording a conviction the Court has not only to satisfy itself that the facts constituting the offence have been established, but also to see whether the proved or admitted facts bring the case within any of the exceptions which take the case out of the purview of the offence.⁹ Especially in cases where the accused specifically raises such a plea, such as the right of private defence, the exact circumstances justifying the act should be established.¹⁰

In considering the effect of the evidence adduced, regard should be had only to the quality and weight of the evidence adduced and not to the number of witnesses examined.¹¹ Thus, it is open to the

7. ('85) 1885 All W N 28 (29), *Empress v. Zauwar Hussain*.

('26) AIR 1926 Cal 945 (946) : 53 Cal 471: 27 Cri L Jour 975, *Surendra Nath v. Janki Nath*.

('30) AIR 1930 All 481 (482) : 31 Cri L Jour 716, *Emperor v. Kanhaiya*.

('25) AIR 1925 All 443 (444) : 26 Cri L Jour 981, *Din Dayal v. Emperor*.

('28) AIR 1928 Lah 923 (924) : 29 Cri L Jour 734, *Sheo Karan v. Emperor*.

8. ('85) 1885 All W N 28 (29), *Empress v. Zauwar Hussain*.

('28) AIR 1928 Lah 923 (924) : 29 Cri L Jour 734, *Sheo Karan v. Emperor*.

9. ('29) AIR 1929 Cal 346 (348): 56 Cal 1013: 31 Cr. L. J. 369, *Muhammad Ghul v. Fazley Karim*.

('22) AIR 1922 Lah 314 (315) : 22 Cri L Jour 507, *Gulam Rasul v. Emperor*. (Right of private defence established on evidence, though accused set up different defence.)

[See ('04) 1 Cri L Jour 300 (303) : 8 C W N 421, *Holland Bombay Trading Co. v. Buktear Mull*. (Under S. 486, Penal Code, onus is on accused to bring himself within exceptions to the section.)]

10. ('25) AIR 1925 Rang 133 (134): 26 Cr. L. J. 409: 2 Rang 558, *Nga Po Ev v. Emperor*.

('27) AIR 1927 Lah 786 (788) : 28 Cri L Jour 838, *Hazura Singh v. Emperor*.

('12) 13 Cr. L. J. 470 (471): 15 Ind Cas 310 (Mad), *Veeranna Nandan v. Emperor*.

('27) AIR 1927 Cal 321 (326): 28 Cri L Jour 334, *Adam Ali Talukdar v. Emperor*.

('26) AIR 1926 Pat 433 (434): 27 Cr. L. J. 1322: 5 Pat 520, *Farman Khan v. Emperor*.

11. ('20) AIR 1920 Pat 366 (367): 21 Cri L Jour 33, *Brahmdeo Singh v. Emperor*.

('28) AIR 1928 Mad 1135 (1136) : 29 Cr L Jour 1041, *Muhammad Salia Rowther v. Emperor*. (No criminal Court is justified in brushing aside the documents, to which the accused are parties when the accused themselves file those documents in Court along with their statements.)

('14) AIR 1914 Lah 565 (566): 16 Cr. L. J. 266 (267), *Sardar Ahmad v. Emperor*. (Held that in the case of unnatural offence under S. 377, Penal Code, conviction can safely be based on uncorroborated testimony of the boy if it is not otherwise doubtful.)

('21) AIR 1921 Oudh 115 (115) : 22 Cr. L. J. 647 : 24 Oudh Cas 225, *Gur Din v. Emperor*.

('25) AIR 1925 Oudh 501 (501) : 27 Oudh Cas 327 : 26 Cr. L. J. 530, *Bahadur v. Emperor*.

('31) AIR 1931 All 362 (363) : 53 All 598 : 32 Cr.L.J.780, *Arjun Singh v. Emperor*. (Evidence of even one witness is sufficient for conviction on charge of perjury.)

('25) AIR 1925 Lah 295 (296) : 26 Cri L Jour 292, *Aziz v. Emperor*. (Conviction on single witness's evidence—Evidence must be free from all doubt.)

('22) AIR 1922 Pat 88 (91), *Ajodhya Prasad v. Emperor*.

('18) AIR 1918 Lah 322 (322) : 19 Cri L Jour 946, *Ganpat v. Emperor*.

('30) AIR 1930 Lah 892 (893) : 32 Cri L Jour 444, *Ram Saran Das v. Emperor*. (Policeman's testimony, like that of every other witness must be judged on its own merits.)

('34) AIR 1934 Lah 158 (160) : 36 Cri L Jour 108, *Hayat Mohammad v. Emperor*. (Witnesses being friends or relations of each other is insufficient for discrediting their testimony.)

('26) 27 Cri L Jour 223 (224) : 92 Ind Cas 175 (Lah), *Pali v. Emperor*. (It is not safe to base conviction on interested and contradictory evidence.)

[See ('21) 3 Lah L Jour 482 (484), *Nura v. Emperor*.

('23) AIR 1923 Pat 519 (519) : 24 Cri L Jour 360, *Bhangi Dubey v. Emperor*.

Court in its judgment to rely on the evidence of a particular person even though such person may be interested,¹² or to discard the evidence of a number of witnesses on the ground of their unreliability.¹³ The Court should exercise great care in considering and giving weight to the evidence of accomplices (see section 337 Note 17), or to retracted confessions of accused persons. (See Notes 18 and 19 to S. 161.) Where a part of the evidence of a witness is found to be false, the Court should not accept the other parts of his evidence to base a conviction thereon, unless such evidence is corroborated by other independent evidence.¹⁴ Especially in capital cases the evidence of persons who have resiled from their former statements should not be relied upon.¹⁵ The Court

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- (28) AIR 1928 Pat 98 (100) : 26 Cr. L. J. 906, *Jogi Raut v. Emperor*.
 (25) AIR 1925 Lah 42 (42) : 26 Cr. L. J. 393, *Tabri v. Emperor*.]
 12. (30) AIR 1930 Cal 645 (646) : 31 Cr. L. J. 1225, *Haripada Baidya v. Emperor*.
 (28) AIR 1928 Mad 1186 (1190) : 51 Mad 956; 30 Cri L Jour 317 (FB), *Veerappa Goundan v. Emperor*.
 (29) 1929 Mad W N 587 (590), *Kumaraswami Asari v. Emperor*.
 (75) 24 Suth W R Cr 18 (18), *Gobinda Suain v. Narain Raot*.
 [See (31) AIR 1931 Lah 529 (530) : 32 Cr. L. J. 1032, *Miran Baksh v. Emperor*.
 (Eye-witness not coming forward immediately investigation begins—His testimony should not be disregarded on that ground alone.)
 (26) 8 Lah L Jour 144 (146), *Gandasingh v. Crown*.]
 13. [See (25) AIR 1925 Lah 397 (398) : 26 Cri L Jour 1335, *Nawab v. Emperor*.
 (29) AIR 1929 Lah 436 (436) : 30 Cri L Jour 941, *Hazura Singh v. Emperor*.
 (27) AIR 1927 Lah 874 (874) : 28 Cri L Jour 43, *Dalip Singh v. Emperor*.]
 14. (33) AIR 1933 All 314 (318) : 55 All 379 : 34 Cr. L. J. 689, *Shukul v. Emperor*.
 (31) AIR 1931 Lah 38 (47) : 32 Cri L Jour 522, *Mahla Singh v. Emperor*.
 (27) 28 Cri L Jour 185 (186) : 99 Ind Cas 857 (Lah), *Kheri v. Emperor*.
 (30) 1930 Mad W N 723 (726), *Viswanatha Ayyar v. Emperor*.
 (27) AIR 1927 Nag 43 (44) : 28 Cri L Jour 186, *Mt. Yashodi v. Emperor*.
 (33) AIR 1933 All 401 (402) : 34 Cri L Jour 765, *Man Singh v. Emperor*.
 (16) AIR 1916 Cal 98 (99) : 16 Cr. L. J. 411 (412) : 42 Cal 784, *Hari Krishna v. Emperor*. (It is dangerous precedent to convict a man on evidence of people who are found to be untruthful, without corroboration.)
 (24) AIR 1924 Nag 33 (35) : 25 Cri L Jour 141, *Laxman v. Emperor*.
 (17) AIR 1917 Pat 331 (332) : 18 Cri L Jour 639 (639), *Jagdeo Rai v. Kali Rai*.
 (30) AIR 1930 Oudh 460 (463) : 32 Cri L Jour 94, *Gendun Lal v. Emperor*.
 (27) AIR 1927 Lah 797 (798), *Sardul Singh v. Emperor*.
 (21) AIR 1921 Pat 406 (408), *Dhannu Beldar v. Emperor*.
 [See (32) AIR 1932 Lah 424 (425) : 33 Cri L Jour 744, *Sanwal v. Emperor*.
 (Accepting evidence of eyewitnesses against some accused but not against others does not necessarily vitiate judgment.)
 (33) AIR 1933 Oudh 59 (61) : 34 Cr. L. J. 243, *Ram Adhin v. Emperor*. (Prosecution witnesses considered unreliable in case of some accused—Their evidence must be closely sifted as regards others.)]
 [See also (29) AIR 1929 Oudh 248 (250) : 4 Luck 705 : 31 Cr. L. J. 181, *Dwarka v. Emperor*. (Witnesses altering statements in Sessions Court to fit evidence in Magistrate's Court—Evidence must be carefully scrutinized.)
 (23) AIR 1923 All 352 (354) : 45 All 300 : 24 Cr. L. J. 526, *Khetal v. Emperor*.
 (The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters.)
 (15) AIR 1915 Cal 558 (562) : 16 Cri L Jour 424 (428) : 42 Cal 313, *Meredith v. Sanji Bani Dasi*.
 (18) AIR 1918 Pat 536 (537) : 19 Cri L Jour 877, *Phatali v. Emperor*.]
 [See however (14) AIR 1914 Lah 93 (94) : 15 Cri L Jour 148, *Lakka Singh v. Emperor*. (Evidence distrusted as regards one accused should not be disregarded altogether.)
 (31) AIR 1931 Pat 384 (385) : 10 Pat 590 : 33 Cri L Jour 111, *Leda Bhagat v. Emperor*.]
 15. (25) AIR 1925 Mad 879 (880) : 27 Cr. L. J. 18, *Ayyamperumal Pillai v. Emperor*.

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should not accept blindly the evidence of medical men,¹⁶ or experts,¹⁷ or identification evidence,¹⁸ to outweigh the testimony of respectable eye-witnesses: nor should the Court base its judgment on its own theories unsupported by evidence,¹⁹ or on personal knowledge²⁰ or on

16. ('24) AIR 1924 Bom 457 (459), *Siddubai v. Nilappagauda*.
(23) AIR 1923 Cal 116 (120): 50 Cal 100, *Saradindu Nath v. Sudhir Chandra Das*.
17. ('25) AIR 1925 Oudh 413 (415): 26 Cri L Jour 929: 29 Oudh Cas 1, *Girdhari Lal v. Emperor*. (Corroboration of expert's evidence is necessary.)
(32) AIR 1932 Lah 490 (490): 33 Cri L Jour 593, *Prabh Dial v. Emperor*.
(12) 13 Cri L Jour 563 (564): 15 Ind Cas 979 (Lah), *Jalal-ud-din v. Emperor*.
(05) 2 Cri L Jour 353 (355): 2 A L J 444, *Srikant v. Emperor*.
(22) AIR 1922 Pat 73 (75): 1 Pat 242: 23 Cr.L.J. 638, *Bazari Hajam v. Emperor*.
[See also ('33) 1933 Lah 561 (566): 34 Cr.L.J. 735, *Diwan Singh v. Emperor*.
(29) AIR 1929 Lah 210 (211): 30 Cri L Jour 52, *Dileddad v. Emperor*. (Evidence of thumb-impression expert is valuable.)]
[But see ('30) AIR 1930 Lah 667 (668): 31 Cri L Jour 877, *Sarada v. Emperor*. (Finger-print expert.)]
18. ('27) AIR 1927 Cal 820 (821): 28 Cri L Jour 874, *Emperor v. Irjan*.
(32) AIR 1932 Oudh 99 (102): 7 Luck 552: 33 Cr.L.J. 381, *Gajadhar v. Emperor*. (Evidence of identity based on personal impression should be approached with considerable caution.)
(33) AIR 1933 Oudh 49 (49, 50): 34 Cri L Jour 382, *Tula v. Emperor*.
(24) AIR 1924 Oudh 295 (296): 25 Cri L Jour 1125, *Din Dayal v. Emperor*.
(28) AIR 1928 Lah 724 (725): 29 Cri L Jour 697, *Sullah v. Emperor*. (Identification marks told to witness before identifying accused—Subsequent identification cannot be considered.)
(33) AIR 1933 Lah 299 (301): 35 Cri L Jour 610, *Chanan Singh v. Emperor*.
(23) AIR 1923 Lah 662 (662): 26 Cri L Jour 19, *Rehman v. Emperor*.
(17) AIR 1917 Oudh 118 (120): 18 Cri L Jour 456 (458), *Kallu v. Emperor*.
(32) AIR 1932 Sind 55 (58): 33 Cri L Jour 641, *Nawat Kamal v. Emperor*.
(29) AIR 1929 Sind 149 (149, 150): 30 Cri L Jour 456, *Ramzan v. Emperor*.
(04) 1 Cri L Jour 475 (476): 2 Low Bur Rul 206, *Tha Hmu v. Emperor*.
(34) AIR 1934 Lah 641 (647): 36 Cr. L. J. 121, *Bhagat Ram v. Emperor*. (Value of identification evidence must vary with the circumstances of each case.)
(25) AIR 1925 Lah 137 (138): 25 Cr. L. J. 1272, *Mahni v. Emperor*. (Identification evidence cannot be accepted unless witness had picked out same person in identification parade.)
(29) AIR 1929 All 928 (929): 31 Cri L Jour 206, *Man Singh v. Emperor*.
(30) AIR 1930 All 746 (748): 32 Cri L Jour 152, *Abdul Jalil Khan v. Emperor*.
(25) AIR 1925 Lah 19 (20): 5 Lah 396: 27 Cr. L. J. 170, *Lal Singh v. Emperor*.
[See also ('32) AIR 1932 Oudh 287 (287): 34 Cr. L. J. 197, *Sheo Sahai v. Emperor*.
(26) 27 Cri L Jour 946 (947): 96 Ind Cas 498 (Lah), *Ranga Singh v. Emperor*. (Track evidence.)]
[See however ('27) AIR 1927 Oudh 196 (197): 2 Luck 444: 28 Cri L Jour 460, *Mathura v. Emperor*. (Evidence of identification is not by itself unsafe basis for conviction.)]
(16) AIR 1916 Lah 297 (297): 17 Cri L Jour 156 (157), *Nikka v. Emperor*. (Identification of particular accused by witnesses to whom they were strangers is not valueless.)]
19. ('24) AIR 1924 Pat 813 (815): 25 Cri L Jour 724, *Joharmal v. Emperor*.
(30) AIR 1930 All 45 (48): 31 Cri L Jour 37, *Mt. Bakhtawari v. Emperor*.
(17) AIR 1917 Lah 48 (48): 18 Cr. L. J. 490 (491): 1917 Pun Re No. 1 Cr, *Emperor v. Buta Singh*.
(24) AIR 1924 Cal 611 (613): 26 Cri L Jour 71, *Superintendent & Remembrancer of Legal Affairs, Bengal v. Purna Chandra*.
(30) AIR 1930 Oudh 460 (463): 32 Cri L Jour 94, *Gendan Lal v. Emperor*.
(19) AIR 1919 All 167 (167): 20 Cri L Jour 370, *Alay Ahmad v. Emperor*.
(86) 1886 All W N 20 (20), *Empress v. Maheshu*.
20. ('02) 6 Oudh Cas 204 (211), *Sri Kishen v. King-Emperor*.
(19) AIR 1919 Pat 111 (115): 20 Cri L Jour 289, *Satrughan v. Emperor*.
(19) AIR 1919 All 345 (347): 20 Cri L Jour 283, *Jai Narain v. Emperor*.
(04) 1 Cri L Jour 589 (589): 6 Bom L R 480, *In re D. Fonseca*.
(04) 1 Cri L Jour 99 (101): 1903 Pun Re No. 27 Cr, *Nurdin v. Emperor*.
(31) AIR 1931 Sind 127 (128): 25 Sind L R 213: 32 Cri L Jour 923, *Shambhauram v. Emperor*.

a hypothetical state of facts which were never put forward by the prosecution and were never suggested to the accused as being the case he had to meet.²¹ Mere suggestions by counsel in cross-examination, however ingenious, are of no evidentiary value unless accepted by the witness or proved by other evidence.²² The evidence relating to alibi should be scrutinised very carefully.²³

The standard of proof required in criminal cases does not vary with the magnitude or enormity of the crime,²⁴ though it is usual and prudent to observe the rule "the fouler the crime is, the clearer and plainer ought the proof of it to be."²⁵ In cases based on circumstantial evidence, such evidence should be so strong as to point very clearly to the guilt of the accused.²⁶ It is of utmost importance in such cases that in order to justify an inference of guilt, the inculpatory facts should be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.²⁷

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- (25) AIR 1925 Lah 166 (167): 25 Cri L Jour 808, *W'ali Muhammad v. Emperor*.
[See also ('33) AIR 1933 Cal 36 (39): 34 Cr. L. J. 36, *Jagadish v. Emperor*.]
21. ('10) 11 Cr.L.J. 245 (246): 5 Ind Cas 771 (Cal), *Bhanga Hadua v. Emperor*.
(26) 27 Cri L Jour 1346 (1346): 98 Ind Cas 466 (All), *Ram Surat v. Emperor*.
22. ('32) AIR 1932 Cal 375 (377): 33 Cr.L.J. 725, *Emperor v. Karimuddin Sheikh*.
23. ('28) AIR 1928 Mad 791 (793): 29 Cri L Jour 717, *Public Prosecutor v. Chidambaram*.
- (33) AIR 1933 Oudh 369 (370): 34 Cr.L.J. 1146, *Suraj Baksh Singh v. Emperor*.
(Satisfactory evidence that man committed crime—Alibi evidence should be rejected even if that alibi be supported by what, on surface, would appear to be satisfactory evidence.)
24. ('33) AIR 1933 Sind 166 (168): 34 Cr. L. J. 808, *Salu Mangan v. Emperor*.
(18) AIR 1918 Cal 314 (316): 19 Cri L Jour 81, *Ashraf Ali v. Emperor*.
25. ('20) AIR 1920 Pat 616 (620): 22 Cri L Jour 154, *Raghunandan v. Emperor*.
26. ('30) AIR 1930 Mad 632 (635): 53 Mad 590: 31 Cr. L. J. 712, *Shankaralinga Thevan v. Emperor*.
- (26) 27 Cri L Jour 1254 (1255): 98 Ind Cas 102, (Cal), *Arajali v. Emperor*.
27. ('23) AIR 1923 Lah 488 (490): 26 Cri L Jour 161, *Bahali v. Emperor*.
- (32) AIR 1932 Oudh 251 (253): 6 Luck 658: 32 Cr.L.J. 1184, *Gaya Prasad v. Emperor*.
- (29) 30 Cri L Jour 757 (759): 117 Ind Cas 348 (All), *Emperor v. Abdul Aziz*.
- (28) 29 Cr. L. J. 289 (290): 107 Ind Cas 774 (Lah), *Gulam Rasul v. Emperor*.
- (19) AIR 1919 Lah 440 (446): 19 Cr. L. J. 187, *Emperor v. Jagatram*.
- (20) AIR 1920 Pat 674 (676): 21 Cr. L. J. 278, *Emperor v. Mt. Zohra*.
- (20) AIR 1920 Pat 616 (620): 22 Cr. L. J. 154, *Raghunandan v. Emperor*.
- (28) AIR 1928 Nag 257 (261): 29 Cr. L. J. 561, *Mt. Shevanti v. Emperor*.
- (33) AIR 1933 Lah 308 (311): 34 Cr. L. J. 714, *Gowardan Lal v. Emperor*.
- (17) AIR 1917 Lah 87 (88): 18 Cr. L. J. 897 (898), *Saleh v. Emperor*.
- (28) AIR 1928 Lah 382 (392): 30 Cr. L. J. 18, *Pritchard v. Emperor*.
- (28) AIR 1928 Bom 130 (131): 52 Bom 385: 29 Cr.L.J. 403, *Emperor v. Ismail*.
- (32) AIR 1932 Oudh 324 (325, 326): 7 Luck 623: 33 Cr. L. J. 379, *Havaladar v. Emperor*.
- (29) AIR 1929 Lah 61 (63): 29 Cr. L. J. 996, *Mohammad Ali v. Emperor*.
- (30) AIR 1930 Lah 659 (662): 31 Cr. L. J. 871, *Feroz v. Emperor*.
- (14) AIR 1914 Cal 65(68): 41 Cal 621: 14 Cr. L. J. 660 (662), *Emperor v. Suranamoyee Biswas*. (Circumstantial evidence must be exhaustive and exclude possibility of guilt by other person.)
- (13) 14 Cr. L. J. 316 (317): 1913 Pun Re No. 27 Cr: 19 I. C. 1004, *Bishen Das v. Emperor*.
- (10) 11 Cr. L. J. 82 (86): 4 I. C. 941 (Lah), *Gurdit Singh v. Emperor*.
- (26) 27 Cr.L.J. 1297 (1303): 98 I. C. 241 (Pat), *Dinamani Udai Pal v. Emperor*.
- (17) AIR 1917 Lah 366 (367): 18 Cr. L. J. 375 (376): 1916 Pun Re No. 32 Cr, *Thakar Das v. Emperor*.
- (26) AIR 1926 Lah 691 (691): 27 Cr.L.J. 1004: 7 Lah 561, *Ghauns v. Emperor*.
- (26) AIR 1926 Lah 88 (90): 7 Lah 84: 27 Cr. L. J. 709, *Rannun v. Emperor*.
- (25) AIR 1925 Lah 323 (325): 26 Cr. L. J. 760, *Majhi v. Emperor*.

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Thus, where the action of the accused is open to two constructions, one criminal and the other honest, the Court should not assume that it was criminal : the presumption of innocence should prevail.²⁸

As to what constitutes proof of guilt of an accused person in any case depends upon the bundle of facts which serve to convince the Court of the prosecution story and of the charges against the accused. Absolute certainty amounting to a demonstration of guilt can seldom be had and it must only be judged whether, in the circumstances of each particular case, the degree of probability is so high as to justify one in regarding it as certainty and in acting accordingly.²⁹ A number of facts each having some probative value, but inconclusive by itself may be quite sufficient in their cumulative effect to justify a conviction,³⁰ but a collection of separate circumstances each by itself insufficient, being quite consistent with the innocence of the accused, cannot have such evidentiary value.³¹ Where, however, the evidence for the prosecution case is in the main trustworthy, it cannot be held that it is unsupportable merely because the prosecution failed to prove a motive for the crime,^{31a} or because there are discrepancies in detail,³²

('14) AIR 1914 Cal 450 (450) : 15 Cr. L. J. 293, *Chiraguddin v. Emperor*.

('04) 1 Cr. L. J. 124 (130) : 8 C W N 278 (F B), *Hurjee Mull v. Imam Ali*.

('67) 1867 Pun Re No. 15 Cr, p. 30 (32), *Crown v. Goola*.

[See ('14) AIR 1914 Lah 433 (435) : 1914 Pun Re No. 1 Cr : 15 Cri L Jour 344, *Fazal Ahmad v. Emperor*. (Duty of prosecution is to exclude explanation of all facts consistent with innocence of accused.)]

28. ('27) AIR 1927 Pat 292 (296): 28 Cri L Jour 611, *Kumar Prasad v. Emperor*.

('13) 14 Cri L Jour 251 (252): 19 Ind Cas 507 (Bom), *Emperor v. Shivdas Onkar*.

('30) AIR 1930 Sind 99 (101): 24 S.L.R. 96: 31 Cr.L.J.117, *Nur Khan v. Emperor*.

('31) AIR 1931 Mad 689 (693) : 54 Mad 931 : 33 Cri L Jour 51, *Venkatasubba v. Emperor*.

('04) 1 Cri L Jour 610 (611): 6 Bom L R 551, *Emperor v. Ramchandra Dhondoo*.

('31) AIR 1931 Oudh 385 (386) : 32 Cri L Jour 851, *Hazari v. Emperor*.

('24) AIR 1924 Mad 816 (817) : 25 Cri L Jour 1221, *In re Narayana*.

29. ('33) AIR 1933 Oudh 340 (342) : 34 Cri L Jour 538, *Emperor v. Ram Dat*.

[See ('33) AIR 1933 Lah 1055 (1055) : 35 Cri L Jour 470, *Mohammad Rafiq v. Emperor*. (Evidence on both sides of interested nature—Truth of either version and guilt of accused should be judged from surrounding circumstances.)]

30. ('26) 27 Cri L Jour 775 (775) : 95 Ind Cas 311 (Lah), *Abdullah v. Emperor*.

31. ('27) AIR 1927 Pat 257 (261) : 28 Cri L Jour 497, *Devendra v. Emperor*.

31a. ('25) AIR 1925 Lah 328 (330) : 26 Cri L Jour 774, *Mohna v. Emperor*.

('34) AIR 1934 Lah 413 (415): 15 Lah 814: 36 Cr.L.J. 97, *Chanan Singh v. Emperor*.

('28) AIR 1928 Lah 657 (659) : 29 Cri L Jour 378, *Chandu v. Emperor*.

('30) AIR 1930 Lah 490 (490) : 31 Cri L Jour 1069, *Sewa Singh v. Emperor*. (Failure of prosecution to establish motive is not sufficient reason to disbelieve eye-witnesses.)

('10) 11 Cri L Jour 498 (500) : 7 I. C. 601 : 4 S. L. R. 38, *Emperor v. Balochkhan*.

('29) 31 Cri L Jour 765 (766) : 125 Ind Cas 55 (Lah), *Fazal Din v. Emperor*.

('28) 29 Cri L Jour 768 (768) : 110 Ind Cas 800 (Oudh), *Tilak Ram v. Emperor*.

('29) 1929 Mad W N 946 (950), *Doraiswamy Pillay v. Emperor*.

('29) 1929 Mad W N 592 (595), *Pedda Pullappa v. Emperor*.

('21) AIR 1921 Pat 109 (111) : 6 Pat L Jour 147: 22 Cri L Jour 417, *Fatu Santal v. Emperor*.

('33) AIR 1933 Oudh 333 (335, 336) : 35 Cri L Jour 45 : 8 Luck 570, *Ratan Lal v. Emperor*. (It is not the bounden duty of the prosecutor to prove the motive for a crime. It is sufficient if the prosecution prove by clear and reliable evidence that certain persons committed the offence.)

('33) AIR 1933 Oudh 340 (343): 34 Cri L Jour 538, *Emperor v. Ram Dat*. (Prosecution is not bound to furnish evidence of motive of accused.)

32. ('28) AIR 1928 Pat 100 (101): 6 Pat 627: 29 Cr. L. J. 239, *Ghanshyam Singh v. Emperor*.

unless such discrepancies are material and important and go to the root of the matter.³³ As to how far oral testimony can be relied upon, see the undermentioned cases.^{33a}

Since it is the duty of the prosecution to establish the case against the accused to a certainty, the accused is entitled to the benefit of any doubt which may reasonably arise in the prosecution case.³⁴ The maxim

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(34) AIR 1934 Lah 710 (714) : 36 Cr L. J. 419, *Emperor v. Muhammad Khan*.
[See (33) AIR 1933 Oudh 269 (271) : 35 Cri L Jour 58, *Chhote Lal v. Emperor*.
(Evidence cannot be totally rejected simply because of existence of some deliberate falsehood.)

(33) AIR 1933 Sind 166 (168) : 34 Cri L Jour 808, *Salu Mangan v. Emperor*.
(Minor discrepancies will always be found where honest witnesses come to depose.)

(29) AIR 1929 Nag 325 (327) : 30 Cri L Jour 944, *Kisandas v. Emperor*.]

[See also (30) AIR 1930 Nag 108 (109, 110) : 31 Cr. L. J. 417, *Bageshwar v. Emperor*.
(Want of interest in prosecution does not stamp evidence of witness with truth.)

(28) AIR 1928 All 280 (282) : 29 Cri L Jour 472, *Kashi Ram v. Emperor*. (Evidence against accused free from improbabilities or material contradictions — It is not proper to act on surmise disregarding clear evidence.)

(10) 11 Cri L Jour 66 (67) : 4 I. C. 864 : 1909 Pun Re No. 15 Cr, *Emperor v. Harnama*. (Minute attention to immaterial discrepancies is improper.)]

33. (29) 1929 M W N 592 (595), *Pedda Pullappa v. Emperor*. (When there are important discrepancies in evidence, it can neither be clear nor convincing.)

(33) AIR 1933 Oudh 226 (228, 229) : 8 Luck 397 : 34 Cri L Jour 935, *Har Dayal Singh v. Emperor*.

(15) AIR 1915 Lah 438 (438) : 16 Cr. L. J. 699 (699) : 1915 Pun Re No. 51 Cr, *Mohabli v. Emperor*.

[See (13) 14 Cr. L. J. 314 (315) : 19 I. C. 1002 (Cal), *Kalu Khalashi v. Emperor*.

(33) 34 Cr. L. J. 227 (230) : 141 I. C. 786 (790) (Pat), *Sadhu Dome v. Emperor*.]

33a. (07) 6 Cr. L. J. 304 (310) : 11 C W N 1085, *Nibaran Chandra v. Emperor*.
(An elementary principle of shifting evidence is to test it in the light of probabilities.)

(04) 1 Cr. L. J. 305 (310) : 28 Bom 479 : 6 Bom L R 324, *Emperor v. Bal Gangadhar Tilak*.

(33) AIR 1933 Lah 667 (668) : 34 Cri L Jour 606 (607), *Abbas Ali v. Emperor*.
(Evidence of children.)

34. (28) AIR 1923 Lah 195 (197), *Muhamad v. Emperor*.

(17) AIR 1917 All 394 (395) : 18 Cr. L. J. 435 (437), *Raghubar Dayal v. Emperor*.

(27) AIR 1927 Oudh 611 (612) : 28 Cri L Jour 688, *Gur Charan v. Emperor*.

(25) AIR 1925 Oudh 676 (678) : 26 Cr. L. J. 1042, *Bishambar Nath v. Emperor*.

(17) AIR 1917 Cal 687 (687) : 17 Cr. L. J. 9 (9, 10), *Deputy Legal Remembrancer v. Matukdhari Singh*.

(33) AIR 1933 Lah 899 (900) : 35 Cri L Jour 143, *Godha Waryam v. Emperor*.

(33) AIR 1933 Lah 714 (716) : 35 Cri L Jour 81, *Chenchal Singh v. Emperor*.

(33) AIR 1933 Lah 511 (512) : 34 Cri L Jour 1213, *Jahana v. Emperor*.

(32) AIR 1932 Lah 195 (196) : 33 Cri L Jour 501, *Dila Ram v. Emperor*. (Circumstantial evidence suspicious — Accused should be given benefit of doubt.)

(26) 28 Cri L Jour 114 (115) : 99 Ind Cas 322 (Lah), *Muza ffar v. Emperor*.

(29) 30 Cri L Jour 727 (728) : 117 I. C. 212 (Nag), *Ram Lal Lodhi v. Emperor*.

(28) 29 Cri L Jour 208 (208) : 106 Ind Cas 800 (Lah), *Kallu v. Emperor*.

(97-01) 1 Upp Bur Rul 316 (317), *King-Emperor v. Nga Tok Hla*.

(33) AIR 1933 Rang 117 (118) : 34 Cri L Jour 794, *Nga Ba Pa v. Emperor*.

(33) AIR 1933 Rang 95 (96) : 34 Cri L Jour 747, *Nga Kan Htu v. Emperor*.

(07) 5 Cri L Jour 67 (70) (Lah), *Sant Singh v. Crown*.

(11) 12 Cri L Jour 561 (562) : 12 Ind Cas 649 (Lah), *Muhamada v. Emperor*.

(13) 14 Cri L Jour 320 (320) : 19 Ind Cas 1008 (Lah), *Kesar Singh v. Emperor*.

(77) 1877 Rat 127 (128), *Queen-Empress v. Shivgod*.

(34) AIR 1934 Lah 693 (694) : 36 Cri L Jour 778, *Sardar Ahmed v. Emperor*.

(34) AIR 1934 Lah 211 (211) : 36 Cri L Jour 32, *Ghulam Ahmad v. Emperor*.

(34) AIR 1934 Lah 10 (10) : 35 Cri L Jour 615, *Lalu Rahim Mirasi v. Emperor*.

(11) 12 Cr. L. J. 497 (500) : 12 I. C. 217 (Mad), *Teli Khaja Hussain v. Emperor*.

(16) AIR 1916 All 363 (366) : 17 Cri L Jour 102 (105), *Mt. Anandi v. Emperor*.

[See (31) AIR 1931 Mad 42 (42) : 32 Cr. L. J. 262, *Public Prosecutor v. Nagaraju*.
(Accused must be given benefit of assumption that he knows the law.)]

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of law is that it is better that a guilty man should escape punishment than that an innocent person should be made to suffer.³⁵ But the doubt, the benefit of which the accused is entitled to, should be such as any rational, thinking and sensible man may fairly and reasonably entertain : not the doubts of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism.³⁶

The judgment in a criminal case should scrutinise and discuss the evidence, oral and documentary,³⁷ and should contain findings that all the ingredients required to make up the offence are proved or are not proved as the case may be.³⁸ Where the Judge makes any local inspection, the nature of such inquiry should be set forth in the judgment if it has influenced his judgment.³⁹

7. Reasons for decision. — The section requires that the judgment should give reasons for the decision on the various points arising for determination.¹ The judgment should, therefore, contain a discussion of the evidence.² But a judgment is not required to be a resume or reproduction of all the evidence on record. A Court is entitled to and should select such important evidence as it considers necessary to support a decision on the material points arising for consideration.^{2a} It is not proper to base a conviction merely on the

[See also ('14) AIR 1914 Sind 116 (117) : 7 Sind L R 108 : 15 Cri L Jour 488, *Emperor v. Tikam Lakhi*. (Prosecution in alternative based on two contradictory statements—Presumption in favour of their reconciliation must be made.) ('14) AIR 1914 Sind 115 (116) : 7 Sind L R 96 : 15 Cri L Jour 379, *Imambux Khudabux v. Emperor*. (Do.))]

35. ('31) AIR 1931 Cal 752 (757) : 33 Cri L Jour 85, *Sali Sheikh v. Emperor*.

36. See ('24) AIR 1924 All 511 (513) : 26 Cri L Jour 324, *Lakhan v. Emperor*.

37. See ('20) AIR 1920 Nag 71 (72) : 21 Cri L Jour 140, *Pirbax v. Mt. Baji*.

38. ('20) AIR 1920 Nag 71 (73) : 21 Cri L Jour 140, *Pirbax v. Mt. Baji*.

('70) 13 Suth W R Cr 50 (50), *Queen v. Mahomed Ali*.

('30) AIR 1930 Lah 1051 (1052) : 32 Cri L Jour 271, *Ahmad Ali v. Emperor*.

[See also ('05) 9 Cal W N cclxxxvi (cclxxxvi), *Mahammed Hussain v. Emperor*.

39. ('96) 1896 All W N 73 (74), *In the matter of the petition of Kala*.

('25) AIR 1925 Cal 353 (353) : 25 Cri L Jour 705, *Bhola Nath Nandi v. Kedar Nandi*. (Record of local inspection should be allowed to be objected to if desired before judgment.)

[See also ('23) AIR 1923 Cal 320 (321) : 23 Cri L Jour 502, *Aziz Mandal v. Girish Chandra*. (Local inspection used solely for understanding evidence—Judgment is not vitiated thereby.)]

Note 7

1. ('38) AIR 1938 Cal 551 (552) : 39 Cri L Jour 835, *Nirmal Kumar v. Emperor*. (Merely stating that Judge agrees with opinion of assessors is no judgment.)

(1865) 4 Suth W R Cr 18 (18), *Queen v. Aruj Shaikh*.

[See ('95) 1895 Rat 833 (834), *Queen-Empress v. Dhurmiya*. (There should be sufficient particulars in a judgment to enable appellate Court to know what facts were found and how.)]

2. ('67) 7 Suth W R Cr 25 (26), *Queen v. Nawab Khan*.

[See ('37) AIR 1937 Nag 394 (395, 396) : 39 Cri L Jour 75 : 1 L R (1938) Nag 157, *Raghunathmal v. Patiram*. (A mere statement in the judgment that the Magistrate has gone carefully through the whole evidence and that there are many discrepancies in the depositions of witnesses is no discussion of the evidence at all.)]

2a. ('37) AIR 1937 Cal 99 (112) : 38 Cr.L.J. 818 (SB), *Jitendra Nath v. Emperor*.

('39) AIR 1939 Rang 263 (266) : 40 Cri L Jour 871, *Nga Than v. The King*. (The judgment should contain such of the evidence as is necessary to ascertain the facts deposed to, and the importance of and the value to be attached to the evidence of the witnesses, and the reasoning based on this evidence on which Judge founds his decision and his sentence.)

appearance and manner of speech of the accused.³ Where there are several accused persons, the judgment should analyse the evidence against each of them separately.⁴

The Court should arrive at an independent conclusion on the case before it.⁵ A reference to the opinion of the Advocate-General or the Public Prosecutor in the judgment is irrelevant.⁶

8. Remarks in the judgment.—A judgment should not contain any damaging remarks against the character of persons, neither parties nor witnesses before the Court who, therefore, have had no opportunity of defending themselves against such remarks.¹ Even in the case of parties and witnesses the Court should not make any unfounded and unnecessary observations which are calculated to injure their reputation or wound their feelings, especially when the person attacked has had

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(‘33) AIR 1933 All 690 (696) : 34 Cr.L.J. 967 : 55 All 1010, *Jhabwala v. Emperor*.
(‘24) AIR 1924 Pat 181 (182) : 24 Cr. L. J. 181, *Durga Singh v. Emperor*. (Magistrate drawing inferences from documents and from probabilities and giving strong reasons for his conclusion—Judgment is not defective though there is no reference to oral evidence.)

3. (‘22) 23 Cri L Jour 161 (162) : 65 Ind Cas 625 (Lah), *Ghulam Mahomed v. Emperor*. (An ugly stammering nervous man may be innocent while a good looking plausible man may be a scoundrel.)

4. (‘40) AIR 1940 Sind 113 (113, 114) : 41 Cr.L.J. 724, *Abdul Karim v. Emperor*.
(‘38) AIR 1938 Pat 34 (35) : 39 Cri L Jour 221, *Mewalal Singh v. Emperor*. (Evidence adduced on behalf of the accused in support of their case must also be carefully and fully considered.)

(‘37) AIR 1937 Sind 26 (27, 28) : 30 S.L.R. 382:38 Cr.L.J. 363, *Ghousbux v. Emperor*.

(‘24) AIR 1924 Oudh 335 (336) : 27 O C 32 : 25 Cri L Jour 913, *Idu v. Emperor*.

(‘24) AIR 1924 Mad 350 (351) : 25 Cri L Jour 790, *In re Sama Chari*.

(‘24) AIR 1924 Rang 67 (67) : 25 Cri L Jour 205, *Nga Mu v. Emperor*.

(‘25) AIR 1925 Sind 204 (205) : 25 Cr.L.J. 1377:19 S.L.R. 96, *Khairo v. Emperor*.

(‘83) 1883 All W N 145 (146), *Empress v. Gayadin*.

(‘16) AIR 1916 Mad 834 (834) : 16 Cr. L. J. 809 (809), *In re Ramaswami Naidu*. (When the evidence against each of the accused is not equally strong it should be considered separately.)

5. See (‘07) 7 Cr. L. J. 400 (401):12 C W N 604, *Mohesh Sonar v. King-Emperor*. (Postponement of case to enable the accused to get a ruling from the High Court.)

6. (‘18) AIR 1918 Bom 226 (227, 228) : 42 Bom 400 : 19 Cri L Jour 607, *In re Hubert Crawford*. (Question of jurisdiction is for the Magistrate to decide and counsel’s opinion is irrelevant.)

Note 8

1. (‘38) AIR 1938 Sind 103 (105) : 39 Cri L Jour 524, *Kartarchand v. Emperor*. (Person neither accused nor witness — Magistrate is not justified in condemning him without giving him opportunity of being heard.)

(‘34) AIR 1934 Sind 68 (69) : 35 Cri L Jour 1138, *Emperor v. Md. Umer*. (Magistrate should reserve mistake or irregularity of police-officer for separate official correspondence—Judgment should not comment on conduct of police-officer who has had no opportunity to explain it.)

(‘34) 36 Cri L Jour 383 (383):35 P L R 373 (373, 374), *Bhagat Singh v. Emperor*. (High Court may expunge remarks.)

(‘21) AIR 1921 Bom 394 (395) : 45 Bom 1127:22 Cr.L.J. 335, *In re Holibasappa*.

(‘29) AIR 1929 Lah 201 (202) : 29 Cri L Jour 1102, *Maharam v. Emperor*.

(‘33) AIR 1933 Sind 91 (92):27 Sind L R 13:34 Cr.L.J. 367, *Tejmal Narayandas v. Emperor*.

(‘25) AIR 1925 Lah 392 (394):26 Cr.L.J. 1326:6 Lah 166, *Benarsi Das v. Emperor*.

(‘97) 21 Mad 83 (91) : 2 Weir 503, *Queen-Empress v. Raman*. (Judge should not censure conduct of a police-officer without giving opportunity to Public Prosecutor to call him.)

(‘90) 18 Cal 201 (214) : 17 I A 159 : 5 Sar 607 (PC), *Kali Kishore v. Bhuson Chander*. (Hasty, uncalled for, and indiscreet expressions casting suspicions of grave crimes against unnamed absent persons, without one tittle of evidence to

A judgment should not contain any remarks calculated to throw doubt on the conclusion which it embodies.⁶ See also Note 13.

In cases which have assumed a communal aspect, the language of the judgment should not be such as to promote communal enmity.⁷

9. Offence to be specified. — It is necessary that the judgment should distinctly specify the offence or offences of which the accused is convicted.¹ This section also requires that where the offence is under the Penal Code or under any other law, the section of the Act under which the accused is convicted should be stated.²

Where a Judge convicts the accused on a charge of culpable homicide not amounting to murder, he should state in his judgment under which of the exceptions in S. 300 of the Penal Code the case falls.³

10. "Punishment to which he is sentenced." — Where a Court finds an accused person guilty, it is bound to pass some sentence.¹ This section shows that the sentence is part of the judgment² and a

6. ('38) AIR 1938 Sind 103 (105) : 39 Cri L Jour 524, *Kartarchand v. Emperor*. (Order of Magistrate exculpating rather than inculcating accused — Remarks seriously to prejudice of accused are not justified.)

('22) AIR 1922 Pat 97 (99) : 23 Cri L Jour 371, *Birnarayan Singh v. Emperor*. (Verdict of not guilty—No suggestion against accused except that of establishing his innocence should be made.)

('78) 2 All 33 (35), *Empress of India v. Chatter Singh*. (Adding a note throwing doubt on the conclusion on evidence is unwarranted.)

('30) 1930 Mad W N 1253 (1254), *Nanjunda Naicken v. Ratnasabapathi*. (After scrutinising the evidence against the accused it is improper for a Magistrate to observe that the accused has "escaped from the clutches of the law.")

7. ('36) AIR 1936 Lah 429 (433) : 37 Cri L Jour 661, *Emperor v. Attah Ullah*.

Note 9

1. ('75) 7 N W P H C R 137 (144), *Queen v. Jamurha*.

('22) AIR 1922 All 21 (22) : 23 Cri L Jour 248, *Munshi Lal v. Emperor*.

(1865) 4 Suth W R Cr 19 (19), *Queen v. Bhobunesshur*.

2. ('95) 1895 Rat 806 (806), *Queen-Empress v. Kallappa*.

[See also ('06) 9 Cr. L. J. 271 (272) : 1 Sind L R 32, *Crown v. Haji Mir Mahmud*. (Section containing several sub-sections—Sub-section under which accused is convicted must be stated.)]

3. ('66) 1 Agra Cr 3 (6), *Government v. Kalika Misser*.

Note 10

1. ('84) 1884 A W N 219 (219), *Empress v. Kalua*.

('86) 1886 Rat 291 (292), *Queen-Empress v. Jakin*.

('91) 1891 Rat 545 (546), *Queen-Empress v. Lakshmibai*.

('97) 1897 Rat 892 (893), *Queen-Empress v. Sadu*.

('95) 22 Cal 805 (809), *Dewan Singh v. Queen-Empress*.

('69) 2 Weir 305 (306).

('72-92) 1872-1892 Low Bur Rul 409 (409), *Queen-Empress v. Mi Bauk*.

(1865) 3 Suth W R Cr L 15 (15).

[See also ('30) AIR 1930 Pat 241 (242) : 9 Pat 113 : 31 Cri L Jour 789, *Narayan Maharana v. Emperor*. (Where the offence is utterly trivial and the prosecution is inspired by motives other than the pursuit of justice and the Magistrate is convinced of the commission of offence from evidence on record, Magistrate should give effect to his opinion by convicting the accused and imposing a purely nominal penalty.)]

[But see ('28) AIR 1928 Nag 188 (189) : 24 Nag L R 110 : 29 Cri L Jour 506, *Sitaram Kunbi v. Emperor*. (There is no law that says that penalty must follow conviction.)]

See also S. 245 Note 6, S. 258 Note 6 and S. 309 Note 15.

('95) 1895 Rat 804 (805), *Queen-Empress v. Sahadat Miran*. (Cannot therefore be subsequently altered.)

Section 367 Notes 8-10

Section 367
Notes 10-11

Court has, therefore, no power to postpone the passing of the sentence to some future date once it convicts the accused.³

It is the duty of a Court, pronouncing a sentence, to define precisely the nature of the sentence intended to be passed; the sentence ought to be self-contained, so that the functionary who has to execute it should have nothing to do but to obey the directions given therein without making an inquiry on his own account.⁴ Thus, a direction in a sentence that the accused should be detained in a reformatory school for a period of five years unless he should sooner attain the age of eighteen years would not be a legal sentence, as it would leave to the officer-in-charge of the school to determine when the sentence would expire, otherwise than by reference to the warrant.⁵

11. "Shall be dated and signed by the presiding officer . . . at the time of pronouncing it." — The judgment must be dated and signed by the presiding officer,¹ at the time of pronouncing it in open Court.²

The word 'sign' has not been defined in this Code. It has been held to mean the "writing of the name of the person who is the signatory, so that it may convey a distinct idea to others that the writing indicates a particular individual whose signature it purports to be."³ Merely putting the initials of the presiding officer has been held not to amount to signing the judgment within the meaning of this section.⁴ The signature should be made with a pen and ink and not with a stamp.⁵

The omission to date and sign a judgment by the presiding officer is, however, only an irregularity covered by S. 537 and will not render the judgment void.⁶ Similarly the affixing of a signature with a stamp instead of with pen and ink is merely an irregularity.⁷

3. ('12) 13 Cri L Jour 288 (288) : 14 Ind Cas 672 (Bom), *Emperor v. Keshavlal*.

4. ('01) 24 Mad 13 (15, 16) : 1 Weir 882, *Queen-Empress v. Rama*.

('93) 15 All 208 (209) : 1893 A W N 107, *Queen-Empress v. Narain*.

See also S. 32 Note 3.

5. ('93) 15 All 208 (209) : 1893 A W N 107, *Queen-Empress v. Narain*.

Note 11

1. ('89) 1889 All W N 181 (184), *Empress v. Jia Lal*.

2. ('17) AIR 1917 Mad 340 (341) : 17 Cri L Jour 166 (166) : 40 Mad 108, *In re Savarimuthu Pillai*.

('89) 1889 Rat 429 (429), *Queen-Empress v. Ganpat*.

[See ('23) AIR 1923 Rang 44 (44, 45) : 24 Cri L Jour 584, *Rambit v. Emperor*. (Judgment dated and signed and sent to the clerk to deliver—*Held*, it cannot be treated as a mere irregularity.)]

3. ('30) AIR 1930 Mad 867 (868) : 54 Mad 252 : 32 Cr. L. J. 430, *Brahmiah v. Emperor*.

4. ('30) AIR 1930 Mad 867 (868) : 54 Mad 252 : 32 Cri L Jour 430, *Brahmiah v. Emperor*. (And is an illegality.)

5. ('83) 6 Mad 396 (398) : 2 Weir 328, *Subramanya Ayyar v. Queen*.

('70) 14 Suth W R Cr 81 (81), *Queen v. Dedar Nushyo*.

6. ('98) 2 Weir 711 (712), *In re Venkataramanayya*.

('25) AIR 1925 All 299 (300) : 47 All 284:26 Cr. L. J. 688, *Ram Sukh v. Emperor*.

('30) AIR 1930 Rang 77 (78) : 7 Rang 370 : 30 Cr. L. J. 1166, *Mohamed Hayat v. Emperor*.

7. ('83) 6 Mad 396 (398, 399) : 2 Weir 328, *Subramanya Ayyar v. Queen*.

See also S. 75 Note 3.

Where a case was heard by only three Magistrates of a Bench, but the judgment was signed by seven, it was held that this was an illegality.⁸ As to judgments by a Bench of Magistrates, see S. 350A and Notes thereto.

Section 367
Notes 11-14

See also S. 265 Note 3 and S. 537 Note 12.

12. Judgment in the alternative — Sub-section (3). — Sub-section (3) of this section allows a judgment to be given in the alternative, when there is a doubt as to which of two sections or which of two parts of the same section applies.¹ Such a judgment in the alternative can be passed only in cases in which, not the *facts*, but the application of the *law* to the facts is doubtful.² See also Note 1 to S. 236.

Where a judgment does not state in *express* terms that the Court is in doubt under which of two sections or which of two parts of the same section the offence falls, as required by this section, it is only an irregularity which will not vitiate the judgment.³

13. Judgment in cases of acquittal. — Where the accused is acquitted, the judgment should state what the offences are of which he is acquitted and should direct that he be set at liberty.¹ When a verdict of not guilty is recorded, the Court should not, in its judgment, make any suggestion against the accused, except that of establishing his innocence.² See also Note 8.

As soon as a judgment of acquittal is pronounced, the accused is entitled to be discharged from custody and his further detention is illegal and no formal warrant of release addressed by the Court to the superintendent of the jail is necessary.³

14. Judgment in capital cases — Sub-section (5). — This sub-section requires that if an accused person is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, it shall, in its judgment, state the reasons why the

8. ('31) AIR 1931 Mad 494 (495) : 32 Cr.L.J. 971, *Picha Kudamban v. Servaikar Thevan*.

Note 12

1. ('40) AIR 1940 Pat 289 (290) : 19 Pat 369, *Nebti Mandal v. Emperor*. (Charge under Ss. 302 and 201, I. P. C.—Doubt as to the offence committed by accused —Judgment may be given in the alternative.)

('21) AIR 1921 Bom 3 (13) : 45 Bom 834 : 22 Cr. L. J. 241 (F B), *Purshottam Ishwar v. Emperor*.

('86) 1886 Pun Re No. 5 Cr, p. 7 (8), *Bura v. Empress*.

[See also ('68) 4 M H C R Cr 51 (52) : 1 Weir 156, *In re Palany Chetty*.]

2. ('14) AIR 1914 Lah 549 (550) : 14 Cr. L. J. 664 (665) : 1913 Pun Re No. 11 Cr, *Partapa v. Emperor*.

('75) 7 N W P H C R 137 (143), *Queen v. Jamurha*.

('87) 1887 Pun Re No. 11 Cr, p. 19 (21, 22), *Khan Muhammed v. Empress*.

3. ('99) 2 Weir 440 (440), *Takirugadu v. Sivayya*.

See also S. 537 Note 12.

Note 13

1. ('92) 1892 All W N 157 (157), *Queen-Empress v. Abdul Majid Khan*.

2. ('22) AIR 1922 Pat 97 (99) : 23 Cr. L. J. 371, *Bir Narayansingh v. Emperor*.

3. ('69) 5 Mad H C R App ii (ii, iii).

[See also ('38) AIR 1938 All 534(535) : 39 Cr.L.J. 971, *Md. Yakub v. Emperor*.

See also S. 220 Note 1 and S. 306 Note 5.

Section 367
Notes 14-15

sentence of death was not passed.¹ It, therefore contemplates sentences of death in capital cases as the ordinary rule and sentences of transportation for life as the exception. Before passing the lesser sentence, the Judge should find that there are really extenuating circumstances, not merely an absence of aggravating circumstances; it is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so.² But if the Judge is in doubt whether a sentence of death or a sentence other than death should be passed, the doubt, like all other doubts, should result in favour of the accused.³

This section, however, does not indicate what reasons should be considered sufficient for not passing a sentence of death in a capital case.⁴ Such reasons must be in accordance with established legal principles.⁵

15. Trial by jury—Heads of charge to the jury—Proviso.—

Where the case is tried by jury, the Judge is not bound to write a judgment; it is enough if he records the heads of the charge to the

Note 14

1. ('35) AIR 1935 Lah 337(338): 36 Cr.L.J. 1001:16 Lah 1131, *Mewa v. Emperor*. ('35) AIR 1935 Oudh 265 (268): 36 Cr. L. J. 529, *Naresh Singh v. Emperor*. ('10) 11 Cr. L. J. 481 (481, 482): 7 I. C. 397 (Mad), *In re Kurumba Hosakeri*. ('27) AIR 1927 Oudh 588 (590): 28 Cr. L. J. 980, *Dwaraka v. Emperor*. (1893-1900) 1893-1900 Low Bur Rul 112 (113), *Maung U v. Empress*. ('22) AIR 1922 Low Bur 32 (33):11 Low Bur Rul 323: 23 Cr. L. J. 437, *Emperor v. Nga Shwe Hla U*. ('33) AIR 1933 Rang 61 (61): 34 Cr. L. J. 699, *Nga Sein Tun v. Emperor*. (1864) 1864 Suth W R Cr Gap 27 (27), *Queen v. Dabee*.
2. (1900-02) 1 Low Bur Rul 216 (219) (F B), *Crown v. Tha Sin*. ('35) AIR 1935 Oudh 265 (268): 36 Cr. L. J. 529, *Naresh Singh v. Emperor*. ('33) AIR 1933 Nag 307(309): 34 Cr. L. J. 1168: 30 N L R 9, *Local Government v. Sitrya Arjuna*. (The fact that the assessors gave their opinion that the accused was not guilty is no reason for passing the lesser sentence.) ('06) 3 Cr. L. J. 25 (26): 3 Low Bur Rul 111, *Shwe Cho v. Emperor*. (This subsection applies also to the High Court on its original criminal jurisdiction.) ('22) AIR 1922 Low Bur 32(33,34): 11 Low Bur Rul 323: 23 Cr.L.J. 437, *Emperor v. Nga Shwe Hla U*. ('03-04) 2 Low Bur Rul 63 (64), *Hamid v. King-Emperor*. ('24) AIR 1924 Rang 179(180):25 Cr.L.J. 1121:1 Rang 751, *Mi She Yi v. Emperor*. [See ('30) AIR 1930 Cal 193(195): 31 Cr.L.J. 817, *Emperor v. Dukari Chandra*. (Per Cumming, J.)]
3. ('72-92) 1872-1892 Low Bur Rul 459 (461), *Nga Po Aung v. Queen-Empress*. [But see (1900-02) 1 Low Bur Rul 216 (220) (FB), *Crown v. Tha Sin*. (Dictum of Irwin, J., that such doubt should be left to the High Court, disapproved in 3 Cri L Jour 25.)]
4. ('06) 4 Cri L Jour 132 (133): 3 Low Bur Rul 163, *Emperor v. Nga Tun*.
5. ('26) AIR 1926 Lah 428 (429): 7 Lah 141: 27 Cri L Jour 764, *Waryam Singh v. Emperor*. (Voluntary drunkenness is no reason for not inflicting death sentence.) [See ('35) AIR 1935 Lah 337 (338): 36 Cri L Jour 1001: 16 Lah 1131, *Mewa v. Emperor*. (Common intention to murder brutally carried out — All accused taking part in beating—Merely because by whom the fatal blow is caused is not known, is no reason for awarding lesser penalty.) ('33) AIR 1933 Nag 307 (309): 34 Cr.L.J. 1168: 30 Nag L R 9, *Local Government v. Sitrya Arjuna*. (Fact that assessors gave their opinion that accused was not guilty is no reason for passing lesser sentence.) ('29) AIR 1929 All 160(161): 30 Cri L Jour 559, *Parshadi v. Emperor*. (It should not be a practice to assume that where the particular person cannot be found to be guilty of the fatal blow the capital sentence should not be inflicted.)]

jury. As the law allows an appeal in cases of trial by jury on the ground of misdirection in the charge to the jury, the Judge should record the heads of the charge in such a form as to enable the Court of appeal to judge whether the facts and circumstances of the case were properly placed before the jury and the law correctly explained to them.¹ It is not sufficient for the Judge merely to state in his record that the law on the subject was explained and that the abstract of the evidence recorded in Court was given to the jury.²

Although there is nothing in this section as to when the heads of the charge should be written, it is desirable that the Judge should

Section 367 Note 15

Note 15

1. ('37) AIR 1937 Cal 266 (268) : 38 Cr. L. J. 767, *Madan Tilakdas v. Emperor*. (Heads of charge to jury should clearly and distinctly show what the exposition of the law actually was.)
- ('26) AIR 1926 Cal 139 (145) : 53 Cal 372 : 27 Cr.L.J. 266, *Khajiruddin v. Emperor*.
- ('98) 25 Cal 736 (738) : 2 Cal W N 484, *Abbas Pcada v. Queen-Empress*.
- ('27) AIR 1927 Cal 936 (936) : 28 Cri L Jour 478, *Taka Mia v. King-Emperor*.
- ('29) AIR 1929 Cal 170 (171) : 30 Cri L Jour 912, *Dwarka v. Emperor*.
- ('27) AIR 1927 Cal 460 (461) : 28 Cri L Jour 278, *E. St. C. Moss v. Emperor*.
- ('26) AIR 1926 Cal 895 (897) : 27 Cri L Jour 926, *Emperor v. G. C. Wilson*.
- ('07) 5 Cr.L.J. 427 (431) : 34 Cal 698 : 11 C W N 666, *Jatindra Nath v. Emperor*.
- ('22) AIR 1922 Cal 192 (192) : 24 Cr.L.J. 8, *Abdul Gafur Khan v. King-Emperor*.
- ('19) AIR 1919 Cal 439 (442) : 20 Cri L Jour 661, *Afiruddi v. King-Emperor*.
- ('97) 25 Cal 561 (563), *Biru Mandal v. Queen-Empress*.
- ('75) 23 Suth W R (Rules) 7 (7, 8). (The record of the charge to the jury should represent with absolute certainty the substance of the charge to enable the Appellate Court to see that the case was fairly and properly placed before the jury.)
- ('75) 23 Suth W R Cr 32 (33), *Queen v. Kasim Sherik*.
- ('09) 9 Cr.L.J. 452(453) : 38 Cal 281 : 11 C.O. 970, *Fanindra Nath Banerjee v. Emperor*.
- ('17) AIR 1917 All 173(175) : 18 Cr.L.J. 491(493) : 39 All 348, *Ikramuddin v. Emperor*.
- ('08) 8 Cri L Jour 35 (37) : 10 Bom L R 565, *In re Shambhul*.
- ('95) 2 Weir 499 (499), *In re Dara Narayana Reddi*.
- ('98) 2 Weir 385 (385), *In re Laxumana*.
- ('88) 2 Weir 493 (495, 496), *In re Anchula*.
- ('16) AIR 1916 Pat 236 (237, 238) : 17 Cri L Jour 353 (355) : 1 Pat L Jour 317, *Elknath Sahay v. Emperor*.
- ('68) 9 Suth W R Cr 52 (53), *Queen v. Denonath*.
- ('96) 1896 Rat 850 (850), *Queen-Empress v. Fakira Venkappa*. (In long trial Judge ought to read to jury important testimonies in trial *in extenso*.)
- [See also ('25) AIR 1925 Cal 926 (927) : 26 Cr.L.J. 1279, *Abdul Rahim v. Emperor*.
- ('21) AIR 1921 Cal 269 (270) : 23 Cri L Jour 41, *Gangadhar Goala v. Reed*.
- ('24) AIR 1924 Cal 771 (772) : 51 Cal 79 : 25 Cri L Jour 945, *Kiamuddi v. King-Emperor*. (Judge is not bound to write down everything he says to the jury.)]
- ('97) 1897 Rat 917 (917), *Queen-Empress v. Baswantappa*. (It cannot be presumed that the Judge said only that which is recorded.)]
2. ('03) 1903 All W N 232 (232), *Emperor v. Baij Nath*.
- ('25) AIR 1925 Cal 1055 (1056) : 26 Cri L Jour 1151, *Rahamali v. Emperor*.
- ('25) AIR 1925 Pat 797(801, 802) : 4 Pat 626 : 27 Cr.L.J. 49, *Rupan Singh v. Emperor*.
- ('28) AIR 1928 Pat 420 (425) : 7 Pat 361 : 29 Cri L Jour 804, *Chotan Singh v. Emperor*. (Moreover, mere explanation of sections in words of Judge without reading out sections is also undesirable.)
- ('20) AIR 1920 Cal 564 (564) : 47 Cal 795 : 21 Cr.L.J. 694, *Kasimuddin v. Emperor*.
- ('30) AIR 1930 Cal 712 (713) : 32 Cri L Jour 236, *Hafez Ali Haldar v. Emperor*.
- ('30) AIR 1930 Pat 243 (244, 245) : 9 Pat 148 : 31 Cri L Jour 786, *Dhanpat Tiwari v. Emperor*. (Per Dhavle, J.)
- [See also ('37) AIR 1937 Cal 266 (268) : 38 Cr. L. J. 767, *Madan Tilakdas v. Emperor*. (Merely stating that no fewer than twenty-nine sections of the Penal Code were read and explained to jury is not enough.)]
- [See however ('32) AIR 1932 Cal 786 (786) : 34 Cr. L. J. 56, *Hanif v. Emperor*. (No mention as to how sections were explained to jury—No difficulty about sections—Charge is not bad.)]

Section 367
Notes 15-17

write them out as soon as possible after the delivery of the charge to the jury and while the facts are still fresh in his mind.³

In cases of trials by jury, the written heads of charge are the only record of the Judge's address to the jury and the Court of appeal must perforce base its decision in an appeal upon that record.⁴

See also the undermentioned cases.⁵

16. Judgment not in conformity with section — Procedure in appeal. — Where an appellate Court finds that the trial Court has not written a judgment in conformity with the provisions of this section, the proper procedure is to reverse the judgment of the lower Court and to order a *de novo* hearing and not to retain the case on its own file and ask the lower Court to record a proper judgment.¹ See also Notes to section 424.

17. Sub-section (6). — Even before the addition of sub-s. (6) to this section in 1923, it was held by the High Court of Madras that the words "offence (if any)" in sub-s. (2) of this section and the wording of sub-s. (2) of S. 117 suggested that the provisions of this section would apply to orders under S. 118 and sub-s. (3) of S. 123.¹ The High Court of Calcutta held in the undermentioned case² that, whether this section applies or not, the order should show that the case of each counter-petitioner had been considered on its own merits. The enactment of sub-s. (6) to the section in 1923 gives legislative recognition to the view of the Madras High Court mentioned above. This sub-section makes an order under S. 118 or S. 123, sub-s. (3), a judgment for the purposes of this section; and, therefore, by analogy an order passed under either of the two sections must be self-contained.

3. ('09) 9 Cr. L. J. 452 (453) : 38 Cal 281 : 1 I. C. 970, *Fanindra Nath v. Emperor*. [See ('75) 23 Suth W R (Rules) 7 (7). (It is not necessary that a charge to jury should be reduced to writing before delivery.)]

4. ('08) 8 Cri L Jour 35 (37) : 10 Bom L R 565, *In re Shambhulal*. [See also ('36) AIR 1936 Sind 49 (50) : 37 Cr. L. J. 783, *In re Md. Aslam*. (Statements made by Judge in charge to jury form part of judicial record and must be taken as correct.)]

('98) 2 Cal W N 702 (706), *Queen-Empress v. Bhairab*.]

5. ('35) AIR 1935 Cal 31 (32) : 36 Cr. L. J. 480, *Kasimuddin v. Emperor*. (Under proviso to S. 367 (5) of the Cr. P. C., it is not necessary for the Sessions Judge to record the heads of re-charge in respect of the fresh charge under a particular section, when the fresh charge is the same as the original charge already recorded; and the omission to do so is not fatal to a conviction.)

('30) AIR 1930 Rang 351 (352) : 8 Rang 372 : 32 Cri L Jour 23, *U Ba Thein v. Emperor*. (Practice of Rangoon High Court in taking only shorthand notes in murder cases deprecated.—Record of charge must be made in all appealable cases.)

Note 16

1. ('20) AIR 1920 Mad 171 (172) : 21 Cri L Jour 52, *In re Karuppiiah Pillai*. See also S. 423 Note 28.

Note 17

1. ('20) AIR 1920 Mad 337 (342) : 43 Mad 511 : 21 Cri L Jour 402 (FB), *Venkata-chinnayya v. Emperor*.

2. ('10) 11 Cri L Jour 23 (23, 24) : 37 Cal 91 : 5 I C 29, *Kalu Mirza v. Emperor*. [See also ('16) AIR 1916 Lah 412 (413) : 17 Cri L Jour 142 (143), *Muhammad Hussain v. Emperor*.

('08) 8 Cri L Jour 207 (208) : 35 Cal 929 : 12 C W N 992, *Ajodhya Prasad Singh v. Emperor*.

('09) 10 Cr. L. J. 591 (591) : 1910 Pun Re No. 4 Cr : 4 IC 432, *Bahadur v. Emperor*.]

It must show that the Court has considered the evidence against each of the suspected persons and has found that the evidence proves the case against each of them individually.³

Section 367
Notes 17-18

18. Effect of non-compliance with the section. — See Note 12 to Section 537.

368.* (1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

Section 368

(2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

1. Form of sentence. — A sentence of death should direct that the accused be hanged by the neck until he be dead. An order that the accused is sentenced "to receive the supreme penalty" is not in proper form.¹

369.† Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

Section 369

Synopsis

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|--------------------------------|--|
| 1. Legislative changes. | 5. Power of High Court to review its judgment. |
| 2. Scope of the section. | 6. "Save as otherwise provided by this Code." |
| 3. Judgment when final. | |
| 4. "Alter or review the same." | |

Other Topics (miscellaneous)

- | | |
|--|--|
| Damaging observations against witness — Power to re-consider. See Note 4. | Judgment — Final only after pronouncing and signing. See Note 3. |
| Final orders — Cannot be reviewed — Examples. See Note 2. | Judgment — Means decision in a trial. See Note 2. |
| Inherent power of High Court — Power to review its own order not included. See Note 6. | Principle — Not applicable to administrative or ministerial orders. See Note 2. |
| Interlocutory orders — Can be re-considered—Examples. See Note 2. | Revision application in High Court—Dismissal for default—Fresh application — Whether can be entertained. See Note 5. |

* 1882 : S. 368; 1872 : Ss. 319, 321; 1861 : Ss. 50, 51, 53.

† Code of 1898, original S. 369.

369. No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Ss. 395 and 484 or to correct a clerical error.

1882 : S. 369; 1872 : S. 464; 1861—Nil.

3. ('40) AIR 1940 Sind 113 (114) : 41 Cri L Jour 724, *Abdul Karim v. Emperor*. ('37) AIR 1937 Sind 26 (27) : 30 S L R 382 : 38 Cr. L. J. 363, *Ghousbux v. Emperor*.

Section 368 — Note 1

1. ('36) AIR 1936 Rang 46 (47) : 37 Cri L Jour 290, *Nga Thein Mg. v. Emperor*.

Section 369
Notes 1-2

1. Legislative changes.—There was no provision corresponding to this section in the Code of 1861. Section 464 of the Code of 1872 provided that a judgment or final order cannot be altered or reviewed by the Court giving such judgment or order.

Changes made by Codes of 1882 and 1898 —

- (1) Section 369 of the Code of 1882 excluded High Courts from the purview of this section. (See Note 6.)
- (2) The words “except as provided in sections 395 and 484 or to correct a clerical error” were introduced.

Changes made in 1923 —

The words “save as otherwise provided such High Court, no Court” were substituted for the words “no Court other than a High Court” and the words “as provided in sections 395 and 484, or” were omitted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923. (See Note 6.)

2. Scope of the section. — It is a universal principle of law that, when a matter has been finally disposed of by a Court, the Court is, in the absence of a direct statutory provision, *functus officio* and cannot entertain a fresh prayer for the same relief unless and until the previous order of final disposal has been set aside. (See Note 19 to S. 435.) This section is based on this principle. The judgment of a Criminal Court is final, as far as that Court is concerned; and, on signing and pronouncing it, such Court becomes *functus officio* and has, therefore, no power to review, override, alter or interfere with the judgment in any manner except —

- (1) where it is otherwise provided by the Code or by any other law for the time being in force (see Note 6); or
- (2) for the purpose of correcting clerical errors.¹

Section 369 — Note 2

1. ('66) 5 Suth W R Cr 61 (64): Beng L R Sup Vol 436(FB), *Queen v. Godai Raout*. (Dissenting from 3 Suth W R Cr 45.)
- ('72) 17 Suth W R Cr 2 (2), *In re Krishna Churan*. (5 Suth W R Cr 61 foll.)
- ('26) AIR 1926 Mad 420 (420,421): 27 Cr.L.J. 184, *In re Arumuga Padayachi*.
- ('24) AIR 1924 Mad 640 (641): 26 Cr.L.J. 370: 47 Mad 428, *In re Somee Naidu*.
- ('30) AIR 1930 Mad 1001 (1002): 53 Mad 870: 32 Cri L Jour 429, *Ekambara v. Alamelammal*.
- ('68) 4 Mad H C R App xix (xix).
- ('25) AIR 1925 Oudh 476 (477): 26 Cri L Jour 543, *Paras Ram v. Emperor*.
- ('11) 12 Cr. L. J. 473 (474): 12 Ind Cas 81 (LB), *Emperor v. Nga Ke Maung*.
- ('71) 3 N W P H C R 273 (275), *Queen v. Tiloke Chand*.
- ('66) 6 Suth W R Cr 70 (70), *Gunowree Bhowa v. Jhandoo*. (A lower Court has no power to quash its own conviction though illegal.)
- ('70) 7 Bom H C R Cr 67 (67), *Reg. v. Mehtarji Gopalji*.
- ('17) AIR 1917 Pat 110 (111): 19 Cri L Jour 225, *Lachmi Singh v. Bhusi Singh*. (Assumes the applicability of this section to orders under S. 146 of the Code.)
- ('16) AIR 1916 Mad 1220 (1220): 16 Cr.L.J. 584, *Narasinga Rao v. Vittoba Rao*.
- ('12) 13 Cri L Jour 301 (301): 14 Ind Cas 765 (LB), *Nga Than v. Emperor*. (An order under S. 437 cannot be reviewed.)
- ('34) AIR 1934 Oudh 85 (85, 86): 35 Cri L Jour 417, *Rameshwar Dutt Singh v. Bharath Singh*. (Order of reference under S. 438 cannot be reviewed by subsequent order.)

See also cases in foot-notes to Note 5.

[But see ('70) 5 Mad H C R App xix (xx). (A Magistrate was held at liberty to alter his sentence at any time before the despatch of the Calender to the appellate authority.)

The Court cannot also entertain any fresh application on the same facts for the same relief, as it would, in effect, amount to a re-consideration of the previous order.²

The prohibition will, however, extend only to matters which were the subject-matter of the prior adjudication. The section does not bar any application to consider a matter which was not the subject of the prior adjudication. Thus, where a prior appeal by an accused against his conviction was dismissed, it was held that a revision application by the Government for *enhancement* of the sentence is not barred inasmuch as the question of enhancement was not the subject-matter of adjudication in the prior appeal.³ As to whether the High Court can in such an application enquire into the merits or the legality of the conviction, see S. 439 Note 22.

The word "judgment" for the purposes of this chapter, and therefore for the purposes of this section also, means a decision in a *trial* which decides a case finally, so far as the Court trying the case is concerned and terminating in a *conviction* or *acquittal*.^{3a}

Section 369
Note 2

('70) 6 Mad H C R App vii (viii). (Do.)

('71) 6 Mad H C R App xviii (xviii). (Do.)]

2. ('12) 13 Cr. L. J. 301 (301) : 14 Ind Cas 765 (LB), *Nga Than v. Emperor*. (First order in revision refusing to interfere — Subsequent order directing further inquiry under S. 437 was held an order reviewing the first.)

('11) 12 Cri L Jour 556 (557) : 12 Ind Cas 614 (Mad), *Kulandai v. Ramasamy*. (First order declining to proceed under S. 476 — Subsequently on motion of the opposite party Court passed order under S. 476—Second order amounted to review of the first.)

[See ('16) AIR 1916 Mad 516 (517) : 16 Cri L Jour 697, *In re Kanakasabhai*. (Once a criminal revision petition is dismissed on the merits by a High Court, the rules of equity, justice and good conscience require that no other petition on the same matter should lie.)]

[See however ('69) 12 Suth W R Cr 40 (41) : 5 Beng L R App 82n, *Kalidass Bhattacharjee v. Mohendro Nath Chatterjee*. (But where the Magistrate first passes an order under S. 133 he is not precluded from passing another order under S. 141 on the same facts.)]

3. ('26) AIR 1926 Bom 555 (556, 557) : 50 Bom 783 : 27 Cr. L. J. 1173, *Emperor v. Jorabhai*.

('39) AIR 1939 Rang 392 (391) : 40 Cri L Jour 108 : 1940 R L R 145, *The King v. Nga Ba Saing*. (Assumed.)

('33) AIR 1933 All 485 (486) : 55 All 715 : 34 Cr. L. J. 1205, *Emperor v. Abdul Qayum*.

('32) AIR 1932 Pat 126 (127, 128) : 12 Pat 18, *Bashist Narain v. Sia Ramchandra*.

[See ('26) AIR 1926 Nag 323 (321) : 27 Cr. L. J. 339, *Local Government v. Doma*. (Conviction altered—Application for enhancement can be entertained.)]

('25) AIR 1925 Mad 993 (994, 996) : 26 Cr. L. J. 583, *In re Anif Sahib*. (Dismissal of revision application by accused against conviction does not bar application by complainant for enhancement of sentence.)

('34) AIR 1934 Bom 471 (473) : 36 Cr. L. J. 351, *Emperor v. Inderchand*. (Do.)]

3a. ('40) AIR 1940 Oudh 396 (397) : 41 Cr. L. J. 725, *Emperor v. Madho Singh*. (Appellate Magistrate postponing decision to await examination of new witnesses by the lower Court—Subsequent decision without such evidence—S. 369 does not apply to such a case but the procedure of the Magistrate is irregular.)

('39) AIR 1939 F C 43 (48) : 40 Cr. L. J. 468 : I L R (1939) Kar (FC) 132 : 1939 F C R 159 : I L R (1940) Lah 400, *Hori Ram Singh v. Emperor*. (Judgment in the Code means a judgment of conviction or acquittal — It does not include an interlocutory order.)

('39) AIR 1939 Sind 193 (195) : 40 Cr. L. J. 745 : I L R (1940) Kar 74 (FB), *Mt. Harbai v. Raja Premji*. (Order dismissing complaint under S. 203 or discharging accused under S. 259 is not judgment.)

Section 369
Note 2

In respect of *final orders*, which do not amount to judgments in trials, the section does not in terms apply, but the general principle on which the section is based would apply and such orders cannot be reviewed or altered by the Court which passed them or by any Court of co-ordinate jurisdiction. Thus, an order under S.145,^{3b} or S.146,⁴ or S.488,⁵ or an order accepting the verdict of a jury and postponing the case for passing the sentence,⁶ or an order in a case to the effect "enter as false, mistake of law" passed on a perusal of a police-report,⁷ are all final orders disposing of the case, so far as the Court passing the order is concerned, and cannot be reviewed or re-considered by such Court. See also the undermentioned case.⁸ In *Emperor v. Chinna Kaliappa Gounden*,⁹ there are, however, certain observations made by White, C. J., tending to show that there is no such general principle as that mentioned above. It is submitted that they are not correct. The decision itself is supportable on the ground that the order in question in that case was not a *final order*.

Where the order in question is neither a "judgment" within the meaning of this section nor a final order, there is nothing in law preventing the Court which passed it from re-considering it or from entertaining a fresh application for the same relief as was asked for in the proceeding in which the order was passed. Thus, *interlocutory* orders such as an order for transfer of a case,¹⁰ or for issue of a

(37) AIR 1937 All 76 (77) : 38 Cr. L. J. 318, *Jagat Ram v. Emperor*. (Complaint under S. 476 is not judgment — S. 369 is no bar against a Court altering or reviewing the complaint.)

(08) 9 Cr. L. J. 80 (82) : 31 Mad 543 (545) : 4 Ind Cas 1113, *Emperor v. Maheshwara*. (Order of discharge under S. 253 is not judgment.)

(01) 28 Cal 652 (660) : 5 C W N 457 (FB), *Dwaraka Nath Mundal v. Beni Madhab*. (30) 1930 Mad W N 190 (190), *Anjappa v. Subbamma*. (An order of acquittal under S. 247 is final and cannot be reviewed.)

(24) AIR 1924 Cal 96 (96) : 24 Cr. L. J. 716, *Nityananda Koer v. Rakhabhari*. (Do.) See also S. 367 Note 1a.

3b. (25) AIR 1925 Nag 457 (458) : 26 Cr. L. J. 1289, *Narayan v. Chandrabhaga*. (08) 7 Cri L Jour 401 (402, 403) : 35 Cal 350 : 12 C W N 605, *Parbati Churn Roy v. Sajjad Ahmad Chowdhry*.

(26) AIR 1926 All 242 (242) : 48 All 258 : 27 Cri L Jour 466, *Lallan Misser v. Ram Rachchha*.

See also S. 145 Note 56.

4. (17) AIR 1917 Pat 28 (30) : 19 Cri L Jour 105, *Ballam Singh v. Lal Babu*.

(69) 11 Suth W R Civ 532 (533), *Chowdhry Zuhoorul Huq v. Mt. Bagoo Jan*.

(13) 14 Cri L Jour 605 (606) : 16 Oudh Cas 192 : 21 Ind Cas 477, *Ramdulare v. Ajudhya*. (Assumed that S. 369 applied to the case.)

(17) AIR 1917 Pat 110 (111) : 19 Cri L Jour 225, *Lachmi Singh v. Bhusi Singh*. (It was assumed in this case that S. 369 applied to such orders and it was further stated that clerical mistakes could be corrected.)

See also S. 146 Note 16.

5. (40) AIR 1940 Rang 222 (223), *Saw Gwan Shein v. Ma Kin Kin*.

(17) AIR 1917 Cal 799 (800) : 18 Cri L Jour 556 (557), *Nanda Narain v. Manmaya Kamin*. (Such an order is in effect a judgment.)

6. (1900) 4 Cal W N 683 (683), *Queen-Empress v. Mojahur Rahman*. (Assumed that S. 369 would apply.)

7. (23) AIR 1923 Pat 532 (535) : 24 Cri L Jour 481, *Gajo Chowdhry v. Debi Charadhry*. (S. 369 assumed to apply.)

8. (98) 22 Bom 949 (958), *In re Harilal Buch*. (Order refusing to deliver property seized by the police.)

9. (06) 29 Mad 126 (132) : 3 Cri L Jour 274 (FB).

10. (81) 8 Cal 63 (72) : 4 Shome L R 57, *In re Abdool Sobhan*.

summons to an accused person under S.201,¹¹ or to a witness,¹² can be reconsidered by the Court. An order of discharge not amounting to an acquittal,¹³ or an order of dismissal under S.203 of the Code,¹⁴ or an order cancelling a notice under S.107 of the Code, for the absence of the complainant,¹⁵ is not a final order and can be reconsidered by the Court.

The general principle abovementioned has no application to administrative or ministerial orders.¹⁶

Section 369
Notes 2-3

3. Judgment when final. — A judgment of a criminal Court becomes final only after it is *pronounced* and *signed*.¹ A judgment, therefore, which though signed has not been pronounced is inoperative and incomplete and the Judge has power to alter or vary it before pronouncing it.² Similarly, where the Magistrate is pronouncing a

('93) 20 Cal 513 (519), *Dhanput Singh v. Chhatrput Singh*. (Order of transfer without notice to the parties — Magistrate was competent to re-consider it.)

[See also ('20) AIR 1920 Pat 563 (561, 565) : 21 Cri L Jour 591 : 5 Pat L Jour 47, *Ram Barai v. Ram Pratab*. (Inadvertent order of transfer.)]

11. ('23) AIR 1923 Cal 662 (662) : 25 Cri L Jour 464, *Lalit Mohan v. Noni Lal*. See also S. 201 Note 10.

12. ('31) AIR 1931 Pat 81 (81, 82) : 32 Cri L Jour 551, *Assistant Government Advocate v. Upendranath Mukerjee*.

13. ('30) AIR 1930 Cal 61 (62) : 31 Cr. L. J. 260, *Deby Das Karmakar v. Emperor*. (Order of discharge under S. 209.)

('01) 28 Cal 652 (658, 662) : 5 C W N 457 (FB), *Dwarkanath Mondul v. Benimadhab Banerjee*.

('25) AIR 1925 Nag 432 (432) : 26 Cri L Jour 1040, *Asgar Ali v. Akbar Ali*. (Order of dismissal under S. 256.)

('09) 9 Cr. L. J. 80 (82) : 31 Mad 543 (545) : 4 I. C. 1113 (FB), *Emperor v. Maheshwara*.

('27) AIR 1927 Mad 503 (503, 504) : 28 Cri L Jour 301, *Venkhanna v. Emperor*. (Discharge under S. 259.)

('08) 8 Cri L Jour 208 (208) : 18 M L J 561, *In re Rudra Goud* (Do.)

('02) 29 Cal 726 (732) : 6 C W N 633 (F B), *Mir Akwad v. Muhammad Askari*. (No difference between order of discharge passed by a Presidency Magistrate and one passed by a Provincial Magistrate.)

('29) AIR 1929 Bom 134 (134) : 30 Cr. L. J. 594, *Emperor v. Amanath Kadar*. (AIR 1925 Bom 258, 29 Cal 726 (FB), 29 Mad 126 (FB) and AIR 1914 All 79, followed.)

('08) 7 Cal W N 527 (529), *Walters v. Ibrahim*. (28 Cal 652, followed.)

[See also ('39) AIR 1939 Sind 193 (195) : 40 Cri L Jour 745 : I L R (1940) Kar 74 (FB), *Mt. Harbai v. Raya Premji*. (Order of discharge is not "judgment".)]

[But see ('35) AIR 1935 All 59 (60) : 36 Cri L Jour 128, *Phonsia v. Emperor*.]

14. ('30) AIR 1930 Cal 61 (62) : 31 Cri L Jour 260, *Debi Das v. Emperor*.

('06) 29 Mad 126 (131) : 3 Cri L Jour 274 (FB), *Emperor v. Chinna Kaliappa*.

('32) AIR 1932 Mad 369 (371) : 55 Mad 622 : 33 Cri L Jour 454 : (FB), *Ponnuswamy Goundan v. Emperor*.

[See also ('39) AIR 1939 Sind 193 (195) : 40 Cr. L. J. 745 : I L R (1940) Kar 74 (FB), *Mt. Harbai v. Raya Premji*. (Order dismissing complaint is not "judgment".)]

15. ('23) AIR 1923 All 332 (333) : 24 Cri L Jour 232, *Jasua v. Emperor*. (It only amounts to a discharge—It was, however, held in this case that the Magistrate cannot re-institute the enquiry though a fresh complaint is not barred.)

16. ('33) AIR 1933 Pat 242 (243) : 12 Pat 234 : 34 Cri L Jour 1198, *Uma Singh v. Emperor*.

Note 3

1. ('89) 1889 Rat 429 (429), *Queen v. Ganpat*.

('12) 13 Cri L Jour 120 (120, 121) : 13 I. C. 776 : 33 Cal 828, *Amodini Dasi v. Darson Ghose*.

('87) 14 Cal 42 (48) (FB), *In re Gibbons*.

[But see ('70) 5 Mad H C R App xix (xx). (Under old law, the Magistrate had power to alter sentence or order, before despatch of Calender to appellate authority.)]

2. ('13) 14 Cri L Jour 562 (563) : 21 Ind Cas 162 (All), *Ramdhir Rai v. Emperor*. (Judgment not pronounced is mere expression of opinion.)

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Notes 3-4

judgment before signing it, and his attention is drawn to certain matters in it showing an error or mistake therein, he has ample powers to correct any mistake or alter the judgment before signing it.³ Under the rules of the Allahabad High Court, a judgment becomes final only after it is sealed, and, therefore, the High Court has power to alter or add to its judgment before it is actually sealed.⁴ See also the case cited below.⁵

A Division Bench of the Chief Court of Oudh has, however, held that the sealing of the judgment is not what creates finality in the judgment and that it is only a ministerial act,⁶ though it is the practice of the Court that judgments in criminal appeals and revisions are sealed. According to the practice of the Bombay High Court in its ordinary original criminal jurisdiction, no judgment nor any other pronouncement of its decision is signed until the warrant is signed by the presiding Judge and therefore before signing the warrant the Court can alter or review its sentence, though already pronounced.⁷

A "judgment" within the meaning of this section should be taken to mean and refer only to the judicial act of the Court in finally disposing of the case and must refer to, and indicate only the order of the Court when it is read out and signed by the Judge. It does not refer to any formal orders which are contemplated to be drawn up and issued⁸ in consequence by a ministerial officer of the Court. Such ministerial orders, which are issued, may be corrected or altered.⁹ See also section 350 Note 6.

4. "Alter or review the same." — It has been seen in Note 2, that the Court after signing and pronouncing its judgment becomes *functus officio* and has no power thereafter to add to or alter such judgment in any manner. Any such alteration or addition, if made, would be without jurisdiction, and a nullity.¹ Thus, the following

3. ('66) 5 Suth W R Cr 61 (64) : Beng L R Sup Vol. 436, *Queen v. Godai Raout*. ('93) 1893 Rat 659 (663), *Queen v. Waman*.

4. ('16) A I R 1916 All 183 (184) : 38 All 134 (137) : 17 Cri L Jour 47, *Gobind Sahai v. Emperor*. (21 All 177 and 27 All 92, followed.)

('99) 21 All 177 (178) : 1899 A W N 15, *Queen-Empress v. Lalit Tiwari*.

('04) 1 Cri L Jour 710 (711) : 27 All 92 : 1904 A W N 195, *Kallu v. Emperor*.

5. ('03) 7 Cal W N vii (viii), *Bibhutti v. Sasi Mone*.

6. ('40) AIR 1940 Oudh 371 (374) : 188 Ind Cas 780 (783, 784) : 41 Cri L Jour 682, *Mt. Rajkumari v. Emperor*. (21 All 177; 27 All 92; A I R 1916 All 183; 7 C W N vii, Dissented from.)

7. ('36) AIR 1936 Bom 193 (195) : 37 Cri L Jour 753 : 60 Bom 485, *Emperor v. Abdul Rahiman*.

8. ('26) AIR 1926 Mad 420 (420, 421):27 Cr. L. J. 184, *In re Arumuga Padayachi*.

9. ('70) 2 N W P H C R 117 (118, 119) (FB), *Queen v. Nyn Singh*.

Note 4

1. ('95) 1895 Rat 804 (805), *Queen v. Sahadat Miran*. (Changing the date of the commencement of sentence.)

('98) 22 Bom 949 (958), *In re Harilal Buch*.

(1862-63) 1 Bom H C R Cr 3 (3), *Reg v. Tukia*. (Altering sentence.)

('73) Weir 3rd Edition 983 (984). (Expunging the sentence of flogging.)

('06) 4 Cri L Jour 210(211): 10 C W N 1062 : 4 C L J 415, *In re Surendra Nath*.

('96) 1896 Rat 877 (877), *Queen-Empress v. Ranchhod Hari*. (Review of order of predecessor.)

Section 369
Note 4

alterations and additions are illegal:

- (1) The addition of an explanatory note to the judgment after it is pronounced.²
- (2) Subsequent sentence under S. 75, Penal Code (enhancing punishment on account of a previous conviction) after accused has already been convicted and sentenced.^{2a}
- (3) The enhancement of the sentence passed, even though it be at the request of the accused himself in order to make his case appealable.³
- (4) The addition of a sentence of imprisonment in default of payment of fine even though it had been omitted to be passed by oversight.^{3a}

In the last mentioned case, the Court can only report the matter to the High Court under S. 433.⁴ Even in cases where the Court finds that the conviction and sentence passed by it are illegal,^{4a} or where the innocence of the accused is discovered from facts which come to light subsequent to the conviction and sentence passed by the Court,⁵ the only remedy would be to report the matter to the High Court under S. 433 or to refer the matter to the Provincial Government for necessary action under chapter XXIX and not to review or re-consider the matter itself. Similarly, where a mistake is pointed out to the Magistrate subsequent to his passing an order under S. 488, he cannot amend the order but can only submit the proceedings to the Sessions Judge for submission to the High Court for rectification.^{5a}

This rule against review of judgments applies only to cases where the portion of the judgment or order sought to be reviewed forms an integral part of the judgment, which cannot be treated as *separate* and *distinct* from such judgment.⁶ Where, however, the judgment

(19) AIR 1919 All 329 (330) : 20 Cri L Jour 486, *Raj Kumar Das v. Emperor*. (Alteration in the order requiring security under S. 107.)

[See however (1865) 3 Suth W R Cr 16 (16). (An amendment referring to the time at which the sentences should commence is not an alteration of the sentence itself.)]

2. ('78-80) 2 All 33 (35), *Empress of India v. Chatter Singh*.

[See ('40) AIR 1940 Lah 192 (193) : 41 Cri L Jour 708, *Ghanshyam Das v. Suraj Bhan*. (High Court has no power to amend its own order by way of explanation or otherwise.)]

2a. ('18) AIR 1918 Bom 250 (250) : 42 Bom 202 : 19 Cri L Jour 279, *Mari Parsu v. Emperor*.

3. ('83) 1883 All W N 16 (16), *Qurban Ali v. Azizuddin*. (See however S. 413 N 4.)

3a. See cases in foot-note (4).

4. ('21) AIR 1921 Bom 368 (368) : 22 Cri L Jour 608, *In re Dhondi Nathaji Raut*. ('92-96) 1 Upp Bur Rul 18 (18), *Queen-Empress v. M E Gywe*.

4a. ('75) 23 Suth W R Cr 49 (49), *Queen v. Poran Mal*.

('72-92) 1872-92 Low Bur Rul 354 (354, 355), *Nga E v. Queen-Empress*.

('04) 2 Low Bur Rul 43 (45), *King-Emperor v. Maung Cho*.

('30) AIR 1930 Mad 1001 (1002) : 53 Mad 870 : 32 Cri L Jour 429, *Ekambara Mudali v. Alamelammal*. (Court cannot treat its order of acquittal as a nullity.)

(1865) 6 Suth W R Cr 70 (70), *Gunowree Bhowa v. Jhandoo*.

('68) 4 Mad H C R App xix (xix).

('78) 1878 Rat 137 (137), *Queen-Empress v. Tukaram*.

See also S. 438 Note 4.

5. ('23) AIR 1923 All 473 (474) : 45 All 143 : 24 Cr. L. J. 766, *Kale v. Emperor*.

('77) 1 Ind Jur N S 333 (), *Reg. v. Hart*.

5a. ('40) AIR 1940 Rang 222 (223), *Saw Gwan Shein v. Ma Kin Kin*.

6. ('17) AIR 1917 Lah 163(164) : 18 Cri L Jour 332 (333) : 1916 Pun Re No. 25 Cr, *Official Receiver, Karachi v. Ganga Ram*.

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Notes 4-5

contains damaging observations against a witness, who at the time had no opportunity of explaining or defending himself, it has been held that the Judge has power to re-consider that portion of it for the purpose of expunging such observations, if thereby the *judgment against the accused* is not affected, reviewed or varied.⁷ Similarly, where the Magistrate accidentally omits to pass an order regarding the disposal of property at the time of the judgment, he or his successor can subsequently pass an order for its disposal, as such an addition is not an alteration of the judgment.⁸ A judgment cannot be said to be altered within the meaning of this section in the following cases :

- (1) Where the Sessions Judge sentences the accused to transportation in ignorance of the fact that the accused is already serving a sentence of imprisonment and after becoming aware of it, directs that the sentence of transportation should take effect immediately.⁹
- (2) Where the Court adds a direction as to costs in a proceeding under section 145.¹⁰
- (3) Where the appellate Court setting aside a conviction on the ground of want of jurisdiction, but omitting to order a re-trial, adds the necessary directions subsequently.¹¹

5. Power of High Court to review its judgment. — Before the amendment of 1923, the section ran as follows :

“No Court, other than a High Court, when it has signed its judgment, shall alter or review the same except as provided in ss. 395 and 484 or to correct a clerical error.”

The question arose whether the express negation of the power of review in respect of criminal tribunals other than the High Court had the effect of conferring upon the High Court such a power by implication. It was held in a series of decisions that the exclusion of judgments of the High Court from the purview of the section could not, in the absence of any provision expressly conferring the power, be read as conferring upon the High Court any such power,¹ and that the Legislature in thus excluding High Courts from the purview of that section had in mind s. 434 and the Letters Patent which provide for review of judgments where questions of law are reserved for consideration.²

7. ('10) 11 Cri L Jour 178 (179) : 5 I. C. 611 (Lah), *In re Malik Umar Hayat*. See also S. 561A Note 7.

8. ('22) AIR 1922 Mad 329 (329) : 24 Cri L Jour 159, *In re Subba Raidu*. [But see ('01) 4 Bom L R 12 (13), *Sakharam v. Jairam*.]

9. ('88) 1888 Rat 391 (391), *Queen-Empress v. Hari*.

10. ('20) AIR 1920 Cal 320 (320) : 47 Cal 974 : 21 Cr. L. J. 751, *Nafar Chandra Pal v. Sidhartha Krishna*.

11. ('81) 3 Mad 48 (51) : 2 Weir 756, *In re Rami Reddy*.

Note 5

1. ('23) AIR 1923 Mad 426 (427) : 46 Mad 382 : 24 Cr.L.J. 439, *Kunhamad Haji v. Emperor*.

('86) 14 Cal 42 (47) (FB), *In re Gibbons*.

('95) 1895 Rat 791 (791), *Queen v. Mohun Abhesingh*.

2. ('85) 7 All 672 (674) : 1885 A W N 177, *Queen-Empress v. Durga Charan*.

('95) 1895 Rat 791 (791), *Queen v. Mohun Abhesingh*.

('86) 10 Bom 176 (180) (F B), *Queen-Empress v. C. P. Fox*.

The section has been amended in order to give effect to the view abovementioned.³ Where the High Court has pronounced its judgment and signed it, it becomes *functus officio* and neither the Judge, who passed the judgment nor any other Bench of the High Court has any power to review, re-consider or alter it except for correcting a clerical error,⁴ whether the judgment was passed in revision,⁵ or on appeal,⁶ or on a reference to it under S. 432 or S. 434,⁷ or in its original criminal jurisdiction.

Where the High Court dismisses a criminal revision application for default, or where it passes an order to the prejudice of a party without providing such party an opportunity for being heard in

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Note 5

('23) AIR 1923 Mad 426 (433): 46 Mad 382: 24 Cr. L. J. 439, *Kunhamad Haji v. Emperor*.

('35) AIR 1935 All 60 (62): 56 All 990 : 35 Cr. L. J. 1485, *Kunji Lal v. Emperor*. (The reference to Letters Patent is to Clauses 18 and 19 in the case of Allahabad High Court.)

[See ('24) AIR 1924 Mad 640 (641) : 47 Mad 428 : 26 Cr. L. J. 370, *In re Somu Naidu*.]

3. Statement of Objects and Reasons, 1921.

('35) AIR 1935 All 466 (467): 36 Cr.L.J. 1286: 57 All 867, *Banwari Lal v. Emperor*.

('24) AIR 1924 Mad 640 (643): 47 Mad 428: 26 Cr.L.J. 370, *In re Somu Naidu*.

4. ('33) AIR 1933 Cal 870 (871, 874): 34 Cri L Jour 1100: 61 Cal 155, *Dahu Raut v. Emperor*.

('87) 14 Cal 42 (48) (F B), *In re Gibbons*.

('09) 10 Cr. L. J. 314 (318): 1909 Pun Re No. 8 Cr: 3 I C 580, *Hira v. Emperor*.

('99) 23 Bom 50 (54), *Queen-Empress v. Ganesh Ramkrishna*.

('09) 9 Cr.L.J. 306 (307): 1909 Pun Re No. 1 Cr: 1 I C 506, *Hale v. Emperor*.

('17) AIR 1917 Bom 238 (238): 18 Cri L Jour 889 (889), *Nagangauda v. Emperor*.

[See ('27) AIR 1927 Mad 961 (962): 28 Cr. L. J. 974 (S B), *Muthu Balu Chettiar v. Chairman, Madura Municipality*. (But where a Bench of the High Court heard the case, but did not finally dispose of the case, held another Bench of the Court had power to hear and dispose of the case.)]

5. ('35) AIR 1935 All 466 (467) : 36 Cr. L. J. 1286 : 57 All 867, *Banwari Lal v. Emperor*.

('29) AIR 1929 Lah 797 (799): 10 Lah 241: 30 Cr.L.J. 815, *Emperor v. Dhanna Lal*.

('09) 10 Cri L Jour 314 (318): 1909 Pun Re No. 8 Cr: 3 I C 580, *Hira v. Emperor*.

('89) 1889 Rat 458 (458), *Queen-Empress v. Chimaba*.

('98) 26 Cal 188 (191, 192): 3 C W N 49, *Hurbullabh v. Luchmeswar*.

('05) 2 Cr. L. J. 465 (467) : 1905 Upp Bur Rul Cr P C 35, *Ah Lak v. Emperor*.

('19) AIR 1919 Pat 514 (514) : 20 Cri L Jour 447, *Nand Kishore v. Emperor*.

('16) AIR 1916 All 183 (183): 17 Cr. L. J. 47 (48): 38 All 134, *Gobind v. Emperor*.

('85) 7 All 672 (673): 1885 A W N 177, *Queen-Empress v. Durga Charan*.

('85) 10 Bom 176 (180) (F B), *Queen-Empress v. C. P. Fox*.

('28) AIR 1928 Lah 462 (464): 10 Lah 1: 29 Cri L Jour 669, *Raju v. Emperor*.

[See ('16) AIR 1916 Mad 516 (517): 16 Cr.L.J. 697, *In re Kanakasabhai*. (Revision petition dismissed on merits—No fresh petition on same matter lies.)]

[But see ('27) AIR 1927 All 724 (726) : 29 Cri L Jour 88, *Sripat Narain Singh v. Gahbar Rai*. (Dissented from in AIR 1935 All 466.)]

6. ('39) AIR 1939 Lah 244 (245) : 40 Cr. L. J. 763, *Edward Few v. Emperor*. (The only authority that can interfere with the sentence is the Provincial Government.)

('36) AIR 1936 Nag 132 (134) : I L R (1936) Nag 99 : 38 Cr. L. J. 390, *Diwan Singh v. Emperor*.

('81) 2 Weir 573 (573), *In re Venkatachalam*.

('72) 17 Suth W R Cr 47 (48, 49), *Queen-Empress v. Chundro Joogi*.

('23) AIR 1923 All 473 (474) : 45 All 143 : 24 Cr. L. J. 766, *Kale v. Emperor*.

(Even if any new materials had been discovered which if they had been placed before Court the Court might have come to a different conclusion, the Court has no power of review and the only remedy is to apply to Government.)

('79) 4 Bom 101 (102, 103), *Empress v. Mahomed Yashin*.

7. ('93) 1893 Rat 638 (638), *Queen-Empress v. Canji*.

Section 369
Notes 5-6

support of his case, has the High Court power to restore the case and hear the matter again on its merits? The answer to this question depends upon the nature of the order passed by the Court. The powers of revision vested in the High Court under S.439 can only be exercised at the discretion of the Court if the circumstances require it and ordinarily no party has a *right* to be heard in support of his case.⁸ But where such a right is expressly given to the accused as under sub-s.(2) to S.439, the High Court is bound to provide an opportunity to the accused before passing any order to his prejudice. It has, therefore, been held that where an order is passed to the prejudice of an accused, and by mistake or inadvertence, no opportunity had been given to him to be heard in his defence, such an order being *without jurisdiction* is not a judgment contemplated by this section and that the High Court has power to entertain a fresh revision application to re-consider the matter.⁹ Where, however, the sentence against an accused is reduced without notice to the Crown, the Court has no power to re-consider the matter as the Crown has *no right* to be heard in the matter of sentence.¹⁰ In all other cases, where a criminal revision application is dismissed for default of the petitioner, the High Court has no right to entertain a fresh application for the same relief.¹¹ It has, however, been held by the High Courts of Lahore,¹² Rangoon¹³ and Calcutta¹⁴ that even in such cases the High Court has power to set aside the order of dismissal, as an order of dismissal for default is not a judgment (which is presumably a judgment on merits) contemplated by this section. See also section 435 Note 20.

As to the inherent power of the High Court in such cases, see Note 6.

6. "Save as otherwise provided by the Code." — The provisions of the section should be read as subject to any provision of the Code which provides specifically for a review of judgment. The following provisions admit of review of judgments in particular cases:

- (1) Section 395 providing for review of the sentence of whipping.
- (2) Sections 432 and 434 providing for review of a case where questions of law are referred or reserved, as the case may be, for decision by the High Court.

8. ('24) AIR 1924 Mad 640(644): 47 Mad 428: 26 Cr.L.J. 370, *In re Somu Naidu*.

9. ('24) AIR 1924 Mad 640(644): 47 Mad 428: 26 Cr.L.J. 370, *In re Somu Naidu*. ('27) AIR 1927 Cal 702 (704): 55 Cal 417: 28 Cr. L. J. 831, *Ramesh Pada v. Kadambini Dasi*.

See also S. 439 Note 45.

10. ('33) AIR 1933 Cal 870 (872, 873): 61 Cal 155: 34 Cr. L. J. 1100, *Dahu Raut v. Emperor*.

11. ('12) 13 Cr. L. J. 710 (711): 16 I. C. 518 (Mad), *Ranga Row v. Emperor*.

(23) AIR 1923 Mad 276 (276): 23 Cr. L. J. 746, *Appayya v. Venkatapayya*. (Revision rejected for non-payment of printing charges — *Held* Court had no power to re-hear.)

[*See* ('16) AIR 1916 Mad 516 (517): 16 Cr. L. J. 697 (698), *In re Kanakasabhai*. (Revision dismissed on merits—No fresh petition lies on the same matter.)]

12. ('24) AIR 1924 Lah 310(310): 23 Cr.L.J. 750, *Kishen Singh v. Girdhari Lal*.

13. ('28) AIR 1928 Rang 288 (288): 30 Cr. L. J. 749, *Ibrahim v. Emperor*.

14. ('09) 10 Cr.L. J. 287 (288, 289): 3 I.C. 393 (Cal), *Bibhutj Mohan v. Dasimoni Dassi*. (Application dismissed not heard and determined on merits — It can be restored to file and heard.)

- (3) Section 484 providing for review of judgment in contempt cases where the accused tenders an apology.¹
- (4) Section 436 providing for a District Magistrate making further inquiry himself in respect of an order passed by himself.²
- (5) Section 489 (2) providing for cancellation or variation of an order passed under S. 488.³
- (6) Judgments and orders passed by an appellate Court are final except in cases provided for in chapter XXXII. See S. 430. As to whether S. 430, which saves the right of revision in respect of appellate orders, has application to orders in appeal passed by the *High Court itself*, see section 439 Note 32.

Section 369
Note 6

The inherent powers of the High Court, as stated in S.561A, do not include the power to review an order made by the High Court in its criminal jurisdiction. That section merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code; it does not confer on the Court any new powers such as any power to review or alter orders passed by itself.⁴

370.* Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate's judgment. Presidency Magistrate shall record the following particulars:—

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- (a) the serial number of the case;
- (b) the date of the commission of the offence;
- (c) the name of the complainant (if any);

* 1882 : S. 370; 1872 and 1861 — Nil.

Note 6

1. ('35) AIR 1935 All 60 (61):56 All 990:35 Cri L Jour 1485, *Kunji Lal v. Emperor*.
2. ('01) 28 Cal 102 (104), *Bidhu Chandalini v. Mati Shaikh*.
(‘06) 11 Cal W N xi, *Dedar v. Emperor*.
See also S. 436 Note 4a.
3. ('37) AIR 1937 Cal 334 (335) : 39 Cri L Jour 381, *Bhagubhai Ranchhodas v. Bai Arvinda*.
4. ('28) AIR 1928 Lah 462 (463):10 Lah 1:29 Cri L Jour 669, *Raju v. Emperor*.
(AIR 1927 Lah 139, overruled.)
(‘39) AIR 1939 Lah 244 (245) : 40 Cri L Jour 763, *Edward Few v. Emperor*.
(The only authority that can interfere is the Provincial Government.)
(‘38) AIR 1938 Nag 74 (75) : 39 Cri L Jour 116 : I L R (1940) Nag 267, *Laxman-
rao Parashram v. Emperor*. (AIR 1928 Oudh 402, dissented from.)
(‘33) AIR 1933 Cal 870 (874):61 Cal 155:34 Cr. L. J. 1100, *Dahu Raut v. Emperor*.
(‘29) AIR 1929 Lah 797 (799) : 10 Lah 241 : 30 Cri L Jour 815, *Emperor v. Dhanna Lal*.
(‘35) AIR 1935 All 466 (467, 468) : 36 Cri L Jour 1286 : 57 All 867, *Banwari Lal v. Emperor*. (Case law discussed.)
(‘31) AIR 1931 Nag 169 (169):27 Nag L R 163:32 Cr. L. J. 1222, *Ganpat v. Emperor*.
(‘35) AIR 1935 All 60 (61) : 56 All 990: 35 Cr. L. J. 1485, *Kunji Lal v. Emperor*.
[But see ('28) AIR 1928 Oudh 402 (403) : 29 Cri L Jour 893 : 3 Luck 680, *Emperor v. Shiva Datta*. (Following AIR 1927 Lah 139 which was overruled by AIR 1928 Lah 462.)]
See also S. 56A Note 2.

Section 370
Notes 1-2

- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence;
- (e) the offence complained of or proved;
- (f) the plea of the accused and his examination (if any);
- (g) the final order;
- (h) the date of such order; and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

Synopsis

1. Scope of the section.
2. Record of particulars.
3. Plea and examination of the accused — Clause (f).
4. Recording reasons — Clause (i).
5. "Imprisonment."

Other Topics (miscellaneous)

- | | |
|---|--|
| <p>"Imprisonment" — Refers only to substantive sentence. See Note 5.</p> <p>Magistrate—Referring to document on record—No serious objection. See Note 4.</p> <p>Omission to record particulars—Only irregularity. See Note 2.</p> | <p>Reasons—To be recorded briefly—Omission to do so not seriously prejudicing accused—Irregularity cured by S. 537. See Note 4.</p> <p>Section—No application to proceedings under Workman's Breach of Contract Act. See Note 1.</p> |
|---|--|

1. Scope of the section. — This section is an exception to S. 367 and enacts that a Presidency Magistrate shall record the particulars specified instead of recording a judgment as provided by S. 367.¹ This section has no application to proceedings started under S. 2, sub-s.(1), and S. 3 of the Workman's Breach of Contract Act, 1859.²

2. Record of particulars. — The direction to record particulars should be strictly followed.¹ The various particulars should be recorded in the form prescribed by the various High Courts.² Where, however, all the important particulars have been recorded, the omission to record *all* the particulars in the form prescribed is only an irregularity which can be cured under S. 537.³

Section 370 — Note 1

1. ('21) AIR 1921 Bom 374 (375) : 45 Bom 672 : 22 Cr.L.J. 17, *G. S. Fernandez v. Emperor*.
2. (1900) 27 Cal 131 (132, 133) : 4 C W N 201, *Averam Das v. Abdul Rahim*.

Note 2

1. ('32) AIR 1932 Cal 62 (63) : 33 Cr. L. J. 264, *Man Mohan v. Corporation of Calcutta*.
- ('32) AIR 1932 Cal 64 (64) : 33 Cr. L. J. 265, *Probodh Chandra v. Corporation of Calcutta*.
- ('26) AIR 1926 Cal 692 (692) : 27 Cri L Jour 110, *Ismail Sha v. Emperor*.
2. ('26) AIR 1926 Cal 1109 (1110):27 Cr.L.J. 1131, *Bishnu Pada Deb v. Emperor*.
3. ('26) AIR 1926 Cal 1109 (1110):27 Cr.L.J. 1131, *Bishnu Pada Deb v. Emperor*. See also S. 537 Note 12.

3. Plea and examination of the accused—Clause (f).—The words “if any” in clause (f) do not control the provisions of S. 342, under which the Magistrate is bound to record the examination of the accused.¹ No hard and fast rule is contemplated as to how the plea and examination of the accused are to be recorded; the entry, therefore, “denies” in the column was held sufficient compliance with the section where, when the plea was taken and the accused was examined, he merely denied having committed the offence.²

As to the effect of non-compliance with the clause, see S. 537 Note 12.

4. Recording reasons — Clause (i).—In all cases where the Magistrate passes a sentence of imprisonment or fine exceeding Rs. 200, he should record briefly his *reasons* for the conviction. It is enough if the reasons are briefly stated,¹ but it should be done in such a manner that the High Court may in revision be in a position to judge whether there were sufficient materials before the Magistrate to support the conviction.² Thus, a mere statement that the offence is proved,³ or that the accused has no defence to make,⁴ or that the Magistrate believes the prosecution witnesses,⁵ is not a compliance with the provisions of the section; where, however, the omission to record the reasons has not seriously prejudiced the accused,⁶ as where the trying Magistrate has made a record of the evidence and other important matters and the records are made available to the Court,⁷ the irregularity will be cured under S. 537. Section 441 further enables the Magistrate to submit a statement of reasons where the records are called for by the High Court (under S. 435) even in cases where no reasons are recorded at all by the

Section 370
Notes 3-4

Note 3

1. ('21) AIR 1921 Bom 374 (375, 376); 45 Bom 672; 22 Cr.L.J. 17, *G.S. Fernandez v. Emperor*.

See also S. 342 Note 4.

2. ('29) AIR 1929 Cal 406 (406, 407) : 56 Cal 1067 : 30 Cr. L. J. 526, *Sadagar v. Emperor*.

Note 4

1. ('04) 1 Cri L Jour 839 (841) : 31 Cal 983; 8 C W N 839, *Emamdu v. Emperor*. ('26) AIR 1926 Cal 1109 (1111) : 27 Cr. L. J. 1131, *Bishnu Pada Deb v. Emperor*. (Under S. 370 there is no serious objection to the Magistrate's referring to a document on the record instead of taking the trouble to re-write those portions of it which should have been included in his final order.)

('87) 14 Cal 174 (175), *Moteeram v. Belaseeram*.

2. ('04) 1 Cri L Jour 527 (528) : 8 C W N 587, *Toolsey Kaharin v. Emperor*.

('86) 13 Cal 272 (274), *Yakoob v. Adamson*.

('23) AIR 1923 Mad 144 (144) : 23 Cri L Jour 602, *In re Varadarajulu*.

3. (1900) 27 Cal 461 (462) : 4 C W N 467, *Natabar v. Provash*.

('86) 13 Cal 272 (273), *Yakoob v. Adamson*.

[See ('26) AIR 1926 Cal 692 (692) : 27 Cri L Jour 110, *Ismail Sha v. Emperor*.]

4. (1900) 27 Cal 461 (461, 462); 4 C W N 467, *Natabar Ghose v. Provash Chunder*.

5. ('15) AIR 1915 Bom 137 (137) : 16 Cri L Jour 771 (771), *Shankar v. Emperor*.

6. ('24) AIR 1924 Mad 799 (800) : 25 Cri L Jour 1084, *In re Thurman*. (Accused found guilty of assault in public street—No prejudice by failure to record finding as to breach of the peace.)

(1900) 27 Cal 461 (462) : 4 C W N 467, *Natabar Ghose v. Provash Chunder*.

('32) AIR 1932 Cal 655 (656) : 33 Cri L Jour 729, *Shamlal Khettry v. Emperor*.

(Where evidence and statements of the accused were recorded failure to give reasons did not prejudice the accused.)

[See ('15) AIR 1915 Bom 137 (137); 16 Cr.L.J. 771 (771), *Shankar v. Emperor*.]

7. ('23) AIR 1923 Mad 185 (186) : 46 Mad 253 : 24 Cr. L. J. 84, *In re Derwish*.

Section 370
Notes 4-5

Presidency Magistrate in his judgment. But where the conviction is passed without proper reasons therefor, on evidence of which no record is taken and which is, therefore, not available to the High Court, the omission to record the reasons in such cases is a grave irregularity which will be a sufficient ground for interference by the High Court.⁸ See also section 537 Note 12.

The Presidency Magistrate is not bound to give any statement of reasons in case he inflicts a fine of less than Rs. 200, but if he chooses to write a judgment in such a case it is his duty to give his findings on the facts proved.⁹

5. "Imprisonment." — The word "imprisonment" contemplated by this section refers to the substantive sentence passed; it does not include the sentence of imprisonment ordered in default of payment of fine.¹

Section 371

371.* (1) On the application of the accused a copy of judgment, etc., to be given to accused on application. copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

1. "On the application of the accused." — Under this section the accused is entitled to a copy of the judgment only on his application. The undermentioned cases decided under the Code of 1872 wherein the grant of copies has been held to be compulsory and independent of any

* 1882 : S. 371; 1872 : S. 464; 1861—Nil.

8. ('23) AIR 1923 Mad 185 (186); 46 Mad 253 : 24 Cri L Jour 84, *In re Derwish*.

('04) 1 Cri L Jour 527 (528) : 8 C W N 587, *Toolsey v. Emperor*.

('29) 1929 Mad W N 892 (893), *Mahaboob Khan v. Emperor*. (Evidence meagre.)

('86) 13 Cal 272 (274), *Yacoob v. Adamson*. (Prejudice is presumed.)

9. ('33) AIR 1933 Cal 532 (533) : 60 Cal 656 : 34 Cri L Jour 1059, *Nishikant Chatterjee v. Behari Kahar*.

Note 5

1. ('87) 14 Cal 174 (175), *Motiram v. Belaseeram*.

request on the part of the accused are no longer of any importance.¹
See also Notes to section 548.

Section 371
Notes 1-3

2. Court-fees. — Where a copy is granted under this section free of cost, it is not also necessary to affix any court-fee stamp on it when preferring an appeal.¹

3. Limitation for appeal against sentence of death. — The period of limitation prescribed for an appeal from a sentence of death passed by a Court of Session is seven days from the date of the sentence. See Article 150 of Schedule II of the Limitation Act.

372.* The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Section 372

1. Scope of the section.—The Court is bound, where the accused so requires, to furnish a translation of the judgment where it is recorded in a different language from that of the Court¹ but this section applies only to judgments and final orders in the nature of a judgment and has no application to orders on interlocutory applications or to administrative orders.² See also section 369 Note 2.

373.† In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

Section 373

* 1882 : S. 372; 1872 : S. 464; 1861 : S. 429.

† 1882 : S. 373; 1872 : S. 302; 1861 : S. 384.

Section 371 — Note 1

1. ('73) 1873 Rat 73 (73).
(‘68) 9 Suth W R Cr 19 (19), *In re Ram Chunder*.

Note 2

1. ('88) 1888 Rat 364 (364), *Queen-Empress v. Ragba*.

Section 372 — Note 1

1. See (1863) 1 Bom H C R Cr 17 (19), *Reg. v. Ratanji Bhukan*.
2. ('72) 1872 Rat 61 (61) *Reg. v. Pandurang*. (Case under Code of 1861—Section applies to final orders passed.)

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

Section 374

374.* When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session.

1. Scope and object. — The Legislature has provided in the confirmation proceedings a final safeguard of the life and liberty of the subject in cases of capital sentences. The High Court has been given wide powers under this chapter in order to prevent any possible miscarriage of justice.¹ Similar reference is also provided under special laws in the case of sentences of death passed thereunder.²

References for confirmation can be made only in cases of sentences of death.³

The records transmitted to the High Court in a confirmation case must be complete.⁴

As to the time within which reference should be made, see the undermentioned case.⁵

Section 375

375.† (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or

Power to direct further inquiry to be made or additional evidence to be taken.

* 1882 : S. 374; 1872 : S. 287, para. 1; 1861 : S. 380.

† 1882 : S. 375; 1872 : S. 289; 1861 : S. 400.

Section 374 — Note 1

1. ('21) AIR 1921 Sind 84 (85, 89) : 23 Cr. L. J. 33 : 15 Sind L R 103 (FB), *Gul v. Emperor*.

('95) 1895 Rat 806 (814), *Queen-Empress v. Kallappa*.

2. ('33) AIR 1933 Cal 1 (2) : 33 Cr. L. J. 837 (FB), *Prodyot Kumar v. Emperor*. (See S. 3 (2), Bengal Criminal Law Amendment Supplementary Act.)

('32) AIR 1932 Cal 818 (818, 820) : 33 Cr. L. J. 722 (FB), *Monoranjan Bhattacharjya v. Emperor*. (Do.)

3. ('73) 5 N W P H C R 130 (132), *Queen v. Aman*.

[See ('72) 17 Suth W R Cr 11 (11), *Empress v. Boydonath*. (Accused convicted of murder and sentenced to transportation for life — Held that under Act 37 of 1855 no appeal lay to the High Court from such sentence.)]

See also S. 376 Note 1.

4. ('71) 15 Suth W R Cr 16 (17), *In re Gopal Hajjain*. (The record of the defence set up in the Sessions Court was wanting in this reference.)

5. ('84) 7 Mad H C R App xxi (xxi).

assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

Section 375
Note 1

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

Synopsis

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|-------------------------|-----------------------------|
| 1. Further enquiry. | 3. Presence of the accused. |
| 2. Additional evidence. | 4. Appeal. |

Other Topics (miscellaneous)

- | | |
|--|---|
| Comparison with S. 428. See Note 2. | Further enquiry — Additional evidence not needed. See Note 1. |
| Confession tutored by Magistrate—Examination of Magistrate directed. See Note 1. | Insanity of accused — Direction for medical observation and report. See Note 1. |
| Confession wrongly rejected by Sessions Court. See Note 2. | Reference to prior statements to police. See Note 2. |

1. Further enquiry. — If on the reference under S. 374, the High Court thinks that a further enquiry is to be made, or additional evidence is to be taken regarding the guilt or innocence of the accused, it may make such further enquiry, or take such additional evidence itself, or direct the Court of Session to do so. Further enquiry would ordinarily be ordered, when there is any defect in the procedure adopted in the Court of Session. Thus, where the question was, if the accused was insane at the time he committed the murder of his wife, and where there was evidence that the accused spoke like an insane man on the day previous to the murder, and there was no evidence of any reasonable or probable cause for any jealousy on his part by reason of any evil conduct on the part of his wife, and the assessors found that the accused was not of sound mind, the High Court held that it was a "defect of enquiry" not to have placed the accused under medical observation. The High Court consequently directed the Court of Session to place the convicted person under medical observation for a month, and then forward the case to them, with the evidence of the medical officer and opinion of the Sessions Judge.¹ Where again the prisoner was convicted on the sole evidence of his confession, which he alleged had been tutored by the Magistrate who recorded it, the High Court directed the examination of that Magistrate on the question of the alleged tutoring.² The words "further inquiry should be made into or additional evidence taken upon" show that "further inquiry" does not always involve the taking of additional evidence. "Further inquiry" also includes the consideration of the evidence already taken.³

Section 375 — Note 1

1. (1864) 1 Suth W R Cr 1 (1), *Queen v. Sheik Mustafa*.
2. ('95) 19 Bom 195 (198), *Empress v. Paluji*.
3. ('91) 14 Mad 334 (337, 341) : 1 M L J 343 : 2 Weir 557 (FB), *Queen-Empress v. Balasinnatambi*. (Case under S. 436.)
[See also ('88) 15 Cal 608 (620, 621) (FB), *Hari Das Sanyal v. Saritulla*. (Do.)]
See also S. 436 Note 8.

Section 375
Notes 2-4

2. Additional evidence. — Additional evidence will be directed to be taken, or taken by the High Court itself when such evidence has been improperly rejected by the Court of Session as in the case of a confession wrongly rejected,¹ or when the evidence already on record is insufficient for arriving at a proper decision. Thus, when the evidence as to the prisoner's state of mind was insufficient, additional evidence was called for.²

Where during the course of the trial, the accused applied to be allowed to call for certain evidence material to his defence, and the Court of Session improperly refused to grant his application, the High Court permitted him under this section to produce such evidence.³

Under this section additional evidence can be taken on any point bearing on the guilt or innocence of the accused; while under S. 428 additional evidence can be taken whenever the appellate Court thinks it necessary. Thus, under S. 428 an appellate Court may test the value of a statement made by a defence witness by taking additional evidence in appeal;⁴ while under this section testimony of witnesses cannot be tested by admitting additional evidence. Thus, the High Court cannot refer to the earlier statements made by the witnesses to the police, with a view to discredit such witnesses.⁵

Where the circumstances called for the re-opening of the whole case owing to a grave irregularity in procedure, it was held that the proper course was to set aside the conviction and order a retrial instead of directing additional evidence to be taken under this section.⁶

3. Presence of the accused. — The presence of the accused could be dispensed with when the High Court is recording additional evidence.¹

4. Appeal. — Where on a reference, the High Court had pronounced its decision, it was held that the accused had no further right of appeal, though at the time of reference he could have preferred an appeal.¹

Note 2

1. ('01) 25 Bom 168 (174) : 2 Bom L R 761, *Queen-Empress v. Basavanta*.
2. ('86) 1886 Rat 229 (236, 237), *Queen-Empress v. Nepal*.
3. ('11) 12 Cri L Jour 412 (420) : 11 Ind Cas 596 (Lah), *Bhagwan Kaur v. Crown*. ('25) AIR 1925 Mad 106 (109) : 25 Cri L Jour 401, *In re Narayana Menon*.
4. ('28) AIR 1928 Mad 1174 (1175) : 30 Cr.L.J. 133, *Subramania Iyer v. Emperor*. ('25) AIR 1925 Mad 106 (109) : 25 Cri L Jour 401, *In re Narayana Menon*.
5. ('17) AIR 1917 P C 25 (29) : 44 Cal 876 : 18 Cr. L. J. 471 : 44 Ind App 137 : 13 Nag L R 100 (PC), *Dal Singh v. Emperor*.
6. ('35) AIR 1935 Sind 145 (179) : 28 Sind L R 397 : 36 Cr. L. J. 1161, *Emperor v. Hari*. (Failure to supply to accused copies of statements made to police by witnesses under S. 162.)

Note 3

1. ('06) 3 All L J 112n, *Sheo Achal Singh v. Emperor*.

Note 4

1. ('67) 1867 Pun Re No. 33 Cr, p. 55 (55), *Crown v. Soojun Singh*. See also S. 410 Note 1.

376.* In any case submitted under section 374, Section 376
 whether tried with the aid of as-
 sessors or by jury, the High Court—
Power of High Court
to confirm sentence or
annul conviction.

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Synopsis

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|------------------------------|--|
| 1. Scope. | 4. May annul the conviction. |
| 2. May confirm the sentence. | 5. "Convict the accused of any offence." |
| 3. Commutation of sentence. | 6. New trial. |

Other Topics (miscellaneous)

- | | |
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| Age or sex—Reduction of sentence. See Note 2. | Insufficient grounds for refusal of confirmation. See Note 2. |
| Circumstantial evidence—Death sentence—Or transportation for life. See Note 2. | Judge's summing up enforcing his own view—Re-trial. See Note 6. |
| Compared with Ss. 423 and 418. See Note 1. | Jury verdict—High Court's power. See Notes 1 and 4. |
| Compared with S. 374. See Note 1. | Non-compliance with S. 297—Re-trial. See Note 6. |
| Conviction, annulment and acquittal. See Note 4. | Physical condition of convict. See Note 3. |
| Dead body not found—Lesser sentence. See Note 3. | Proof of motive. Note 2. |
| Delay—No confirmation of death sentence. See Notes 2 and 3. | Reduction of sentence. See Note 3. |
| Doubt as to part taken by accused—Lesser sentence. See Note 3. | Several convicts for one murder—No ground for commutation. See Note 3. |
| | Section 84, Penal Code. See Note 3. |
| | Wrong and improper—Sentence not confirmed. See Note 2. |

* Code of 1882 : S. 376—Same.

Code of 1872 : S. 288.

288. In any case so referred, whether tried with assessors or by jury, the High Court may either confirm the sentence, or pass any other sentence warranted by law, or may annul the conviction and order a new trial on the same or an amended charge, or may acquit the accused person.

Power of High Court
to confirm sentence or
annul conviction.

Code of 1861 : S. 399.

399. In any case so referred, the Sudder Court may either confirm the sentence or pass any other sentence warranted by law or may annul the conviction and order a new trial on the same or an amended charge. If the case shall have been tried by the Court of Session with the aid of assessors, it shall further be competent to the Sudder Court to acquit the accused person and order his discharge.

Power of Sudder Court
to confirm, reverse, &c.,
sentence.

Section 376
Note 1

1. Scope. — In dealing with an appeal the High Court cannot interfere with the verdict of the jury unless such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by the Judge. But in the case of a reference under S. 374, the powers of the High Court are not so limited and it is open to the High Court to go into the *facts* and to come to the conclusion that the finding of the jury is an unsafe finding, or is not justified by the evidence on record.¹ The High Court is thus empowered in such cases to substitute its own finding in the place of the verdict of the jury, even though the verdict is unanimous.² There seems to be no statutory limit to the power of the High Court in this behalf. The whole broad question of the guilt or innocence of the accused is before the High Court, and not merely the question of law as to evidence as in an appeal under S. 418, or questions of misdirection by the Judge or of misunderstanding on the part of the jury as under S. 423 (2).³ As a matter of fact, it has been held that in the case of a reference under S. 374 the question of misdirection is not of much importance as the High Court is obliged to come to its own independent conclusion as to the guilt or innocence of the accused, independently of the verdict of the jury or even of the opinion of the Judge.⁴ Indeed the Legislature has provided in a reference under section 374, a final safeguard analogous to the functions of the Home Office in England, and has laid this duty on the High Court.⁵ Of course, the High Court has got this power only in cases where the sentence of death has been passed.⁶

Section 376 — Note 1

1. ('37) AIR 1937 Sind 162 (164) : 38 Cri L Jour 808 : 31 S L R 82, *Khadim v. Emperor*. (S. 376 is to be read with S. 418 (2).)
- ('36) AIR 1936 Cal 73 (83) : 37 Cr. L. J. 394 : 63 Cal 929, *Benoyendra v. Emperor*.
- ('31) AIR 1931 Cal 178 (183) : 32 Cri L Jour 190 (FB), *Emperor v. Panchu Shaikh*.
- ('27) AIR 1927 Cal 631 (633) : 28 Cri L Jour 742, *Emperor v. Rajab Ali Fakir*. (Entire case is open to the High Court.)
- ('21) AIR 1921 Sind 84 (87, 88) : 15 Sind L R 103 : 23 Cr. L. J. 33 (FB), *Gul v. Emperor*.
- ('32) AIR 1932 Pat 302 (302) : 34 Cri L Jour 83, *Emperor v. Rash Behari Lal*.
- ('98) 2 Cal W N 49 (50), *Queen-Empress v. Chatradhari Goala*. (Some accused sentenced to death and others to transportation—Reference under S. 374 in case of the former and appeal by the latter heard together—Appeal must be limited to points of law—Questions of facts cannot be inquired into.)
- ('73) 19 Suth W R Cr 57 (57), *Queen-Empress v. Jaffir Ali*.
- ('94) 1894 Rat 710 (712), *Empress v. Abdul Razak*.
See also S. 418 Note 4.
2. ('15) AIR 1915 Bom 243 (244) : 16 Cri L Jour 818, *Daji Yesaba v. Emperor*. (In cases of references under S. 374, Bombay High Court's practice is to re-open the case both on facts and law—Per Batchelor, J.)
- ('21) AIR 1921 Sind 84 (87, 88) : 15 Sind L R 103 : 23 Cr. L. J. 33 (FB), *Gul v. Emperor*.
3. ('21) AIR 1921 Sind 84 (88) : 15 Sind L R 103 : 23 Cri L Jour 33 (FB), *Gul v. Emperor*.
4. ('38) AIR 1938 Cal 6 (10) : 39 Cr. L. J. 308, *Emperor v. Durga Charan Sing*.
- ('36) AIR 1936 Cal 73 (83) : 37 Cr. L. J. 394 : 63 Cal 929, *Benoyendra Chandra v. Emperor*. (It should however attach greatest possible weight to verdict of jury if answering reasonable test.)
- ('28) AIR 1928 Cal 430 (432) : 29 Cri L Jour 546, *Hazrat Gul Khan v. Emperor*.
5. ('21) AIR 1921 Sind 84 (89) : 15 S L R 103 : 23 Cr. L. J. 33 (FB), *Gul v. Emperor*.
6. ('73) 5 N W P H C R 130 (132), *Queen v. Aman*.
See also S. 374 Note 1.

But the High Court will act with great circumspection before it sets aside the verdict of the jury.⁷ It will generally interfere where the evidence which might have materially affected the finding, has been improperly rejected or admitted, or where the jury were improperly charged, or where they misunderstood the trial Judge's directions, or where the proved facts are wholly insufficient to support their verdict.⁸

2. May confirm the sentence. — Before the High Court confirms the sentence of death, it will see if the verdict of the jury is supported by the evidence on record¹ and is right on the facts before it.² As a matter of fact the death sentence will not be confirmed unless the High Court feels completely satisfied about the guilt of the accused even though the trial has been with the aid of a jury. In confirming the sentence, the High Court should scrutinise the evidence and see whether the verdict of the jury is perverse, whether the evidence has been improperly excluded or improperly admitted and whether the trial Judge has properly directed the jury on the points of decision, and has pointed out to them how far those points in his opinion are established or not, by admissible and relevant evidence and has otherwise directed the jury properly.³

Where the evidence is totally *circumstantial*, some Judges have been averse to confirming the sentence of death and have commuted it to one of transportation for life.⁴ There is, however, no rule of law that where the evidence is wholly circumstantial, death sentence should not be awarded.^{4a} In the undermentioned case,⁵ where the evidence was entirely circumstantial and the accused was a young man of nineteen years, the sentence of transportation for life awarded by the Sessions Judge was not enhanced to one of death.

7. ('38) AIR 1938 Cal 220 (221) : 39 Cr. L. J. 541, *Kumarish Chandra v. Emperor* (Unanimous verdict of jury—High Court reluctant to interfere.)

(('36) AIR 1936 Cal 73 (83) : 37 Cr. L. J. 394 : 63 Cal 929, *Benoyendra v. Emperor*.

8. ('21) AIR 1921 Sind 84 (85) : 15 Sind L.R. 103 : 23 Cr. L. J. 33 (FB), *Gul v. Emperor*.

Note 2

1. ('26) 27 Cri L Jour 378 (379) : 92 Ind Cas 890 (Cal), *Arshed Ali v. Emperor*.

(('26) AIR 1926 Nag 368 (370) : 27 Cri L Jour 731, *Dadi Lodhi v. Emperor*.

2. ('24) AIR 1924 Cal 625 (628) : 26 Cri L Jour 5, *Hassenulla Sheikh v. Emperor*.

(('86) 1886 Rat 229 (230), *Queen-Empress v. Nepal*. (It is the duty of the High Court to examine the facts of the case and consider the circumstances if any in favour of the accused, to see whether they tend to acquittal or commutation of capital sentence.)

3. ('21) AIR 1921 Sind 84 (86) : 15 Sind L.R. 103 : 23 Cr. L. J. 33 (FB), *Gul v. Emperor*.

(('22) AIR 1922 Cal 124 (127) : 23 Cri L Jour 567, *Emperor v. Durga Charan*. (Misdirection in the charge to the jury causing failure of justice—Verdict of murder and sentence of death set aside.)

4. ('36) AIR 1936 Cal 73 (80) : 37 Cr. L. J. 394 : 63 Cal 929, *Benoyendra v. Emperor*. ('90) 13 Mad 426 (436) : 1 Weir 290, *Empress v. Sami*.

(('86) 2 Weir 736 (737), *In re Vemulada Janaki*.

(('66) 1866 Pun Re No. 60 Cr., p. 67 (67), *Crown v. Najoo*.

(('66) 1866 Pun Re No. 69 Cr., p. 74 (75), *Crown v. Adalut*.

[See ('24) 25 Cr. L. J. 97 (104) : 76 Ind Cas 97 (Pesh), *Abdul Wahab v. Emperor*.]

4a. ('29) AIR 1929 Mad 667 (668) : 30 Cri L Jour 971, *Indrammal v. Emperor*.

(('15) AIR 1915 Mad 821 (824) : 16 Cr. L. J. 20, *In re Rasammal*. (Accused woman of 60 years — Evidence circumstantial — Sentence of transportation for life enhanced to death sentence.)

5. ('15) AIR 1915 Mad 542 (543, 544) : 16 Cri L Jour 28, *Muniandi v. Emperor*.

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Note 2

There seems to be some difference of opinion on the question, if the *age* or *sex* of the accused can, of itself, be a sufficient reason for reducing the sentence. It may, however, be safely said that the age of the accused is a fact which might well be taken into consideration and has been, in fact, taken into consideration in determining the sentence to be passed in cases of murder.⁶

One view is that the age or sex of the accused is not of itself a sufficient reason for awarding the lesser sentence.^{6a} "If there are other

6. ('37) 1937 M W N 728 (728), *Sankaran Nayar v. Emperor*. (Old age is a point to be taken into consideration in awarding sentence on the accused but in itself is not sufficient for not awarding the death penalty.)
- ('22) AIR 1922 Low Bur 34 (35), *Nga Ba Thin v. Emperor*. (Inadequacy of reason why accused dealt such a severe blow—Youth no extenuating circumstance.)
- ('15) AIR 1915 Mad 542 (545) : 16 Cri L Jour 28, *Muniandi v. Emperor*.
- ('15) AIR 1915 Mad 821 (823, 824) : 16 Cri L Jour 20, *In re Rasammal*.
- ('11) 12 Cri L Jour 448 (450) : 11 I. C. 792 : 1 Upp Bur Rul 87, *Nga Tha Kin v. Emperor*.
- ('27) 28 Cri L Jour 217 (218) : 99 Ind Cas 1017 (Lah), *Mangal Singh v. Emperor*. (Murder by juvenile not wholly deliberate or cold-blooded — Some provocation—Lesser sentence to be passed.)
- ('18) AIR 1918 Low Bur 58 (59) : 9 Low Bur Rul 165 : 19 Cri L Jour 648, *Chit Tha v. Emperor*. (Ordinarily youth is in itself an extenuating circumstance except in cases of extreme depravity.)
- ('28) AIR 1928 Nag 108 (111) : 29 Cri L Jour 400, *Sheobalak Prasad v. Emperor*. (That the age of the accused was 16 years, furnished ground for passing lesser sentence.)
- ('26) AIR 1926 Lah 144 (144) : 26 Cri L Jour 1373, *Mt. Daulan v. Emperor*. (Where a young girl of 15 years killed her step-son by a stick blow because her husband was ill-treating her the Court sentenced her to transportation for life.)
- ('28) AIR 1928 Lah 855 (856) : 29 Cri L Jour 682, *Harnamun v. Emperor*. (Youthful accused mere tool in the hands of third persons—Death sentence not called for.)
- ('29) AIR 1929 Lah 64 (66) : 30 Cri L Jour 65, *Thakar Singh v. Emperor*. (Age of discretion not attained — Death penalty not to be given.)
- ('31) AIR 1931 Lah 177 (178) : 32 Cri L Jour 682, *Mohan Lal v. Emperor*. (Extreme youth is sufficient reason for not hanging a murderer.)
- ('33) AIR 1933 Rang 134 (136) : 34 Cri L Jour 835, *Mi Hein v. Emperor*. (Murder by youth of eighteen acting under instructions and semi-compulsion of elder brother — Death sentence commuted.)
- ('24) AIR 1924 Lah 654 (656) : 26 Cr. L. J. 349, *Pirithi v. Emperor*. (Youth—Violent quarrel — No motive for premeditated murder — Lesser punishment awarded.)
- ('33) AIR 1933 Lah 229 (231) : 34 Cri L Jour 375, *Yar Dost Mohammad v. Emperor*. (Where a boy of seventeen committed murder without premeditation under a sudden impulse, held that he should be given a *locus penitentie* and the irrevocable sentence of death should not be passed upon him.)
- 6a. ('24) AIR 1924 Rang 179 (181) : 1 Rang 751 : 25 Cr. L. J. 1121, *Mi She Yi v. Emperor*. (Accused being woman not conclusive reason for not awarding death penalty.)
- ('40) AIR 1940 Mad 710 (716) : ILR (1940) Mad 254, *In re Chenna Reddi*.
- ('37) 1937 Mad W N 728 (728), *Sankaran Nayar v. Emperor*.
- ('37) AIR 1937 Lah 399 (401) : ILR (1937) Lah 481 : 38 Cri L Jour 879, *Gian Chand v. Emperor*.
- ('36) AIR 1936 Rang 71 (74, 75) : 37 Cri L Jour 463, *Nga Kan v. Emperor*.
- ('22) AIR 1922 Low Bur 34 (35), *Nga Ba Thin v. Emperor*. (Youth alone not necessarily ground for giving lesser punishment.)
- The following cases deal with the question of age in respect of sentence for the offence of murder :*
- ('33) AIR 1933 Cal 1 (2, 3) : 33 Cri L Jour 837 (FB), *Prodhot Kumar v. Emperor*. (Age is a circumstance to be taken into consideration along with other facts.)
- ('28) 29 Cri L Jour 540 (541) : 109 Ind Cas 364 (Lah), *Ismail v. Emperor*. (Murder of a very brutal nature by a youth—Death sentence confirmed.)
- ('28) 29 Cri L Jour 211 (212) : 107 I. C. 99 (Lah), *Muhammad Sultan v. Emperor*. (In case of brutal and ruthless crime, the fact that the murderer is 18 years of age is wholly insufficient reason for not imposing sentence provided by law.)

reasons which very nearly justify the passing of the lesser sentence but do not quite do so, or when it is doubtful whether they do so or not, then the youth or sex of the criminal may certainly tip the scale to the side of mercy."⁷ This view has been dissented from in the undermentioned cases.⁸

Section 376
Note 2

* *Delay in hearing the appeal* for which the accused were in no way responsible has been considered a sufficient ground for not confirming the sentence of death. Carnduff, J., felt oppressed by the fact that the convicted persons had had the capital sentences suspended over their heads for nearly six months and he refused to confirm the sentences of death.⁹ Where, again, the High Court thinks it is "wrong and improper" that the sentence of death passed on the accused should be carried out, it will refuse to confirm the sentence.¹⁰

In determining whether the sentence is to be confirmed, the High Court may consider if the commitment and the conviction were by Courts of competent jurisdiction.¹¹

Satisfactory proof of motive is not always necessary before confirming the sentence.¹²

The fact that the accused murdered his sister to vindicate the honour of his family,¹³ or that murder was committed out of a feeling of revenge,¹⁴ are not enough grounds for refusing to confirm the sentence of death.

- (²⁴) AIR 1924 Nag 29 (32) : 25 Cri L Jour 147, *Sukhwaria v. Emperor*.
 (³⁰) AIR 1930 Lah 50 (51) : 31 Cri L Jour 81, *Gelma Sardara v. Emperor*.
 (³¹) AIR 1931 Rang 171 (172) : 9 Rang 81 : 32 Cr. L. J. 941, *Tiri v. Emperor*.
 (³³) AIR 1933 Oudh 52 (53) : 34 Cri L Jour 250, *Bhawani v. Emperor*.
 (³³) AIR 1933 Lah 305 (306) : 34 Cri L Jour 720, *Hari Kishan v. Emperor*.
 (Youth led astray by mischievous literature held no ground for leniency.)
 (²⁸) AIR 1928 Lah 531 (532, 533) : 29 Cri L Jour 1017, *Amir v. Emperor*.
 (²²) AIR 1922 Nag 65 (66) : 22 Cr.L.J. 757 : 18 N.L.R. 101, *Kacharia v. Emperor*.
 (³¹) AIR 1931 Oudh 89 (89) : 32 Cri L Jour 83, *Emperor v. Bhagwan Din*. (Persons understanding nature of acts done are liable to extreme penalty of law.)
 (²⁸) AIR 1928 Lah 855 (856) : 29 Cri L Jour 632, *Harnamun v. Emperor*.
 (³¹) AIR 1931 Lah 536 (537) : 32 Cri L Jour 645, *Sikandar v. Emperor*. (Youth not necessarily sufficient ground for reducing sentence—But youth possibly influenced by elder associates—Sentence reduced.)
 [See (¹⁵) AIR 1915 Lah 237 (238) : 16 Cri L Jour 167, *Wadhawa Singh v. Emperor*. (Held that the accused was guilty of a foul murder which in spite of his youth called for the extreme penalty of the law.)]
 7. (²²) AIR 1922 Nag 65(66):22 Cr.L.J. 757 : 18 N L R 101, *Kacharia v. Emperor*.
 8. (²⁶) AIR 1926 Nag 461 (463) : 22 Nag L R 104 : 27 Cri L Jour 955, *Madho v. Emperor*. (The Judges in this case were not prepared to affirm that the tender age of an accused is not of itself a sufficient reason for passing the lesser sentence—A I R 1922 Nag 65, dissented.)
 [See also (⁰⁷) 11 C W N 904 (909) : 6 Cr. L. J. 154, *Emperor v. Jasha Bewa*. (Girl of sixteen guilty of deliberately killing her husband—Held that in consideration of her age she should be sentenced to transportation for life instead of the extreme penalty of death.)]
 9. (¹³) 14 Cr.L.J. 642 (653) : 21 Ind Cas 882 (Cal), *Autar Singh v. Emperor*.
 [See also (³⁶) AIR 1936 Cal 73 (80) : 37 Cr. L. J. 394 : 63 Cal 929, *Benoyendra Chandra v. Emperor*. (Accused under death sentence for about ten months as result of delay and long vacation—High Court will take the fact into consideration along with other circumstances.)]
 10. (²⁶) AIR 1926 Nag 461(463):22 Nag L R 104:27 Cr.L.J. 955, *Madho v. Emperor*.
 11. (⁷⁹) 2 All 218 (233, 234, 235) (F B), *Empress of India v. Sarmukh Singh*.
 12. (¹⁷) AIR 1917 Cal 492(492) : 17 Cri L Jour 386, *Torap Ali v. Emperor*.
 13. (⁶⁶) 1866 Pun Re No. 48 Cr, p. 56 (57), *Crown v. Kurmoo*.
 14. (⁶⁷) 1867 Pun Re No. 5 Cr, p. 9 (11), *Crown v. Jumma*.

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Note 3

3. Commutation of sentence.— In a case of murder a sentence of death should ordinarily be imposed unless there are mitigating circumstances which would justify the Court in awarding the lesser sentence prescribed by law.¹ See s. 367, sub-s. (5). But the Court must not pass the more severe sentence when circumstances of extenuation exist, merely because the consequences of the crime have been more serious than in an ordinary case.²

The fact that for the murder of one person more than one have to be sentenced to death, or that the accused is the only son of his widowed mother, or is sincerely penitent and filled with remorse for his conduct,³ is no ground for commuting the sentence.⁴ Similarly, doubt as to the guilt of the accused is a ground not for awarding the lesser punishment but for acquitting the accused.⁵

It has been seen in Note 2 above that Carnduff, J., refused to confirm the sentence of death on account of the delay in confirming such sentence; the Nagpur Judicial Commissioner's Court has expressed its agreement with the view expressed by that learned Judge.⁶ The Sind Judicial Commissioner's Court, while distinguishing the above case, however, says, "in the case of an ordinary murder, the delay in confirming a sentence of death may perhaps be taken into consideration."⁷ Where an accused was once sentenced to death, but the High Court quashed the conviction on the ground of want of territorial jurisdiction, and the accused was for a second time sentenced to death by a Court of competent jurisdiction, the High Court of Lahore commuted the sentence of death to one of transportation for life on the ground that the second trial was for an offence committed four and a half years ago.⁸

Where murder is committed under *grave provocation* but not under grave and sudden provocation, the accused will not be free from legal responsibility for murder; yet the High Court in such a case will commute the sentence of death to one of transportation for life.⁹ An

Note 3

1. ('23) AIR 1923 Lah 598 (599) : 24 Cri L Jour 935, *Waryam Singh v. Emperor*.
(30) AIR 1930 Pat 252 (255) : 31 Cri L Jour 727, *Khudu Rajak v. Emperor*.
(28) 29 Cri L Jour 540 (541) : 109 Ind Cas 364 (Lah), *Ismail v. Emperor*.
(32) AIR 1932 Sind 201 (205, 206) : 26 Sind L R 302 : 34 Cri L Jour 147, *Pharho Shahwali v. Emperor*.
- (32) AIR 1932 Lah 245 (246) : 33 Cri L Jour 576, *Amir Singh v. Emperor*. (In cases of premeditated, cold-blooded and brutal murder, only death sentences should be awarded.)
2. ('37) AIR 1937 Rang 466 (467) : 39 Cr. L. J. 137, *Nga Saw v. Emperor*.
3. ('35) AIR 1935 Cal 591 (594, 595) : 36 Cr. L. J. 1254, *Mominuddi v. Emperor*.
4. ('37) AIR 1937 Pat 497 (499) : 38 Cr. L. J. 1007, *Kuar Koeri v. Emperor*.
- (36) AIR 1936 Cal 227(230) : 37 Cr. L. J. 676 : 63 Cal 1089, *Bhakta Bhusan v. Emperor*.
- (16) AIR 1916 Lah 403 (410) : 1916 Pun Re No. 12 Cr : 17 Cr. L. J. 267, *Kaimi v. Emperor*.
5. ('26) AIR 1926 Nag 368 (370) : 27 Cri L Jour 731, *Dadi Lodhi v. Emperor*.
(30) AIR 1930 Pat 247 (252) : 9 Pat 474 : 31 Cr. L. J. 721, *Soharai Sao v. Emperor*.
(30) AIR 1930 Pat 252 (255) : 31 Cri L Jour 727, *Khudu Rajak v. Emperor*.
6. ('13) 14 Cri L Jour 642 (653) : 21 Ind Cas 882 (Cal), *Autar Singh v. Emperor*.
(26) AIR 1926 Nag 461 (463) : 22 Nag L R 104 : 27 Cr. L. J. 965, *Madho v. Emperor*.
7. ('30) AIR 1930 Sind 225 (244) : 31 Cr. L. J. 1026, *Mohammad Yusuf v. Emperor*.
8. ('26) AIR 1926 Lah 582 (584) : 7 Lah 396 : 27 Cr. L. J. 1168, *Buta Singh v. Emperor*.
9. ('16) AIR 1916 Oudh 138 (138) : 17 Cri L Jour 190, *Puran v. Emperor*.

accused killed his brother-in-law, a lad of eight years, under the belief that the deceased was helping in the infidelity of his wife. Yet the murder not having been committed under the "immediate influence" of provocation induced by that belief, the High Court of Calcutta¹⁰ confirmed the sentence of transportation for life but expressed the view that the Government might consider the question of reduction of sentence.

Where the accused at the time of the murder was "suffering from mental derangement of some sort," but was not by reason of such unsoundness of mind incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law, it was held that he was entitled to every indulgent consideration though guilty of murder.¹¹ Thus, where, because they cried and vexed him the accused

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Note 3

('32) AIR 1932 Lah 369 (370) : 33 Cri L Jour 338, *Abdulla v. Emperor*. (Grave provocation sufficient to justify lesser penalty.)

('23) AIR 1923 Lah 409 (409) : 25 Cri L Jour 298, *Partaba v Emperor*. (Requirement as to grave and sudden provocation not satisfied — But accused having lost his temper and in view of his youth, sentence reduced to transportation for life.)

('33) AIR 1933 All 533 (535) : 35 Cri L Jour 232, *Sheo Daran Singh v. Emperor*. (Accused having illicit connection with deceased for 11 years—Deceased changing paramour—Provocation, held sufficient to commute sentence to one of transportation for life.)

('16) AIR 1916 Mad 833 (833) : 16 Cri L Jour 611, *In re Krushno Kariko*. (A provocation though insufficient to bring the case within exception to S. 300, Penal Code, may still be sufficient for the reduction of sentence.)

('66) 1866 Pun Re No. 105 Cr, p. 103 (101), *Crown v. Soucaroo*. (Want of premeditation, absence of deadly weapon, and a violent altercation which made him excessively angry between the accused and the deceased, his wife, whose death was caused, were held to be good grounds for the Court commuting the sentence of death into one of transportation for life.)

[See ('20) AIR 1920 All 193 (200) : 21 Cr. L. J. 607, *Goshain v. Emperor*. (Deciding factor between murder and culpable homicide is suddenness of provocation.)]

('32) AIR 1932 Lah 302 (303) : 33 Cri L Jour 577, *Hari Singh v. Emperor*. (Provocation though not sufficient to reduce guilt of accused to offence under S. 301 held sufficient ground for not sentencing him to death.)]

[See also ('32) AIR 1932 Lah 438 (440) : 34 Cri L Jour 94, *Jamma Fateli Mohommed v. Emperor*. (Mother with young daughter behaving shamelessly in running away with her paramour — Paramour suspected and killed — Provocation held not to be grave and sudden in spite of pangs of shame and humiliation — Death sentence confirmed.)]

('30) AIR 1930 Mad 972 (973) : 53 Mad 861 : 32 Cr. L. J. 261, *Kolanda Nayakan v. Emperor*. (Where the murder by a juvenile was not wholly deliberate or cold-blooded and there was some legitimate provocation rankling in his mind, lesser sentence was passed.)]

10. ('01) 23 Cal 613 (620) : 5 Cal W N 665, *Ghatu Pramanik v. Emperor*.

11. ('96) 23 Cal 604 (609), *Queen-Empress v. Kadar Nasyer Shah*.

('31) 1931 Mad W N 719 (723), *Narayanawamy v. Emperor*. (Accused not insane, but committing murder when said to have been possessed and inspired by God and whirling round—Death sentence reduced to transportation for life.)

('33) AIR 1933 Lah 123 (124) : 34 Cr. L. J. 909, *Mitha v. Emperor*. (Mental unhingement though not sufficient to bring case within S. 81, I. P. C., may justify reduction of sentence.)

('32) AIR 1932 All 233 (236) : 33 Cr. L. J. 714, *Emperor v. Pancha*. (Accused, a person of weak intellect, subject to fits and not possessed of a normal mind committing murder—Sentence reduced to transportation for life.)

('32) AIR 1932 Oudh 18 (21) : 7 Luck 341 : 33 Cr. L. J. 163, *Ramadhin v. Emperor*. (Accused mentally not normal—Murder committed in moment of extreme excitement—Sentence reduced.)

('33) AIR 1933 Rang 144 (146) : 34 Cr. L. J. 791, *Nga Kan Tha v. Emperor*.

('14) AIR 1914 Upp Bur 31(33) : 2 Upp Bur Rul 28; 16 Cr.L.J. 95, *Nga Kan Hla v. Emperor*.

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Note 3

killed his own children of whom he was very fond, at a time when he was suffering from fever and was consequently irritable and sensitive to sound, it was held that he was guilty of murder and that the sentence of transportation for life would satisfy the ends of justice.¹² Similarly, where the medical opinion was that the murder was perhaps committed in *post febrile* lunacy under the foolish belief that some one had done an injury to the accused, the sentence of death was commuted.¹³

Akin to these is the case where a person who is not suffering from any mental derangement brought about by provocation or disease, commits a murder in the honest and strong belief, though superstitious, "absurd and unfounded," that witchcraft was practised upon his wife or children as a result of which they took ill, and that it is only the murder of the supposed witch that will cure them. In such cases it cannot be said that the accused was by reason of unsoundness of mind incapable of knowing what he was doing was wrong, or contrary to law. They are cases of deliberate and intentional murder. But such belief is to be taken into account and some distinction should be made "between such cases as these and cases in which deliberate murder has been committed from *baser motives*." The distinction that is made is in the sentence passed and the death sentence will be commuted to one of transportation for life.¹⁴

Where the dead body has not been found, some Judges have awarded the lesser sentence. "As the body was not actually found, we think the Judge exercised a proper discretion in not passing the sentence of death," said their Lordships in *Queen v. Budduruddeen*.¹⁵ In the undermentioned case¹⁵ the Allahabad High Court altered a conviction under S. 302 into one under S. 307 of the Penal Code on the ground that the dead body not having been recovered, the fact of death was not proved beyond doubt. In a later case decided by the same High Court where the corpse was not found and the fact of death was proved by the retracted confession of the accused and by no other substantial evidence, Mukerji, J., was for commutation, while the other two learned Judges were for confirmation of the sentence of death.¹⁶

Where the evidence was enough to convict the accused of murder, yet there was doubt as to the precise part taken by the accused in the murder, it was thought "safer" to remit the capital sentence and pass

[See ('32) AIR 1932 Cal 658 (660) : 33 Cri L Jour 476 (SB), *Mabajjan Bibi v. Emperor*. (Accused led to desperation owing to starvation killing her own child — No evidence that when committing the deed accused was insane — Punishment of transportation for life held sufficient.)]

[See however ('31) AIR 1931 Oudh 77 (79) : 32 Cr. L. J. 327, *Mahomed Islam v. Emperor*. (Accused was shown to have been eccentric in the past and had very inadequate motive for the murders—*Held*, that there were not sufficient grounds for not passing death sentence.)]

12. ('85) 10 Bom 512 (518), *Queen-Empress v. Lakshman Dagdu*.

13. ('89) 12 Mad 459 (461) : 1 Weir 42, *Queen-Empress v. Venkataswami*.

14. ('66) 6 Suth W R Cr 82 (82), *Queen v. Ooram Sungra*.

('21) AIR 1921 Pat 63 (66) : 21 Cr. L. J. 603, *Mata Ho v. Emperor*.

14a. ('69) 11 Suth W R Cr 20 (20).

15. ('24) AIR 1924 All 662 (663) : 25 Cr. L. J. 900, *Bandhu v. Emperor*.

16. ('25) AIR 1925 All 627 (631, 637) : 26 Cr.L.J. 1431 (FB), *Raggha v. Emperor*.

one of transportation for life.¹⁷ But the guilt of an accused cannot be considered greater than that of his accomplices merely because he has struck the fatal blow or blows.¹⁸

Section 376
Note 3

Where the condition of the convict was such that if he were hanged decapitation would ensue owing to an aperture in the neck communicating with the larynx, the High Court commuted the sentence of death into one of transportation for life.¹⁹ Lapse of time between commission of an offence and arrest of the accused does not entitle him to a lesser sentence, although it may be taken into account in fixing the appropriate sentence.²⁰

See also the undermentioned cases.²¹

17. (1861) 1 Sath W R Cr 48 (49), *Queen v. Daboo Lall Jhah*.
18. ('66) 1866 Pun Re No. 3 Cr, p. 4 (5), *Crown v. Dittoo*. (Sentence of death passed against the accused commuted to one of transportation for life.)
19. ('78) 2 Cal L Rep 215 (216), *In re Boodhoo Jolaha*.
20. ('37) 1937 Mad W N 571 (571), *Narasimhai v. Emperor*.
21. ('38) AIR 1938 Rang 418 (418) : 40 Cr. L. J. 67, *Nga Po Than v. The King*. (Crime committed in a state of drunkenness, as result of provocation—Although provocation is very slight, sentence of death should not be passed—Sentence reduced to one of transportation for life.)
- ('37) 1937 Mad W N 571 (571, 572), *Narasimhai v. Emperor*. (Where the deceased accused's wife was a termagant and there were constant quarrels between the deceased and the accused and the murder took place during one such quarrel without premeditation, death sentence was reduced to transportation for life.)
- ('35) AIR 1935 Cal 591 (595) : 36 Cr. L. J. 1251, *Mominuddi v. Emperor*. (Accused overcome with passion at insults heaped on him by his brother—Period between the idea of killing getting into his head and actual killing very short—Provocation though not sufficient to convert offence into culpable homicide, held sufficient to inflict lesser penalty.)
- ('75) 21 Sath W R Cr 28 (28), *Queen v. Ram Churn*. (Transportation for life, held sufficient punishment where murder is unpremeditated.)
- ('66) 5 Sath W R Cr 20 (20), *Queen v. Kheaz Sheikh*. (No intention to cause death but merely a reckless assault with a deadly weapon—Sentence reduced.)
- ('66) 6 Sath W R Cr 46 (47), *Queen v. Tanoo*. (Murder committed in retaliation for an injury rather than under the influence of any worse passion—Death sentence commuted.)
- ('27) AIR 1927 All 105 (106) : 27 Cr. L. J. 1392, *Abdul Alim v. Emperor*. (Where there has been some provocation and there is no premeditation, and the crime is committed in the heat of passion, sentence of transportation for life is enough.)
- ('11) 12 Cri L Jour 214 (216) : 10 I. C. 119 (Lah), *Rakhia v. Emperor*. (Misconduct of wife who was murdered for same—Sufficient doubt about the immediate circumstances under which the crime was committed—Death penalty not awarded.)
- ('24) AIR 1924 All 233 (251) : 27 Cri L Jour 193, *Abdullah v. Emperor*. (Accused ignorant peasants guilty under Ss. 149, 302 by misrepresentations made by one whom they believed was a worker of miracles—Lesser sentence is sufficient.)
- ('32) AIR 1932 Cal 818 (820) : 33 Cri L Jour 722 (FB), *Manoranjan v. Emperor*. (The fact that a murder was committed in his desire to escape, when the offender a dacoit was being brought to bay is not an extenuating circumstance.)
- ('28) AIR 1928 Oudh 221 (223) : 29 Cri L Jour 230, *Madaru v. Emperor*. (When a man rushes into a brawl with a heavy hatchet and strikes with all his force one of his neighbours, who is unable to defend himself, upon the head with the hatchet and kills him, then it is not a case for the exercise of clemency and capital sentence should not be reduced.)
- ('14) AIR 1914 Sind 136 (136) : 7 Sind L R 118 : 15 Cri L Jour 501, *Emperor v. Rakim Khan*. (The so-called Baluch custom justifying murder for suspicion as to unchastity is no ground for mitigation of sentence.)
- ('33) AIR 1933 Rang 61 (61) : 34 Cri L Jour 699, *Nga Sein Tun v. Emperor*. (Dacoity—Death caused by one of the dacoits other than appellant—General disregard of human life not present—Sentence reduced.)
- ('32) AIR 1932 Pat 209 (212) : 11 Pat 280 : 33 Cr. L. J. 574, *Hikayat Singh v. Emperor*. (Brutal and premeditated and concerted assassination—Sentence of death confirmed.)

Section 376
Note 4

4. May annul the conviction.—The High Court will annul the conviction though the verdict of the jury was unanimous and there

- ('24) AIR 1924 Nag 119 (120) : 25 Cr. L. J. 63, *Dhania Kunbi v. Emperor*. (Where a woman in order to hide her shame, murders her newly born illegitimate child there are mitigating circumstances sufficient to reduce the penalty of death very much below transportation for life; so also father killing illegitimate child born of him to his own sister — Sentence of death commuted.)
- ('23) AIR 1923 Nag 251 (254, 255) : 24 Cr. L. J. 570, *Manjoo v. Emperor*. (Where appellant constituted himself a tribunal and decided that making a charge of paternity against him was an offence punishable with death and he carried out the sentence himself, a sentence of death confirmed as being proper one.)
- ('28) AIR 1928 Lah 93 (94) : 28 Cri L Jour 966, *Preman v. Emperor*. (Sudden and unpremeditated attack — Fatal blows inflicted in heat of passion upon a sudden quarrel—Lesser sentence awarded.)
- ('28) AIR 1928 Lah 913 (914) : 30 Cri L Jour 571, *Gaman v. Emperor*. (Murder occurring suddenly after mutual abuse — Accused not belonging to a turbulent class—Lesser sentence substituted.)
- ('27) AIR 1927 Lah 516(518):29 Cr.L.J.35, *Nihal Singh v. Emperor*. (Sudden quarrel —Elements of premeditation or preparation absent—Lesser sentence proper.)
- ('22) 23 Cri L Jour 140 (141) : 65 Ind Cas 572 (573) (Lah), *Ghaji v. Emperor*. (Woman of depraved character — Refusal to allow husband to have sexual intercourse—Murder by husband—Lesser punishment awarded.)
- ('30) AIR 1930 Lah 154 (155) : 31 Cr.L.J. 731, *Bhana Mal v. Emperor*. (Assault followed sudden quarrel without premeditation — Accused belonging to peaceful trading class—Extenuating circumstances—Death sentence commuted.)
- ('30) AIR 1930 Lah 171 (172) : 31 Cri L Jour 759, *Khanun v. Emperor*. (Murder of wife who continued intimacy with paramour inspite of repeated reprimands— Sentence commuted to transportation for life.)
- ('25) AIR 1925 Lah 584 (586) : 26 Cri L Jour 1133, *Gulab v. Emperor*. (Two-accused — One striking blow — Other not striking but present and acting under the influence of former—Latter's sentence reduced to one of transportation for life.)
- ('32) AIR 1932 Lah 500 (501) : 33 Cri L Jour 497, *Lachminarain v. Emperor*. (No immunity from capital punishment on ground of accused belonging to a particular community or sect.)
- ('33) AIR 1933 Lah 434 (435) : 34 Cri L Jour 711, *Bhagwana v. Emperor*. (Party fight not started by accused—Sentence reduced.)
- ('33) AIR 1933 Lah 718 (720) : 34 Cri L Jour 1251, *Mt. Sardaran v. Emperor*. (Illiterate woman causing death of child being urged by superstition — Lesser penalty to be imposed.)
- ('29) 1929 Mad W N 789 (790), *Subbiah Thevan v. Emperor*. (Sentence of death commuted into one of transportation for life as crime was result of sudden quarrel and some provocation.)
- ('31) AIR 1931 Lah 538 (539) : 32 Cri L Jour 1083, *Shersingh v. Emperor*. (Origin of the assault being in obscurity, death sentence was commuted into one of transportation for life.)
- ('32) AIR 1932 Lah 5 (7) : 33 Cri L Jour 184, *Bhawal v. Emperor*. (Complainant's side deliberately provoking conflict and no previous intention on the part of the accused to kill anybody—Proper sentence would be one of transportation for life.)
- ('32) AIR 1932 Lah 14 (16) : 32 Cri L Jour 1118, *Rahman v. Emperor*. (Wife going to father's house to inquire after his health but without husband's permission and refusing to depart with him at once—Husband annoyed and murdered her—No provocation.)
- ('32) AIR 1932 Lah 189 (192) : 33 Cr. L. J. 457, *Tara Singh v. Emperor*. (When all the accused joined in beating the deceased mercilessly but it was not shown who inflicted the fatal blow, the accused may be sentenced to transportation for life instead of death.)
- ('17) AIR 1917 Lah 226 (230, 231) : 1917 Pun Re No. 28 Cr : 18 Cri L Jour 868, *Pal Singh v. Emperor*. (Drunkardness may be sufficient ground for not awarding death penalty.)
- ('66) 1866 Pun Re No. 41 Cr, p. 47 (47), *Crown v. Boodh Das*. (Do.)
- ('18) AIR 1918 Bom 212 (214) : 19 Cr. L. J. 593, *Hari Ramji v. Emperor*. (Substantial part of the evidence which the prosecution relied upon was evidence recorded without an oath or affirmation as required by the Oaths Act—Death sentence was commuted to one for transportation for life.)

was no misdirection, if the evidence is not enough to sustain a conviction for murder.¹ Thus, where there were no eye-witnesses to the murder and there was a real doubt as to the identification of the accused and the retracted confession of the accused did not appear to be free and voluntary, the High Court annulled the conviction and acquitted the accused.² Where, again, the sole evidence on which the conviction was based was the uncorroborated testimony of an accomplice, the conviction was annulled.³ Similarly, where suspicion fell upon the accused on account of certain ill-feeling between them and the deceased, and the case depended solely on the evidence of the servant of the deceased, it being doubtful whether the servant could recognize the assailants, the High Court annulled the conviction and set the accused free.⁴

Section 376
Notes 4-6

5. "Convict the accused of any offence." — Under S. 288 of the Code of 1872, the High Court was empowered to "annul the conviction and order a new trial." This was interpreted to mean that the High Court could only order a new trial after annulling the conviction, but could not "convict the accused for any other offence of which the Sessions Court might have convicted him."¹ But under the present section the High Court is empowered to annul the conviction and convict the accused of any other offence of which the Sessions Court might have convicted him and which the evidence on record would warrant. Thus, when the evidence on record showed that the accused took no actual part in the murder but that he helped in the disposal of the dead body and other articles, the High Court acquitted him of the charge of murder, but convicted him under S. 201 of the Penal Code.² Where the intention to kill was not clearly proved, the conviction for murder was annulled and altered into one for an offence under S. 226 of the Penal Code.³ See also the undermentioned cases.⁴

6. New trial. — After annulling the conviction the High Court may order a new trial and send the case to the Court of Session. Where the evidence is incomplete and further evidence is felt necessary

Note 4

1. ('33) AIR 1933 Cal 426 (429) : 34 Cri L Jour 533 (SB), *Emperor v. Asraf Ali*. (Re-trial need not be ordered.)
2. ('28) 29 Cr. L. J. 833 (834):111 Ind Cas 385 (Cal), *Emperor v. Panchu Mondal*.
3. ('73) 20 Suth W R Cr 19 (20, 21), *Queen v. Ramsodoy Chuckerbutty*.
4. ('38) AIR 1938 Cal 220 (221, 222):39 Cr.L. J. 541, *Kumarish Chandra v. Emperor*.

Note 5

1. ('77) 1 Bom 639 (640, 641), *Reg v. Balappa*. ('66) 5 Suth W R Cr 41 (42), *Queen v. Sheikh Solim*. (Case under the Code of 1861.)
2. ('13) 14 Cri L Jour 278 (280) : 19 I C 710 : 1913 Pun Re No. 8 Cr, *Mohammad Shah v. Emperor*.
3. ('28) AIR 1928 Cal 430 (432, 435):29 Cr.L.J. 546, *Hazrat Gul Khan v. Emperor*.
4. ('37) AIR 1937 Rang 466 (467) : 39 Cri L Jour 137, *Nga Saw v. Emperor*. (Husband stabbing his wife fatally on the latter's affirmation as to her cohabitation with another man—Provocation held to be grave and sudden—Conviction altered from S. 302 to S. 304, I. P. C.)
- ('19) AIR 1919 Lah 256 (259) : 1919 Pun Re No. 21 Cr : 20 Cri L Jour 635, *Harnam Singh v. Emperor*. (Conviction altered from S. 302 to S. 394, I. P. C.)
- ('19) AIR 1919 Lah 375 (380) : 1919 Pun Re No. 24 Cr : 20 Cri L Jour 711, *Bahal Singh v. Emperor*. (Conviction altered from Ss. 302/34 to 325/109, I. P. C.)

Section 376
Note 6

for giving judgment, a new trial may be ordered.¹ Where an accused was tried for murder without any pleader or advocate having been appointed to defend him and where the difficulties appearing in the evidence had not been cleared up in the course of cross-examination, either by the accused himself or by the Judge, and the High Court felt it difficult to confirm the sentence of death on the evidence before it, a re-trial was ordered.² Where the Judge practically withdrew the case from the jury by so summing it up as to make the jury register merely his own opinion, it was held that there was no proper trial and that there should be a new trial.³ See also the undermentioned cases.⁴

Section 377

377.* In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

1. Non-compliance with the section—Effect. — Where the Court consists of two or more Judges and the order of confirmation of sentence of death is only passed by one of them, the sentence of death is not validly confirmed but remains submitted to the Court which has to dispose of the same under ss. 375 to 379.¹

2. “New sentence or order.” — The new sentence or order referred to in this section refers to the powers of variation of the sentence etc., conferred by s. 376.¹

* 1882 : S. 377; 1872 : S. 290; 1861 : S. 401.

Note 6

1. ('36) AIR 1936 Cal 73 (84) : 37 Cri L Jour 394 : 63 Cal 1929, *Benoyendra Chandra v. Emperor*.
- ('02) 6 Cal W N 921 (921), *King-Emperor v. Daulat Kunjra*.
- ('94) 2 Weir 302 (302), *In re Savari Aye*. (New trial on a different charge directed.)
2. ('16) AIR 1916 Cal 79 (79, 80) : 16 Cri L Jour 481, *Emperor v. Mohar Ali*.
3. ('27) AIR 1927 Cal 631 (632, 633) : 28 Cr.L.J. 42, *Emperor v. Raja Ali Fakir*.
4. ('37) AIR 1937 Cal 269 (273) : 38 Cri L Jour 1018, *Sanyashi Gain v. Emperor*. (Accused convicted of murder and conspiracy—Conviction on murder charge set aside—Occurrence of murder two years before—Likelihood of witnesses confusing what they saw at time of occurrence—Accused convicted separately for conspiracy and sentenced to transportation for life—Case not sent back for retrial on charge of murder.)
- ('05) 9 Cal W N cccxxviii (cccxxviii), *Kangal Mali v. Emperor*. (Same officer committing accused and holding trial in Sessions Court—Commitment order showing that before trial in Sessions Court the Judge had formed a strong opinion in the case—Conviction set aside and re-trial ordered.)

Section 377 — Note 1

1. ('37) AIR 1937 P C 119 (121) : 38 Cri L Jour 498 : 64 I A 148 : ILR (1937) Bom 711 (PC), *Fakira v. Emperor*. (This case is one which went on appeal to the Privy Council from Resident at Hyderabad, Deccan — But S. 377, Criminal Procedure Code of Hyderabad is substantially the same as this section.)

Note 2

1. ('37) AIR 1937 P C 119 (121) : 38 Cri L Jour 498 : 64 I A 148 : ILR (1937) Bom 711 (PC), *Fakira v. Emperor*. (Obiter.)

378.* When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Section 378

Procedure in case
of difference of
opinion.

Synopsis

1. Scope.
2. Difference of opinion as to the guilt of the accused.
3. Difference of opinion as to the sentence to be passed.

Other Topics (miscellaneous)

Anomalous results in working the rule. See Note 2.
 Difference as to guilt—Enhancement of sentence by third Judge. See Note 2.
 Judicial etiquette on difference of views. See Notes 2 and 3.
 Points of difference. See Note 1.
 Retrial ordered by the third Judge. See Note 1.

1. Scope. — Section 377 enacts that any order made on a reference under S. 374 shall be by a Bench consisting of at least two Judges. This section provides that, when the Judges constituting the Bench are equally divided in their opinion, the case with their opinions shall be laid before another Judge. The Judge to whom the case is referred on a difference of opinion is required to deliver his opinion “after such examination and hearing as he thinks fit,” and the order or judgment in the case shall follow such opinion. The difference of opinion may be either as regards the guilt or innocence of the accused or as to the appropriate sentence to be passed. In either of these cases, the section requires the reference to be made to another Judge¹ who is entitled to pass any order he thinks proper including an order directing re-trial of the accused.²

2. Difference of opinion as to the guilt of the accused. — Where a Bench was equally divided in its opinion as to the guilt of the accused, Mr. Justice Mahmood of the Allahabad High Court felt that the order should be one of acquittal “without the necessity of either a remand or a dissentient opinion being recorded.” While admitting that this section rendered it necessary for the case to be placed before another Judge in this circumstance, he observed :

“I cannot help feeling that, as a matter of judicial etiquette, when one Judge differs from his brother Judge on a pure question of the weight of evidence as to the propriety of a conviction, the opinion of the Judge who is in favour of acquittal should prevail—at least as a general rule. . . . I have always felt that the deliberate opinion of one Judge in favour of acquittal upon a *grave* question of the weight of evidence in a case heard by a Bench consisting of only two Judges should,

* 1882 : S. 378; 1872 and 1861—Nil.

Section 378 — Note 1

1. See ('86) 1886 Rat 229 (241), *Queen-Empress v. Nepal*.
2. ('21) AIR 1921 Mad 679 (681) : 23 Cri L Jour 697, *In re Nainamalai Konan*.

Section 378
Notes 2-3

ipso facto, constitute in most cases a sufficient reason for creating such a serious doubt that the benefit of that doubt should be given to the prisoner."¹

In the undermentioned case,² Edge, C. J., disagreeing with the above view observed that the view of Mahmood, J., involved the subordination of the opinion of the Judge who was for conviction, to that of the Judge who was for acquittal, apart from its being opposed to the statute, as admitted by that learned Judge himself. He further observed :

"I know of no rule of judicial etiquette which prescribes that a Judge, in a capital or any other case, should subordinate his judgment to that of his brother Judge."

The working of this section has often led to anomalous results. Where, on the evidence of a lad of 18 years, Subramaniya Iyer, Offg. C. J., was for confirming the conviction for murder, Boddam, J., was for acquitting the accused. Bhashyam Aiyangar, J., to whom the case was referred on account of this difference of opinion, agreed with Subramaniya Iyer, Offg. C. J., as regards the conviction, but differed from him as regards the sentence. The Officiating Chief Justice was for commuting the sentence of death to one of transportation for life on the ground that the accused committed the murder in consequence of the deceased attempting to blackmail him, but Bhashyam Aiyangar, J., passed the sentence of death, without even considering the extenuating circumstance referred to by Subramaniya Iyer, Offg. C. J.³ This, it is submitted, is a very hard case. If Boddam, J., had agreed entirely with Subramaniya Iyer, Offg. C. J., both as regards the conviction and the sentence, thus taking a more unfavourable view to the accused, the lesser sentence of transportation would undoubtedly have been passed. The fact that one of the learned Judges took a view entirely favourable to the accused resulted in a reference to the third who passed the sentence of death. While the sentence passed by Bhashyam Aiyangar, J., was perfectly legal under the Code, it is most respectfully submitted that it gives rise to the anomaly that a more unfavourable view to the accused on the part of Boddam, J., would have saved his life. Indeed, the accused in this case lost the benefit of the Officiating Chief Justice's judgment as regards the sentence, and the benefit of Boddam, J.'s judgment as regards the conviction. The course adopted by Carnduff, J., in similar circumstances, of passing the sentence of transportation for life, even when the Judge who confirmed the conviction was for passing the sentence of death, is, it is submitted, a very salutary one.⁴

3. Difference of opinion as to the sentence to be passed. —

It has been held that when the difference of opinion is as to the appropriate sentence to be passed, one Judge favouring the death penalty, and the other recommending that transportation for life

Note 2

1. ('86) 1886 All W N 275 (276, 277), *Empress v. Debisingh*.
2. ('87) 1887 All W N 125 (127), *Empress v. Bundu*.
3. ('04) 27 Mad 271 (290) : 1 Cri L Jour 641 : 2 Weir 203 : 14 Mad L Jour 226, *Ramaswamy Goundan v. Emperor*.
4. ('13) 14 Cr.L.J. 642 (646, 649, 653) : 21 I.C. 882 (Cal), *Autar Singh v. Emperor*.

would meet the ends of justice, the difference of opinion itself would be a sufficient ground for holding that the death sentence should not be passed.¹ It has, however, been said that it is not an inflexible rule and the third Judge to whom the case is referred is entitled to award the death sentence if he thinks it proper. The rule of "judicial etiquette and practice" strongly advocated by Mahmood, J., (see Note 2) can be more easily followed in this case, than in a case where the difference is as to the guilt of the accused.

Section 378
Note 3

379.* In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court and attested with his official signature, to the Court of Session.

Section 379

380. Where proceedings are submitted to a Magistrate of the first class or a Sub-divisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

Section 380

Synopsis

1. Legislative changes.
2. Power of the first class Magistrate or Sub-divisional Magistrate to remand.
3. Power of the first class Magistrate or Sub-Divisional Magistrate to acquit.
- 3a. Power of the first class Magistrate or Sub-divisional Magistrate to refer under S. 435.
4. Appeal. See S. 408 Note 5.

1. Legislative changes. — Section 380 of the Code of 1882 which dealt with the confirmation by Sessions Judges of sentences of imprisonment for a term exceeding four years, and transportation

* 1882 : S. 379; 1872 : S. 301, para. 1; 1861 : S. 383.

Note 3

1. ('80) AIR 1930 Cal 193 (198): 31 Cr. L. J. 817, *Emperor v. Dukari Chandra*. See also S. 420 Note 3.

Section 380
Notes 1-3

passed under S. 34, by the Assistant Judges and Magistrates, has now been omitted ; such sentences now come before the High Court on appeal, under S. 408 clause (b). The present S. 380 is entirely a new one.

2. Power of the first class Magistrate or Sub-divisional Magistrate to remand. — The first class Magistrate or Sub-divisional Magistrate is not empowered to *remand* the case to the second class or third class Magistrate who submitted the case to him under S. 562. Thus, where a second class Magistrate finding the accused guilty of voluntarily causing grievous hurt under S. 325, Penal Code, sent the case to the District Magistrate under the proviso to S. 562, it was held that the order of the District Magistrate sending the case back to the second class Magistrate on the ground that S. 562 did not apply to the case was illegal. This section enacts that the District Magistrate should pass such order as he would have passed *if he had originally heard the case*, and a District Magistrate could not have sent the case to a second class Magistrate if he had originally heard it himself.¹

3. Power of the first class Magistrate or Sub-divisional Magistrate to acquit. — There is a difference of opinion on the question if the first class or Sub-divisional Magistrate to whom a case is sent under the proviso to S. 562 is empowered to acquit the accused.

It may be noted that in the analogous S. 349, where the trying Magistrate who is not empowered to pass a sufficiently severe sentence is required to submit the proceedings and forward the accused to the superior Magistrate, the trying Magistrate is to “record the opinion” that the accused deserves a more severe sentence than he can pass. But in S. 562 the accused is “convicted” before he is forwarded to the superior Magistrate. Under S. 349, the Magistrate is empowered to pass “such judgment, sentence or order as he thinks fit and as is according to law.” Under this section such Magistrate “may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him.” In the undermentioned case¹ their Lordships of the Madras High Court observed as follows :

“When a Magistrate of the second or third class submits proceedings under S. 349, he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under S. 562 a conviction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under S. 380, that Magistrate has to deal with a person who has been convicted and it is not a case of the referring Magistrate having merely recorded the opinion that he ought to be convicted. Such opinion as the referring Magistrate expresses being that on the conviction, action should be taken under S. 562. It is our opinion that when an accused person comes before a Magistrate under S. 380, he can be treated only as a convicted person and that it is not permissible for the Magistrate acting under that section to set aside the conviction and to acquit him.”

Section 380 — Note 2

1. (1908) 7 Cr. L. J. 449 (450) : 4 Low Bur Rul 150, *Emperor v. Abdul Lal Shein*. See also S. 562 Note 15.

Note 3

1. (1933) AIR 1933 Mad 728 (729) : 57 Mad 85 : 34 Cri L Jour 1045, *Public Prosecutor v. Gurappa Naidu*.

It has, however, been held in Upper Burma Judicial Commissioner's Court² that the power given to the Magistrate to pass such sentence as he would have passed if he had heard the case originally himself, enables him to acquit the accused. The same view is expressed, though as *obiter*, in an earlier case of the Lower Burma Chief Court,³ and the Nagpur Judicial Commissioner's Court⁴ has adopted the view of the Burma Courts. Support is sought for this latter view in the power given to the Magistrate to take additional evidence or make further enquiry. On this point the Madras High Court in the said case¹ observed as follows :

"It may be for the purpose of satisfying the Magistrate that it really is a case for applying S. 562, and possibly such evidence (additional evidence) might be taken with a view to seeing whether the conviction was correct. Even so, in our view, S. 380 does not allow of a Magistrate who acts under it to set aside a conviction."

3a. Power of the first class Magistrate or Sub-divisional Magistrate to refer under section 435. — Under this section, a Sub-divisional Magistrate to whom proceedings are submitted can only dispose of the case in the manner provided by the section. He is not competent to make a reference to the District Magistrate under S. 435.¹

4. Appeal. — See Section 408 Note 5.

CHAPTER XXVIII.

OF EXECUTION.

381.* When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

1. Form of warrant of execution. — As to the form of a warrant of execution of a sentence of death, see Form 35, Schedule V. As to the form of a warrant where the sentence is commuted to one of transportation or imprisonment, see Form 36, Schedule V.

* 1882 : S. 381; 1872 : S. 301, para. 2; 1861 : S. 383.

2. ('15) AIR 1915 Upp Bur 12 (12) : 29 Ind Cas 663 (663) : 2 Upp Bur Rul 55; 16 Cri L Jour 535, *Mi Thi Hla v. Mi Kin*.

3. ('08) 8 Cri L Jour 476 (477, 478) : 4 Low Bur Rul 277, *Morali v. Emperor*.

4. ('18) AIR 1918 Nag 241 (242), *Bhikari Chamar v. Emperor*.

Note 3a

1. ('40) 1940 Mad W N 244 (244), *Maila Gowda v. Emperor*.

Section 380
Notes 3-4

Section 381

Section 382

382.* If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

1. Power to postpone. — The power of postponing the execution of the sentence of death passed on a woman found to be pregnant should be exercised only by the High Court.¹ It may either postpone the execution till after the delivery of the child² or, if it thinks fit, commute the sentence to one of transportation for life.³

Section 383

383.† Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be, confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

Synopsis

1. "Sentenced to transportation."
2. "Shall forthwith forward a warrant to the jail."
- 2a. Accused on bail — Procedure.
3. When a sentence of transportation or imprisonment commences.

Other Topics (miscellaneous)

Sections 58, 59 and 511, Penal Code. See Note 1.

Sentence for period already undergone in police custody—Illegal. See Note 3.

Sentence of imprisonment in police lock-up—Illegal. See Note 2.

Sentence to follow and not precede conviction. See Note 3.

1. "Sentenced to transportation." — A sentence for transportation may, under various sections of the Penal Code, be either for life or for a lesser period. See also ss. 59 and 511 of the Penal Code and the undermentioned cases.¹

* 1882 : S. 382; 1872 : S. 306; 1861 — Nil.

† 1882 : S. 383; 1872 : S. 302 para. 2; 1861 — Nil.

Section 382 — Note 1

1. ('79) 2 Weir 441 (442).
- (1864) 1864 Suth W R Gap Cr 1 (1), *Queen v. Mt. Ghurbhurnee*.
2. (1864) 1864 Suth W R Gap Cr 1 (1), *Queen v. Mt. Ghurbhurnee*.
- ('71) 15 Suth W R Cr 66 (66), *Queen v. Panhee Aurut*.
- ('79) 2 Weir 441 (442).
3. (1865) 3 Suth W R Cr 15 (15), *Queen v. Tepoo*.
- [See ('78) 1878 Pun Re No. 34 Cr, p. 83 (83), *Mt. Malali v. Crown*.]

Section 383 — Note 1

1. ('04) 1 Cr. L. J. 89 (89) : 1903 Pun Re No. 31 Cr, *Arura v. Emperor*.
- ('82) 5 Mad 28 (28) : 1 Weir 30, *Kunhussa v. Empress*.
- ('01) 1901 Pun Re No. 27 Cr, p. 86 (87), *Salar Baksh v. Emperor*.
- (1865) 2 Suth W R Cr 1 (1), *Queen v. Mootkee Kora*. (S. 59, Penal Code.)

Section 383
Notes 1-3

When an offender is sentenced to transportation he should, under this section, be forwarded with a warrant to the jail in which he is or is to be confined and, by virtue of S. 58 of the Penal Code, he will be deemed to be undergoing the sentence of transportation during the period of his imprisonment prior to actual transportation.

Under S. 368, sub-s. (2) of the Code, a sentence of transportation should not specify the place to which the person sentenced is to be transported.

2. "Shall forthwith forward a warrant to the jail." — Under S. 541, sub-s. (1), the Provincial Government has to appoint the place wherein any person liable to be imprisoned or committed to custody under the Code is to be confined, and, under this section, the Court passing the sentence should forthwith forward a warrant to the jail in which the accused is or is to be confined.¹ The words "jail" and "prison" do not include a police lock-up, and the Magistrate has no power to sentence an offender to suffer imprisonment in a police lock-up.²

2a. Accused on bail — Procedure. — Where the accused is on bail and is not present when the Court upholds a sentence of imprisonment, the procedure is for the Court to issue a warrant for his arrest to a police-officer under S. 77.¹ There is no procedure laid down by the Code that the Court should ask the sureties to ask the accused to surrender.²

3. When a sentence of transportation or imprisonment commences. — There are three cases under the Code in which a sentence of imprisonment or transportation may commence on a future date :

- (1) Where a person is convicted of two offences at one trial and the Court sentences him to suffer imprisonment or transportation for each of the offences, the sentences to run consecutively (S. 35).
- (2) Where a sentence of imprisonment or transportation is passed on an escaped convict and the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped (section 396).
- (3) Where a sentence is passed on a person already undergoing a sentence of imprisonment or transportation (S. 397).

(1865) 3 Suth W R Cr 44 (44), *Queen v. Tonooram Malu*. (Do.)

(1866) 5 Suth W R Cr 44 (44), *Queen v. Shonaullah*. (Do.)

[See (1864) 1864 Suth W R Gap Cr 35 (35), *Queen v. Premchand*.]

Note 2

1. ('02) 29 Cal 286 (297): 6 C W N 254(FB), *In re Horace Lyall*. (Court as Court of reference may forward offender to any jail within its jurisdiction as Court of reference.)

2. ('14) AIR 1914 Low Bur 156 (157): 7 Low Bur Rul 62 : 15 Cr. L. J. 10, *Emperor v. Po Thin*.

See also S. 32 Note 4.

Note 2a

1. ('40) AIR 1940 All 386 (386) : 41 Cr. L. J. 741 : I L R (1940) All 507, *Mumtaz v. Chhutwa*.

2. ('40) AIR 1940 All 386 (387): 41 Cr. L. J. 741: I L R (1940) All 507, *Mumtaz v. Chhutwa*.

Section 383
Note 3

In all other cases, a sentence of transportation or imprisonment will commence from the time it is passed;¹ and the Court has no power to direct that such sentence should commence on a future date.² Nor has the Court power to make a sentence precede a conviction.³ The reason is that a sentence should *follow* and not *precede* a conviction.^{3a} Thus, it is illegal to sentence an offender for the period already undergone by him in the police custody.⁴

A sentence of transportation or imprisonment should be definite in respect of each offence.⁵

Section 384

384.* Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined.

1. Warrant for execution of a sentence (*omitted*)

Section 385

385.† When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

* 1882 : S. 384; 1872 : S. 303; 1861 : S. 222.

† 1882 : S. 385; 1872 : S. 304; 1861 : S. 223.

Note 3

1. ('69) 12 Suth W R Cr 47 (48) : 3 Beng L R App Cr 50, *In re Kishen Soonder Bhattacharjee*.

('80) 7 Cal L R 393 (395), *In re Okhoy Kumar*. (Magistrate after sentencing accused admitted them to bail — *Held* such admission to bail did not make sentence one to commence at a future time.)

('17) AIR 1917 Low Bur 159 (159): 17 Cr. L. J. 480 (480), *Shin Taung v. Emperor*. (Sentence of imprisonment under the Prisons Act must commence from date on which it is passed—See also S. 541.)

2. ('68-69) 4 Mad H C R App i (ii). (The Court cannot suspend its own sentence pending appeal.)

('69-70) 5 Mad H C R App i (i). (Do.)

[See however ('81) 7 Cal L R 393 (395), *In re Okhoy Kumar*. (In this case the Magistrate granted bail to enable accused to prefer appeal—*Held*, that the sentence was not to be considered thereby to be one which is to take effect in future and is, therefore, not illegal.)]

3. ('93-1900) 1893-1900 Low Bur Rul 42 (43), *Queen-Empress v. Nga Po Mya*.

3a. ('97) 1897 Rat 892 (893), *Empress v. Sadu*.

('33) AIR 1933 Rang 28 (28) : 34 Cri L Jour 447, *Emperor v. Nga Po Min*. (It is illegal to antedate the execution of sentence.)

('23) AIR 1923 Lah 104 (105) : 23 Cri L Jour 593, *Dangar Khan v. Emperor*. (Half the period ordered to be counted as part of sentence — *Illegal*.)

('08) 7 Cri L Jour 453 (453) : 4 Low Bur Rul 152, *Emperor v. Tha Hmun*.

4. ('97) 1897 Rat 892 (893), *Empress v. Sadu*.

('07) 5 Cri L Jour 217 (218) (Lah), *Baghel Singh v. Emperor*. (But sentence of imprisonment until rising of Court good.)

('08) 7 Cri L Jour 453 (453) : 4 Low Bur Rul 152, *Emperor v. Tha Hmun*.

5. ('68-69) 4 Mad H C R App xxvii (xxvii). (Single sentence passed on conviction of three separate offences—*Illegal*.)

(1864) 1864 Suth W R Gap Cr 35 (35, 36), *Queen v. Premchand*.

386.* (1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may —

Warrant for
levy of fine.

- (a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;
- (b) issue a warrant to the Collector of the District authorizing him to realize the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter :

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The *Provincial Government*^a may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Courts issue a warrant to the Collector under sub-section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly :

* Code of 1898, original S. 386.

386. Whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender, although the sentence directs that, in default of payment of the fine, the offender shall be imprisoned.

1882 : S. 386; 1872 : S. 307; 1861 : S. 61.

Section 386
Notes 1-2

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

a. Substituted by A. O. for "Local Government."

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Amendments in 1923. 2. Recovery of fine. 3. "Has been sentenced to pay a fine." 4. Offender undergoing whole term of imprisonment in default — Levy of fine. 5. "Court passing the sentence." 6. "May take action." 7. Execution against immovable property. | <ol style="list-style-type: none"> 8. Priority over other debts. 9. Death of offender. 10. Attachment of moveable property — Clause (a). 11. "Belonging to the offender." 12. Claims to property attached under sub-section (1) (a). 13. Execution according to civil process — Sub-section (1) (b). 14. Revision. |
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Other Topics (miscellaneous)

- | | |
|---|---|
| <p>Ability but unwillingness to pay fine—
Sufficient special reason. See Note 4.</p> <p>Applicability to S. 16, Punjab Land
Alienation Act. See Note 13.</p> <p>Applicability to all Acts, Regulations,
Rules or bye-laws. See Note 2.</p> <p>Applicability to recoveries under Local
Boards Act. See Note 2.</p> <p>Applicability to S. 488. See Note 2.</p> <p>Comparison with S. 547 — Discretion.
See Note 6.</p> <p>Death of person fined and liability of
his property. See Notes 9 and 11.</p> <p>Deposit by surety for appearance not
liable for fine. See Note 11.</p> <p>Direction of payment to complainant—
Still Crown debt. See Note 8.</p> | <p>Executing Court not to question warrant.
See Note 13.</p> <p>Fine, to be specific as to each offender.
See Note 3.</p> <p>Fine written off — Effect of. See Note 2.</p> <p>Joint fines on several accused. See
Note 3.</p> <p>Non-applicability to Dekkhan Agricultu-
rists' Relief Act, S. 22. See Note 13.</p> <p>Refund of fine. See Note 4.</p> <p>Section 64, I. P. C.—When bar to reco-
very of fine. See Note 2.</p> <p>Simultaneous execution. See Note 7.</p> <p>Suspension of imprisonment in default
of fine. See Note 2.</p> |
|---|---|

1. Amendments in 1923. — This section has been substituted for the old S. 386 by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923. The material changes introduced are as follows :

- (1) The word 'attachment' has been used in place of the word 'distress.'
- (2) A warrant for the levy of the fine may now be issued for execution according to *civil* process against the *moveable* as well as the *immovable* property of the defaulter.
- (3) Where the offender has undergone the whole of the imprisonment awarded in default of payment of fine, no warrant against his properties should issue unless for special reasons recorded in writing.

2. Recovery of fine. — Section 64 of the Penal Code provides that whenever an offender is sentenced to pay a fine, with or without imprisonment, it is competent to the Court to direct that, in default of payment of such fine, the offender shall suffer imprisonment for a certain period. The undergoing of such imprisonment does not, however, operate as a *discharge* or *satisfaction* of the order for payment of the fine, which may, nevertheless, be levied in the manner prescribed by this section,¹ *i. e.* —

Section 386 — Note 2

1. ('01) 23 All 497 (498) : 1901 A W N 176, *Emperor v. Sagwa*.

Section 386
Note 2

- (1) by attachment and sale under *the provisions of this Code* of the *moveable* property of the offender, or
- (2) by execution by *civil process* against his *moveable* or *immovable* property or both, or
- (3) by both the above methods.

There are, however, two limitations subject to which the above procedure is to be adopted, *viz.* —

- (1) Where the offender has *undergone the whole term of imprisonment* in default, no warrant should be issued for levy of the fine except for *special reasons* to be recorded.
- (2) No fine can be levied after the period of *six years* after the passing of sentence, or, where, under the sentence, the offender is liable to imprisonment for a longer period than six years, then after the expiration of the period.² The mere fact, however, that the Court has written off a fine as irrecoverable is no bar to its taking action under this section within the said period if it subsequently appears that the offender has acquired the means of paying it.^{2a}

Where an offender is sentenced to pay *fine only* and to imprisonment in default of payment thereof, the imprisonment may be *suspended* to enable the offender to pay the fine in instalments or on a future date.³

The provisions of this section have been declared to apply —

- (1) to the levy of all fines imposed under the authority of any Act, Regulation, Rule, or bye-law, in the absence therein of any specific provision to the contrary,⁴
- (2) to the recovery of the amount of maintenance ordered to be paid under S. 488,⁵

(175) 1875 Rat 91 (92), *Reg. v. Gulab Chand*. (Award of imprisonment in default of payment of fine imposed under enactments passed after General Clauses Act I of 1869 came into operation is legal.)

(1885) 3 Suth W R Cr Letters 19 (19).

(1885) 3 Suth W R Cr Letters 21 (21).

(1885) 3 Suth W R Cr 61 (62), *Queen v. Modooroodundey*. (Per Kemp and Jackson, J.J., Seton-Karr, J., dissenting.)

2. See Section 70 of the Penal Code.

(184) 1884 Rat 207 (207), *Queen-Empress v. Ganu Sakharan*. (The liability for any sentence of imprisonment awarded in default of payment of fine continues, however, after the expiration of the six years.)

2a. (106) 4 Cr. L. J. 404 (404) : 1906 A W N 275 : 3 A L J 818, *Latiful Husain v. Mumtaz Ali Khan*.

3. See Section 388.

4. General Clauses Act (X of 1897), S. 25;

The Bengal General Clauses Act (Act I of 1899), S. 26;

Bombay General Clauses Act (Act I of 1904), S. 26;

The United Provinces General Clauses Act (Act I of 1904), S. 25;

The Punjab General Clauses Act (Act I of 1898), S. 23;

The Burma General Clauses Act (Act I of 1898), S. 25;

Assam General Clauses Act (Act II of 1915), S. 28;

The Central Provinces General Clauses Act (Act I of 1914), S. 24;

Regulation III of 1876, S. 35;

Regulation III of 1901, S. 61.

[See however (172) 17 Suth W R Cr 7 (8), *Government v. Junglee Beldar*. (S. 5 of General Clauses Act, 1868, applies to fines imposed under any Act *thereafter* to be passed and has no application to the Abkari Revenue Act of 1856.)]

5. Section 488, sub-section (3).

Section 386
Notes 2-4

- (3) to the recovery of all moneys ordered under this Code to be paid but for which no method is otherwise expressly provided for.⁶ Thus, the recovery of compensation amount ordered to be paid under S. 250, or of costs ordered to be paid under S. 148, or of the court-fees or process-fees ordered to be paid under S. 546A, may all be recovered in the manner provided by this section,
- (4) to the recovery by the Local Board under S. 221 of the Madras Local Boards Act, XIV of 1920, of any fee, toll, compensation or damages due to it.⁷

Where money found on an accused person at the time of his arrest is taken and placed in the custody of the Court, it has been held that the Court at the time of convicting and sentencing him can impose a fine and order that the fine should be recovered by confiscation of the money under S. 517.⁸

3. "Has been sentenced to pay a fine." — Before a warrant can be issued under this section it is necessary that the Court issuing the warrant should have *sentenced the offender to pay a fine*. So, a Court cannot, for instance, issue a warrant, merely on a report of a Railway Traffic Inspector to the effect that damage has been done to the railway carriage and that it should be recovered.¹

A sentence of fine should be *specific* as to *each offender* fined.² It is not proper to sentence two or more offenders to pay a fine jointly.³

See also ss. 63 to 70 of the Penal Code.

4. Offender undergoing whole term of imprisonment in default — Levy of fine. — Under the section, as it stood before the amendment of 1923, the Court could issue a warrant for the levy of fine even though the offender had undergone the *whole* term of the imprisonment in default of fine. Under the present section as now amended, a warrant should *not* issue for the levy of fine in such cases unless for *special reasons* to be recorded the Court considers it necessary to issue such a warrant. But where the offender has been committed to jail for failure to pay the fine but the full term of imprisonment for default has *not* been completed, the proviso does not apply and a warrant can be issued.¹ Moreover, the proviso only forbids the *issue* of a warrant

6. See Section 547.

7. ('23) AIR 1923 Mad 275 (275):24 Cr. L. J. 464, *Puniya Syamalo v. Emperor*.

8. ('34) AIR 1934 Bom 193 (194) : 35 Cri L Jour 1344, *In re Samant*.

Note 3

1. ('29) AIR 1929 Pat 108 (108, 109):30 Cr.L.J. 635, *Abdul Majid v. N. L. Mukherji*.

2. ('69-70) 5 Mad H C R App v (v) : 1 Weir 30. (Fine imposed on prisoners individually and collectively—Illegal.)

3. ('17) AIR 1917 Cal 348 (356, 359, 364) : 18 Cri L Jour 945 : 44 Cal 1025 (1060, 1063) (FB), *Amrita Lal v. Corporation of Calcutta*.

('69-70) 5 Mad H C R App v (v) : 1 Weir 30.

[But see ('75) 1875 Rat 90 (90). (In this case it is assumed that a fine can be levied jointly.)]

Note 4

1. ('39) AIR 1939 Cal 337 (338) : 40 Cr.L.J. 654 : I L R (1939) 1 Cal 471, *Emperor v. Smt. Sarojini De*. (Warrant issued without reasons before the accused has undergone the whole imprisonment in default is not illegal although the property is sold after the accused has undergone the full imprisonment.)

('35) AIR 1935 Cal 546 (547) : 36 Cr. L. J. 1267, *Nil Kantha Pal v. Bisakha Pal*.

after the imprisonment in default of fine has been served; it does not require that where a warrant has been issued it must be *withdrawn* if the imprisonment in default of fine has been served for the full period.² But in dealing with such warrants the Court should follow the policy underlying the proviso; so that, if there are special reasons for not withdrawing the warrant the Court should refuse to withdraw it.³ The special reasons for issuing the warrant or for not withdrawing it should be reasons accounting for the fact that the fine has not been recovered before the sentence in default has been served and any reasons which are directed to that point would be relevant.⁴ The facts that the offence is a serious one and that the complainant has been allotted part of the fine are irrelevant.⁵ But it has been said that where an offender *having the means* of paying the fine chooses to undergo imprisonment rather than pay the fine, it is a sufficient special reason which will enable the Court in its discretion to order that the fine may be levied, notwithstanding that the offender has served the full term of imprisonment ordered for default of payment of the fine.⁶

Section 386
Notes 4-5

Where an offender sentenced to fine and to imprisonment in default, paid a portion of the fine, but, the fact not having been communicated to the jailor, he had to serve the whole term, it was held that the Court had no jurisdiction to refund the fine, but that the party should apply to the Local Government for a refund.⁷

5. "Court passing the sentence." — The power to levy a fine is restricted to the *Court passing the sentence*.¹ It may be exercised either by the Judge or Magistrate who passed the sentence or by his successor in office.² See the undermentioned case.³ See also S. 389.

2. ('35) AIR 1935 Bom 160 (161) : 59 Bom 350 : 36 Cri L Jour 1034, *Digambar Kasinath v. Emperor*.

3. ('35) AIR 1935 Bom 160 (161) : 36 Cri L Jour 1034 : 59 Bom 350, *Digambar Kasinath v. Emperor*.

4. ('36) AIR 1936 Cal 149 (151) : 37 Cr. L. J. 524 : 63 Cal 1139, *Jadabendranath Panja v. Emperor*. (The mere fact that the accused is a man of dangerous character is not a sufficient reason.)

('35) AIR 1935 Bom 160 (161) : 36 Cr. L. J. 1034 : 59 Bom 350, *Digambar Kashinath v. Emperor*. (It may be that the authorities, through no negligence on their part, did not know of the existence of the property or the accused may have inherited property after he served his sentence in default, or there may not have been time to execute the warrant—Matters of that sort would all be special reasons.)

5. ('35) AIR 1935 Bom 160 (161) : 36 Cri L Jour 1034 : 59 Bom 350, *Digambar Kashinath v. Emperor*.

6. Statement of Objects and Reasons, 1921.

7. ('66-67) 4 Bom H C R Cr 37 (38), *Reg. v. Natha Mula*.

Note 5

1. ('70) 1870 Rat 35 (35), *Satara Sessions Judge's Letter*.

('68) 9 Suth W R Cr 50 (50) (FB), *Chunder Coomar Mitter v. Modoosooden Dey*.

2. ('68) 9 Suth W R Cr 50 (50) (FB), *Chunder Coomar Mitter v. Modoosooden Dey*.

3. ('36) AIR 1936 Cal 149 (150, 151) : 37 Cr. L. J. 524 : 63 Cal 1139, *Jadabendranath Panja v. Emperor*. (Special Magistrate appointed under Ordinance XI of 1931 passing sentence — After termination of special powers another Magistrate succeeding him as Sub-divisional Magistrate — Such Magistrate cannot execute sentence of fine as he cannot be deemed to be successor in office of the special Magistrate.)

Section 386
Notes 6-9

6. "May take action." — Where an offender has been sentenced to fine and to imprisonment in default of payment of the fine, it is not *imperative* that the Court should take action in all cases. The words "*may take action*" show that it is in the *discretion* of the Court to do so or not. But where an order for payment of *money* has been made under the Code, S. 547 provides that the amount *shall* be recoverable as if it were fine, and it has been held that the Court has no discretion in *such* cases to refuse to take action under this section for the recovery of the amount.¹

7. Execution against immovable property. — Prior to the substitution of this section for the old one in 1923, there was no provision for attachment and sale of *immovable* property of the offender for the purpose of realising a fine and it was held that a sale of immovable property for recovering a fine conferred no title on the purchaser as the sale itself was without jurisdiction.¹ Clause (b) now enables the Court to proceed against the immovable properties belonging to the offender. This, however, can only be according to *civil process* and not as provided in this Code. The Court also has power to issue a warrant for attachment and sale of moveable property and *simultaneously* to order execution against immovable property according to civil process.

8. Priority over other debts. — A fine imposed or an order for payment of money passed by a criminal Court is a debt due to the Crown — and as a *Crown debt* it takes precedence over ordinary contract debts.¹ The character of Crown debt is not lost even though there is a direction that it should be paid over to the complainant.²

9. Death of offender. — Section 70 of the Penal Code provides that the death of the offender shall not discharge from the liability for fine, any property which would, after his death, be legally liable for his debts; and therefore a warrant for the levy of the fine may be issued under this section, even after the death of the offender, against properties in the hands of his legal representatives.¹

Note 6

1. ('23) AIR 1923 Pat 57 (57) : 24 Cr.L.J. 126, *Harendra Krishna v. Balkumar*. (Costs ordered under S. 148 (3).)
(172-92) 1872-1892 Low Bur Rul 606 (606, 607), *Empress v. Alexander Augustus St. Clair Miller*.

Note 7

1. ('21) 22 Cri L Jour 399 (400) : 61 I. C. 527 (527) (Lah), *Madari v. Mehrdin*. ('68) 5 Bom H C R Cr 63 (64), *Reg. v. Lallu Karwar*.
[See also ('92) 20 Cal 478 (481), *Queen-Empress v. Sitanath Mitra*.]

Note 8

1. (1876) 2 Ex D 47 (48) : 46 L J Ex 73 : 35 LT 858, *In re Arthur Heavens Smith* (Appellant in appeal to House of Lords in Chancery entered as usual into recognizance for payment of respondents costs if unsuccessful — Appeal unsuccessful — Appellant did not pay the costs — Recognizance estreated and appellant arrested — Held he was a debtor to the Crown.)
(18) AIR 1918 Mad 1111 (1112, 1115) : 40 Mad 767 (769, 774, 775) : 18 Cr. L. J. 426, *Pichu Vadhiar v. Secy. of State*.
2. ('18) AIR 1918 Mad 1111 (1112, 1115) : 40 Mad 767 (775) : 18 Cr. L. J. 426, *Pichu Vadhiar v. Secy. of State*.

Note 9

1. ('78) 2 Bom 564 (567), *Imperatrix v. Dongaji*.

Section 386
Note 10

10. Attachment of moveable property — Clause (a). — Prior to the substitution of this section for the old one in 1923, the section used the word "distress" and Form No. 37 of Schedule v contained the words "make distress by seizure." As the words "moveable property" were used in the section as being the subject of 'distress' that is, *actual seizure*, it was held that only *tangible or corporeal* moveable property capable of being seized could be proceeded against by way of distress and not such property as debts or choses in action¹ which could not be 'seized.' It was also held that a share or interest in joint moveable property could not be seized and therefore could not be distrained under the section² though a share or interest in joint property could be *attached* under S.88 by the issue of a prohibitory order or the appointment of a receiver.^{2a} The substitution in the present section of the word "attachment" for the word "distress" shows that even a debt due to or a share in joint moveable property belonging to an offender could be attached.³ Sub-section (2) provides that the Provincial Government may make rules for regulating the manner in which the attachment is to be made. In the absence, however, of any such rules the question arises as to the mode in which an attachment of a debt or share in joint moveable property is to be effected. It has been held that seizure and sale of the property in which the offender has an undivided fractional interest are not legal.⁴ According to the High Court of

The following cases, which were decided with reference to old S. 386, are no longer of any importance :

(193) 20 Cal 478 (481), *Queen-Empress v. Sitanath Mitra*.

(168-69) 5 Bom H C R Cr 63 (64), *Reg. v. Lallu Karwar*.

(1865) 4 Suth W R Cri L 6 (6). (Under S. 70, Penal Code, even immovable properties of offender will be liable for payment of fine after the death of offender.)

Note 10

1. (117) AIR 1917 Mad 748 (748, 749) : 18 Cr. L. J. 1, *Secy. of State v. Sengammal*. (It may however include negotiable instruments, bonds and title deeds.)

(118) AIR 1918 Mad 1111 (1113, 1114) : 40 Mad 767 (768, 772) : 18 Cr. L. J. 426, *Pichu Vadhiar v. Secy. of State*. (Surplus sale proceeds in the hands of a mortgagee under power of sale is not a debt but tangible moveable property and could be attached under S. 386.)

2. (192) 20 Cal 478 (479), *Queen-Empress v. Sitanath Mitra*. (Only moveable property of which the offender was the sole owner could be attached under S. 386.) (176) 2 Weir 442 (443).

2a. (117) AIR 1917 Mad 366 (367) : 39 Mad 831 (833) : 17 Cri L Jour 296 (FB), *Secy. of State v. Rangaswamy Iyengar*.

3. [See (126) AIR 1926 Bom 103 (104, 105) : 49 Bom 906 : 27 Cri L Jour 652, *Shivlingappa Nijappa v. Gurlingava Basappa*, (Per Fawcett, J.; Madgaonkar J. being doubtful reserved his opinion on the point.)]

[But see (133) AIR 1933 Nag 248 (248, 249) : 29 Nag L R 320 : 34 Cr. L. J. 1263, *Shrawan v. Emperor*.]

4. (139) AIR 1939 All 373 (374), *Bansraj Das v. Secy. of State*. (Fine imposed upon a coparcener cannot be recovered by attachment and sale of joint moveable property belonging to the family—In such a case the property cannot be said to belong to the offender.)

(133) AIR 1933 Cal 402 (403, 404) : 60 Cal 932 : 34 Cr. L. J. 503, *Pramatha Bhusan v. Emperor*.

(133) AIR 1933 Cal 401 (402) : 60 Cal 851 : 34 Cri L Jour 579, *Manmathanath Kundu v. Emperor*.

(132) AIR 1932 Mad 538 (540) : 55 Mad 1041 : 33 Cr. L. J. 622, *Narasanna v. Emperor*. (132) AIR 1932 Pat 292 (293) : 12 Pat 29 : 33 Cr. L. J. 872 (SB), *Rajendra Prasad Misser v. Emperor*.

(133) AIR 1933 Nag 248 (248, 249) : 29 Nag L R 320 : 34 Cr. L. J. 1263, *Shrawan v. Emperor*.

Section 386
Notes 10-11

Madras⁵ the proper course in such cases is to follow the principle adopted in the Civil Procedure Code and to proceed under O. 21, Rr. 46 and 47.

The High Court of Patna⁶ and the Judicial Commissioner's Court of Sind⁷ have expressed the view that the better method to adopt in such cases would be to proceed under clause (b) rather than clause (a) of the section.

Under sub-s. (1) clause (a) of this section, *any* moveable property belonging to the offender can be attached. The provisions of the Civil Procedure Code exempting certain property from attachment and sale do not apply to criminal Courts.⁸

Salary not yet drawn by the offender is not moveable property within the meaning of this section.⁹

11. "Belonging to the offender." — The Court has power under sub-s. (1) (a) to attach only moveable property *belonging to the offender*, and therefore cannot order the attachment of the money deposited by a surety for the appearance of the offender, in execution of a sentence of fine passed against the offender.¹ Similarly, where joint moveable property passes by *survivorship* to the other members of the family on the death of the person, such property cannot be attached as it is no longer property of the person in the hands of the other members.² It has been held that a sentence of fine against a coparcener cannot be executed by attachment and sale of joint moveable property of the family as the property cannot be said to belong to the coparcener who has got only an unascertained interest therein.³

It is the duty of an officer entrusted with the execution of a warrant of attachment to ascertain by all possible means whether the property belongs to the offender.⁴

[See also ('36) AIR 1936 Mad 560 (560) : 37 Cr. L. J. 836, *Kollivenkataratnam v. Collector of Kistna*. (Attachment by seizure of standing crops of joint Hindu family is illegal—Case under clause (b).)]

5. ('32) AIR 1932 Mad 538 (540) : 55 Mad 1041 : 33 Cr. L. J. 622, *Narasanna v. Emperor*.

6. ('32) AIR 1932 Pat 212 (213) : 33 Cr. L. J. 671, *Sahadeo Singh v. Ram Kishun Singh*. (Proceedings under S. 145.)

7. ('33) AIR 1933 Sind 43 (44) : 34 Cr. L. J. 354, *Pritam Das Mangaram v. Emperor*.

8. ('37) AIR 1937 Lah 367 (367), *Natha Singh v. Mt. Bachint Kaur*. (Order of maintenance under S. 488—Jagir money collected by revenue authorities of person against whom order is made can be taken and attached for realization of amount due under order.)

('89) 1889 Pun Re No. 3 Cr, p. 7, *Sirdar Raghubir Singh v. Mela Singh*.

9. ('34) AIR 1934 Rang 82 (83) : 36 Cri L Jour 850, *Maung Soe Hlaing v. Ma Thein Khin*. (Salary in this case was not earned also.)

Note 11

1. ('21) AIR 1921 All 71 (71) : 22 Cr. L. J. 744, *Girdhari Lal v. Emperor*. (Even though the surety and accused were brothers and members of joint Hindu family.) ('32) AIR 1932 Pat 301 (301) : 33 Cr. L. J. 958 (FB), *Ramchander Pandey v. Emperor*. See also S. 513 Note 1.

2. ('32) AIR 1932 Pat 301 (301) : 33 Cr. L. J. 958 (F B), *Ramchander Pandey v. Emperor*.

3. ('39) AIR 1939 All 373 (374), *Bansraj Das v. Secy. of State*.

4. ('35) AIR 1935 Pat 214 (217) : 36 Cri L Jour 714, *Ram Singh v. Emperor*.

12. Claims to property attached under sub-section (1) (a).

— Under the section before the amendment of 1923, there was no provision for the determination of claims which might be preferred to the property attached,¹ but the Court had, however, to satisfy itself that the property attached *belonged* to the offender.² In cases of doubt it was held that the proper procedure was to stay the sale to enable the claimant to establish his title to the property in a civil Court.³

Sub-section (2) of the present section now provides that the Provincial Government may make rules for the *summary determination* of any claims that may be made in respect of the property attached under sub-s.(1) (a) and it is the duty of the Court in such cases to hold a proper inquiry into the title of the claimant.⁴ In the absence of such rules, it has been held that the procedure prescribed for the inquiry into claims under s. 88 of this Code should be adopted.⁵

The summary procedure for the determination of claims under sub-s.(2) applies only during the *subsistence* of the attachment. Where, therefore, money is attached and *credited* to the Government, an application for the refund of the money by the Government does not lie, the reason being that the attachment must be deemed to be put an end to as soon as the money is credited to the Government.⁶

13. Execution according to civil process—Sub-section (1) (b).

— Where it is sought to execute a sentence of fine against the

Note 12

1. ('39) AIR 1939 Cal 337 (337) : 40 Cri L Jour 651 : I L R (1939) 1 Cal 471, *Emperor v. Sarojini De.*
- ('15) AIR 1915 Lah 227 (229) : 16 Cr. L. J. 166 (166, 167), *Hira Lal v. Emperor.*
- ('95) 22 Cal 935 (938), *Queen-Empress v. Gasper.*
- ('98) 1898 All W N 173 (179), *Secy. of State v. Sukhdeo.*
- ('32) AIR 1932 Bom 476 (477) : 33 Cri. L.J. 805 : 56 Bom 364, *In re Pandurang Venkatesh.*
[See ('02) 4 Bom L R 109 (114), *Ganesh Mahadeo v. Narayan Balshet.* (There is nothing in law indicating that it is the Magistrate's business to do more than issue the warrant.)]
2. ('72-92) 1872-1892 Low Bur Rul 332 (332), *Empress v. Mi Myaing.*
3. ('32) AIR 1932 Bom 476 (477, 478) : 33 Cri L Jour 805 : 56 Bom 364, *In re Pandurang Venkatesh.*
('98) 1898 Rat 976 (976), *Queen-Empress v. Chhagan Jagannath.*
('97) 20 Mad 88 (89) : 2 Weir 42, *Queen-Empress v. Kandappa Goundan.* (Case under S. 88, Criminal P.C.—Principle stated in judgment to be applicable to this section.)
('81) 2 Weir 445 (445).
4. ('39) AIR 1939 Cal 337 (338) : 40 Cr.LJ. 654 : ILR (1939) 1 Cal 471, *Emperor v. Sarojini De.* (Bengal Government Circular Order No. 6 (Cri) 1925, R. 117 (4)—While determining claims to property attached, procedure of O. 21, R. 58, Civil Procedure Code, need not be followed — Services of police-officers cannot be utilized by Magistrate nor can he rely simply on report of police-officer.)
('33) AIR 1933 All 135 (135) : 34 Cri L Jour 847, *Harimal v. Emperor.*
('31) AIR 1931 Lah 543 (543) : 32 Cr.L.J.812, *Parshotam Das v. Emperor.* (Magistrate dismissing objection on report of a Naib Tahsildar—This is not enough.)
5. ('32) AIR 1932 Mad 538 (541) : 55 Mad 1041 : 33 Cri L Jour 622, *Narasanna v. Emperor.*
[But see ('32) AIR 1932 Bom 476 (477, 478) : 33 Cri L Jour 805 : 56 Bom 364, *In re Pandurang Venkatesh.* (Objector directed to Civil Court.)]
6. ('34) AIR 1934 Pat 181 (182,184) : 13 Pat 317 : 35 Cri L Jour 682 (SB), *Suraj Narain Prasad Singh v. Emperor.* (Per Courtney-Terrell C. J., and James J.; Kulwant Sahay, J., contra.)

Section 386
Notes 13-14

immovable property of the offender or against such moveable property as cannot be attached by seizure under sub-s.(1)(a), the better procedure is to issue a warrant as provided under sub-s.(1)(b) for execution according to *civil process*. Sub-section (3) provides that such a warrant shall be deemed to be a decree and the Collector to be the decree-holder and the nearest civil Court can execute the decree in accordance with the provisions of the Code of Civil Procedure relating to the execution of decrees (see O. XXI of the Civil Procedure Code). A warrant issued by a Magistrate to a Collector must, therefore, be accepted as a decree by the civil Court to which it is sent for execution.¹ The Bombay High Court has held that a warrant under this section is deemed to be a decree of the civil Court *only* for the purposes of execution and therefore the exemption of agriculturists' lands from *execution of decrees* under S. 22 of the Dekkhan Agriculturists' Relief Act does not extend to *such warrants*.² The Lahore High Court has, however, held that by virtue of sub-s.(3) the warrant *becomes* a decree of the civil Court, and therefore the land of an agriculturist cannot be attached and sold in execution of such "decree" by virtue of S. 16 of the Punjab Land Alienation Act.³

It is not permissible for the executing Court to go behind the warrant sent for execution or to question the validity of the warrant in respect of some antecedent defect in proceedings before the criminal Court.⁴

14. Revision. — An order of the Magistrate passed under this section in his *judicial* capacity is subject to revision under S. 435.¹ But an order of the Magistrate directing recovery of an amount ordered to be paid (see S.547), such as an amount due to the Port Trust, though passed under this section, is only an *executive order* and is, therefore, not open to revision.²

See also S. 435. For Form, see Sch. V, Form No. 37.

Section 387

387.* A warrant issued under section 386, sub-section (1), clause (a), by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall autho-

* 1882 : S. 387; 1872 : S. 307; 1861 : S. 61.

Note 13

1. ('38) AIR 1938 Pesh 40 (40), *Collector of Peshawar v. Abdul Majid*.
2. ('26) AIR 1926 Bom 582(583,584):50 Bom 844, *Collector of Satara v. Mahadu*.
3. ('29) AIR 1929 Lah 667 (669) : 30 Cr. L. J. 1006, *Emperor v. Milkha Singh*.
4. ('29) AIR 1929 Mad 383 (384), *Kruppuswamy Iyer v. Secretary of State*.

Note 14

1. ('96) 23 Cal 421 (423), *Queen-Empress v. Aswini Kumar Ghose*.
[See also ('33) 1933 All 135 (135) : 34 Cr. L. J. 847, *Harimal v. Emperor*.]
2. ('26) AIR 1926 Sind 57 (57, 58) : 20 Sind L R 63 : 26 Cr. L. J. 1263, *Yusuf Ali Lookmanji v. Emperor*.
[See also ('26) AIR 1926 Bom 103 (106) : 49 Bom 906 : 27 Cr. L. J. 652, *Shivalingappa Nijappa v. Gurlingava Basappa*. (Execution of order under S. 488, Criminal P. C.)]

rize the attachment and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

Section 387
Note 1

The words "a warrant issued by any Court" at the beginning, and the word "attachment" were substituted for the words "such warrant" and the word "distress" respectively by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

1. **Scope of the section.** — As to "jurisdiction of criminal Courts," see section 177.

The Court has no power to levy a fine against property situate outside British India.¹

388.* (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—

Section 388

Suspension of execution of sentence of imprisonment.

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance

* Code of 1898 : original S. 388.

Suspension of execution of sentence of imprisonment. 388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the Court issues a warrant under section 386, it may suspend the execution of the sentence of imprisonment and may release the offender on his executing a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before such Court on the day appointed for the return to such warrant, such day not being more than fifteen days from the time of executing the bond; and in the event of the fine not having been realized the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) In any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith, the Court may require the person ordered to make such payment to enter into a bond as prescribed in sub-section (1), and in default of his so doing may at once pass sentence of imprisonment as if the money had not been recovered.

1882 : S. 388; 1872 and 1861—Nil.

Section 387 — Note 1

1. ('79) 2 Weir 444 (444, 445).

Section 388
Notes 1-2

before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. Order for payment of money on non-recovery of which imprisonment may be awarded — Sub-section (2).

Other Topics (miscellaneous)

Form of bond. See Schedule V, Form 37A.

Warrant for levy of fine—Not needed before imprisonment. See Note 3.

1. Legislative changes.

- (1) This section was substituted for the original S. 388 by the Code of Criminal Procedure (Second Amendment) Act, XXXVII of 1923. Under the section as it stood previously, the Court could not suspend a sentence of fine unless a *warrant for the recovery thereof had* been issued under S. 386.¹ This is not necessary now.
- (2) Under the old section a suspension of the sentence could not exceed a period of fifteen days from the date of executing a bond under the section. Under the present section there can now be an order for payment in two or three *monthly* instalments and suspension of the sentence during that period.

2. Scope of the section. — In order that the section may apply, two conditions are necessary, namely that the offender must have been sentenced,

(1) to *fine only*, and

(2) to imprisonment in *default* of payment of such fine.

The section has, therefore, no application to cases where an offender has been sentenced to fine in *addition* to a sentence of

Section 388 — Note 1

1. ('08) 7 Cri L Jour 452 (452) : 4 Low Bur Rul 151, *Emperor v. The Mya*.

imprisonment¹ or where he is not sentenced to imprisonment *in default* of the payment of the fine.²

Section 388
Notes 2-3

3. Order for payment of money on non-recovery of which imprisonment may be awarded — Sub-section (2). — Under S. 61 of the Penal Code, whenever a sentence of *fine* is passed the Court can order that in default of payment of such fine, the defaulter shall suffer imprisonment for a certain period. There is no such general provision as to orders for payment of money *other than* fine. Sub-section (2) of this section refers to an order made by a criminal Court for the payment of money but which is not a punishment inflicted on an offender for a criminal offence.¹ The Court has no power to order imprisonment in default of payment of any such amount unless it is specifically provided for by a statute.² The Code contains the following provisions for payment of money on the non-recovery of which imprisonment may be awarded :

- (i) Payment of compensation under S. 250, sub-s. (2A).
- (ii) Payment of maintenance under S. 488, sub-s. (3).
- (iii) Payment of the penalty due on a bond under S. 514, sub-s. (4).
- (iv) Payment of process-fees, etc., under S. 516A, sub-s. (1).

In such cases if the money is not paid forthwith the Court may require the person to enter into a bond as provided by sub-s. (1) and on his failure to do so, may at once pass a sentence of imprisonment.

See S. 250, S. 514 sub-s. (4), S. 488 and S. 516A.

It is not necessary that a warrant for the levy of such amount should be issued, and the undermentioned cases³ decided before the amendment to sub-s. (1) are no longer of any practical importance.

Note 2

1. ('33) AIR 1933 Cal 308 (310) : 34 Cri L Jour 530, *Ali Hussain v. Emperor*.
- (‘34) AIR 1934 Rang 11 (12) : 11 Rang 451 : 35 Cr. L. J. 608, *Emperor v. Mohamed*. (Even if sentence of imprisonment is a nominal one, section does not apply and execution of sentence of imprisonment in default of fine cannot be suspended.)
2. ('05) 2 Weir 445 (445), *In re Venkatrapragada Vekatravadu*.

Note 3

1. ('34) AIR 1934 Rang 11 (12) : 35 Cri L Jour 608 : 11 Rang 451, *Emperor v. Mohamed*.
2. ('93) 18 Bom 440 (441), *Queen-Empress v. Kutappa*. (Railways Act, 1890, S. 113 does not provide for imprisonment in default of payment of excess charge and fare due.)
- (‘97) 20 Mad 385 (386) : 1 Weir 871, *Queen-Empress v. Subramania Iyer*. (Do.)
- (‘96) 19 Mad 238 (239) : 2 Weir 461, *Queen-Empress v. Lakshmi Nayakan*. (Imprisonment in default of payment of compensation under Cattle Trespass Act (Act 1 of 1871) is illegal.)
- (‘97) 11 C P L R Cr 10 (11), *Karim Khan v. Nathoosa*. (Do.)
- (‘79) 1 Weir 711 (711). (Do.)
- (‘90) 1 Weir 712 (712), *In re Chetti*. (Do.)
3. ('97-01) 1 Upp Bur Rul 71 (71), *Queen-Empress v. Nga Myit*.
- (‘01) 28 Cal 164 (166), *Lal Mahmud Shaik v. Satcowri Biswas*.
- (‘02) 26 Mad 127 (129) : 2 Weir 321, *In the matter of Byravalu Naidu*. (Issue of a warrant for levy of the attachment, a condition precedent to an order for imprisonment under this section.)
- (‘94) 21 Cal 979 (985), *Ramjeevan Koormi v. Durga Charan Sadhu Khan*. (Doubted whether Magistrate had jurisdiction to make an order for imprisonment in default of payment of compensation.)

Section 389

389.* Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.

1. Successor in office. — A sentence was passed by a special Magistrate appointed under Ordinance 11 of 1931. The special criminal Court came to an end in 1932 with the expiry of the Ordinance. It was held that the sub-divisional Magistrate who succeeded the special Magistrate was not a successor in office of the special Magistrate and that he had no power to issue the warrant.¹

Section 390

390.† When the accused is sentenced to whipping only, the sentence shall subject to the provisions of section 391 be executed at such place and time as the Court may direct.

Synopsis

1. Legislative changes.
2. When the accused is sentenced to whipping only.
3. "At such place and time as the Court may direct."
4. Postponement of whipping sentence when accused is under sentence of imprisonment in another trial.

Other Topics (miscellaneous)

Amendment of S. 391. See Note 3.

Fixing a future date. See Note 3.

Whipping Act (IV of 1909). See Note 2.

1. Legislative changes. — The words "subject to the provisions of s. 391" were added by the Criminal Law Amendment Act, XII of 1923. See Note 3.

2. When the accused is sentenced to whipping only. — This section applies when the accused is sentenced to *whipping only*. Sentences of whipping are passed under the provisions of the Whipping Act (IV of 1909). Sections 3 and 5 of that Act deal with offences for which whipping can be given in *lieu* of other punishments prescribed under the Penal Code, while s. 4 deals with offences for which whipping can be given in *addition* to the other punishments prescribed therefor.

Section 3 of the Whipping Act, IV of 1909, enacts that (a) in the cases of theft under s. 378, Penal Code, and aggravated forms of it under ss. 380 and 382, and (b) in the cases of lurking house-trespass or house-breaking under ss. 443 and 445, Penal Code, and aggravated forms

* 1882 : S. 389; 1872 : S. 307, para. 4; 1861—Nil.

† 1882 : S. 390; 1872 : S. 302, para. 2; 1861—Nil.

Section 389 — Note 1

1. (186) AIR 1936 Cal 149 (150) : 37 Cri L Jour 424 : 63 Cal 1139, *Jadabendranath Panja v. Emperor*.

of them under ss. 444 and 446, Penal Code, respectively, whipping may be awarded in lieu of the other punishments.

Section 390
Notes 2-4

Section 5 of the said Whipping Act provides that the punishment of whipping may be inflicted upon juvenile offenders in lieu of other punishments, in the following cases :

- (i) All offences punishable under the Penal Code, except those specified in chapter VI and in ss. 153A and 505 and offences punishable with death.
- (ii) Offences punishable under any other law with imprisonment, which the Provincial Government may specify in this behalf.

Thus, this section applies only in those cases where sentences of whipping are passed under ss. 3 and 5 of the Whipping Act.

Where a youthful offender for one offence is ordered to be detained in a Training School or a Borstal Institution and for another offence tried at the same trial is sentenced to whipping, the Magistrate must act under the provisions of this section.¹ The reason is that a person sentenced to detention in a Borstal Institution is not sentenced to imprisonment.

3. "At such place and time as the Court may direct." — According to the High Court of Bombay the sentence of whipping need not necessarily be executed on the same day as the sentence was passed, but the Court can fix a day *in the future* for that purpose.¹

Before the amendment of S. 391, in 1923, it was held by the High Court of Madras that a Magistrate had no power to suspend or postpone the execution of a sentence of whipping only, even in cases where such sentence was appealable (as where a second class Magistrate passed a sentence of whipping only).² This practically rendered the right of appeal nugatory. The Chief Court of Lower Burma, on the other hand, held that whenever a sentence of whipping was passed by a Magistrate, against whose sentence an appeal lay, the Magistrate was bound to ask the prisoner whether he intended to appeal and if the prisoner said that he intended to do so, to suspend the execution of the sentence on the analogy of S. 391.³ The addition of clause (a) to sub-s. (1) of S. 391 now makes it clear that if the accused furnishes bail for his appearance, the sentence may be suspended for fifteen days or, if an appeal is made within that time, until after the sentence is confirmed.

4. Postponement of whipping sentence when accused is under sentence of imprisonment in another trial.—The direction in this section, that the sentence shall be executed at such place and

Section 390 — Note 2

1. ('36) AIR 1936 Rang 485 (486, 487) : 38 Cr. L. J. 33 : 14 Rang 625 (FB), *Emperor v. Nga Pyu*.

Note 3

1. ('28) AIR 1928 Bom 138 (138, 139) : 29 Cr. L. J. 573, *Emperor v. Gopal Murgis*. (A direction that whipping should be inflicted as soon as practicable is a proper order — 1897 Rat 906, held obsolete.)
2. ('02) 26 Mad 465 (466) : 2 Weir 447, *Meyyan v. Emperor*.
3. ('93-1900) 1893-1900 Low Bur Rul 310, *Empress v. Chan Tha Aung*.

Section 390
Note 4

time as the Court may direct, is intended for the case where the accused is *not* already under another sentence and is not also at the same time sentenced to imprisonment. It, therefore, does not apply where he is already under another sentence of imprisonment. In such a case the Court should, when passing the order required by this section, follow the analogy of S. 391 (1) as far as may be. It cannot, therefore, postpone a sentence of whipping only till after the accused has undergone a sentence of imprisonment in another case.¹

Section 391

391.* (1) When the accused —

Execution of sentence of whipping, in addition to imprisonment.

(a) is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or

(b) is sentenced to whipping in addition to imprisonment,

the whipping shall not be inflicted until fifteen days from the date of the sentence, or, if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months.

*** Code of 1898, original S. 391.**

Sub-sections (2) and (3) were the same; sub-s. (1) ran as follows :

Execution of sentence of whipping, in addition to imprisonment. 391. (1) When the accused is sentenced to whipping in addition to imprisonment in a case which is subject to appeal, the whipping shall not be inflicted until fifteen days from the date of the sentence, or if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

1882 : S. 391; 1872 : Ss. 310, 311; 1861 — Nil.

Note 4

1. (1900-'02) 1 Low Bur Rul 53 (53), *Empress v. Nga Po Kye*.

Synopsis

Section 391
Notes 1-4

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. When accused is sentenced to whipping only. See S. 390 Note 2 and S. 32. 3. Execution of sentence of whipping only. See S. 390 Notes 3 and 3a. 4. When accused is sentenced to whipping in addition to imprisonment. | <ol style="list-style-type: none"> 5. Postponement of the execution of sentence of whipping in addition to imprisonment. 6. Double sentence of whipping. 6a. Officer in charge of the jail. 7. Whipping in addition to imprisonment for less than three months — Sub-section (3). |
|--|---|

Other Topics (miscellaneous)

- | | |
|---|--|
| <p>No provision for calling back accused for whipping. See Note 5.</p> <p>Section 4 of Whipping Act, IV of 1909. See Note 4.</p> <p>Whipping before statutory period. See Note 5.</p> | <p>Whipping for separate offences. See Note 5.</p> <p>Whipping not executed within statutory time—Effect. See Note 5.</p> <p>Whipping to be executed immediately after statutory period. See Note 5.</p> |
|---|--|

1. Legislative changes.

Changes introduced in 1898 — Sub-section (3) was newly added.

Changes introduced in 1923 — Clauses (a) and (b) of sub-s. (1) were substituted for the words "is sentenced to whipping in addition to imprisonment in a case which is subject to appeal" by the Criminal Law Amendment Act, XII of 1923.

2. When accused is sentenced to whipping only. — See Section 390, Note 2 and Section 32.

3. Execution of sentence of whipping only. — See Section 390, Notes 3 and 3a.

4. When accused is sentenced to whipping in addition to imprisonment. — Whipping in addition to imprisonment can be inflicted under S. 4 of the Whipping Act, IV of 1909, in regard to the offences specified therein.

Sections 3 and 4 of Act VI of 1864, which provided for the punishment of whipping being inflicted in addition to imprisonment on a second conviction for certain specified offences, have been repealed and the cases decided under them are now only of academic interest.¹

Section 391 — Note 4

1. ('69) 5 Mad H C R App i (i).
- ('72-92) 1872-92 Low Bur Rul 336, *Queen-Empress v. Nga Po Sin*.
- (1865) 4 Suth W R Cr 20 (20), *Queen v. Amarul Sheikh*.
- ('80) 1880 Pun Re No. 39 Cr, p. 93 (93), *Kouri v. Empress*.
- ('69) 12 Suth W R Cr 68 (68) : 4 Beng L R App Cr, 5, *Queen v. Uday Putnaik*.
- ('80) 1880 Pun Re No. 42 Cr, p. 99 (100), *Empress v. Mansukh*.
- ('05) 2 Cri L Jour 105 (106) : 2 A L J 173, *Gajju v. Emperor*.
- ('05-06) 3 Low Bur Rul 161 (162) (FB), *King-Emperor v. Nga To*.
- ('72-92) 1872-92 Low Bur Rul 338, *Queen-Empress v. Abdul Majid*.
- (1900) 13 C P L R 171 (171), *Empress v. Sheoram*.
- ('80) 1880 Pun Re No. 41 Cr, p. 94 (96), *Empress v. Radha*.
- ('85) 1885 Pun Re No. 9 Cr, p. 20 (20), *Empress v. Jhandu*.
- ('85) 1885 Pun Re No. 8 Cr, p. 19 (19), *Empress v. Sewak*.
- ('71) 15 Suth W R Cr 7 (7, 8) : 6 Beng L R App 95, *Queen v. Bunda Ali*.
- ('92) 6 C P L R Cr 36 (37), *Empress v. Padam Singh*.
- ('93-1900) 1893-1900 Low Bur Rul 310, *Empress v. Nga Lu Gyi*.
- ('71) 15 Suth W R Cr 52 (52), *Queen v. Nuzee Nushyo*.
- ('66) 1866 Pun Re No. 54 Cr, p. 61 (62), *Crown v. Goolab*.

Section 391
Notes 4-5

Under the provisions of the Act IV of 1909, whipping should be inflicted in cases where there is a certain amount of aggravation in the commission of the offence. Where an accused was convicted under s. 392, Penal Code, for an offence of robbery and sentenced to fine and whipping and in default of fine to imprisonment, the High Court set aside the sentence of whipping on the ground that the hurt caused in the course of the robbery was very slight.^{1a} Where a sentence of whipping only was legal, but the combined sentence of whipping and imprisonment was passed and the former sentence was executed, the sentence of imprisonment was set aside in revision.²

5. Postponement of the execution of sentence of whipping in addition to imprisonment. — Whipping shall not be inflicted within fifteen days from the date of the sentence or until such time as the sentence is confirmed in appeal, if an appeal is preferred within that time. There is no power vesting in Magistrates or Sessions Judges to postpone the execution of the sentence *beyond the time*. It has been held that it is imperative that a sentence of whipping in addition to imprisonment should be carried out immediately on the expiry of the fifteen days from the date on which it was passed unless an appeal be made within that time.¹ It cannot be postponed till after the term of imprisonment in addition to which whipping was given, has expired.² Indeed it is illegal to order a sentence of whipping to be inflicted on the prisoner at the time of his release from the jail.³ There is no provision of law under which an accused who has been released after having undergone his sentence of imprisonment could be called back to undergo the sentence of whipping.⁴ In such cases the sentence of whipping should be cancelled as having become inoperative.⁵

Where, again, an accused is sentenced on three separate convictions, first to a term of imprisonment, second to a certain number of lashes to be inflicted at the expiry of the period of imprisonment, and third to a term of imprisonment after whipping, the postponement of whipping to the expiry of the term of imprisonment under the first conviction is illegal and hence the second term of conviction will begin on the expiry of the first.⁶

1a. ('22) AIR 1922 All 245 (246) : 44 All 538 : 23 Cr. L. J. 274, *Badri Prasad v. Emperor*.

2. (1900-02) 1 Low Bur Rul 362 (363), *Crown v. Po Maung*.

Note 5

1. ('78) 1878 Pun Re No. 31 Cr, p. 73 (74), *Crown v. Ranja*.

('80) 1880 Pun Re No. 34 Cr, p. 81 (82), *Empress v. Man*.

2. ('72) 1872 Rat 68 (68), *Reg. v. Sheikh Husen*.

('80) 1880 Pun Re No. 34 Cr, p. 81 (82), *Empress v. Man*.

('93-1900) 1893-1900 Low Bur Rul 78, *Queen-Empress v. Nga Tun Tha*.

('02) 4 Bom L R 929 (930), *Emperor v. Jagannath Sagar*.

('34) AIR 1934 Pat 551 (551) : 36 Cri L Jour 100, *Emperor v. Rashbehari Singh*.

3. ('66) 1866 Pun Re No. 54 Cr, p. 61 (62), *Crown v. Goolab*.

('78) 1878 Pun Re No. 31 Cr, p. 73 (74), *Crown v. Ranja*.

('80) 1880 Pun Re No. 34 Cr, p. 81 (82), *Empress v. Man*.

4. ('81) 1881 All W N 138 (138), *Empress v. Jiwa Ram*.

5. ('73) 20 Suth W R Cr 72 (73), *Hurchandra Kulal v. Jafer Ali*.

6. ('71-74) 7 Mad H C R App xxix (xxx).

('86) 1886 Rat 300 (301), *Queen-Empress v. Sagram*.

A sentence of whipping not inflicted within the statutory period or within the period prescribed therefor, becomes inoperative.⁷

While Magistrates have no power to postpone the execution of sentence of whipping, they are also not entitled to inflict it before the expiry of the period specified in the section. Thus, where a Magistrate of the first class convicted an accused of theft and sentenced him to one month's rigorous imprisonment and twenty lashes, the District Magistrate took the case in revision and holding that whipping could not be added to imprisonment, directed the accused to be whipped and submitted the case for the orders of the Chief Court. The Chief Court held that the sentence being an appealable one to the Court of Session, the District Magistrate acted illegally in taking up the case in revision and directing the accused to be whipped, before the expiry of the period allowed for appeal.⁸

Where, however, an accused is convicted of two offences for one of which he is sentenced to imprisonment and for the other to whipping, it is not open to the Magistrate to postpone the sentence of whipping on the ground that the accused has preferred an appeal against the sentence of imprisonment.⁹ Before S. 390 was amended, it was not illegal to execute the sentence immediately when it was given as a separate sentence for a separate offence and not in addition to imprisonment.¹⁰ See also section 35 Note 9.

6. Double sentence of whipping. — Under the Whipping Act of 1864 it was held that when a person, who has been previously convicted within the meaning of S. 4 of that Act, is convicted at one time of two or more offences, he may be punished with one but only one whipping in addition to any other punishment to which under S. 46 of the Code of Criminal Procedure he may be liable.¹ The said S. 4 has been repealed, but it is submitted that under this section also it would not be legal to pass a double sentence of whipping. Thus, where an accused was convicted under Ss. 454 and 380, Penal Code, and was sentenced to two years' rigorous imprisonment and fifteen stripes

[See also ('95) 1895 Rat 803 (804), *Queen-Empress v. Habla Sola*. (Conviction for two offences at one trial, a term of imprisonment for each and whipping for the second, two sentences to be consecutive—Whipping ought not to be delayed until the expiry of the first term.)]

7. ('81) 1 Weir 931 (931, 932).

('71) 6 Mad H C R App xxxviii (xxxviii).

('80) 1880 Pun Re No. 34 Cr, p. 81 (82), *Empress v. Man*.

[See ('78) 1878 Pun Re No. 31 Cr, p. 73 (74), *Crown v. Ranja*.

('66) 1866 Pun Re No. 54 Cr p. 61 (62), *Crown v. Goolab*.]

[But see ('78) 1878 Rat 136 (136), *Queen-Empress v. Mohadhu*. (If through accident, neglect or wilful breach of duty whipping is not inflicted at the statutory time it does not thereby become inoperative.)]

8. ('02) 1902 Pun L R No. 45 Cr, p. 170 (172), *Crown v. Rura*.

9. ('02) 4 Bom L R 436 (437), *Emperor v. Jaiwant*.

10. ('78) 2 Weir 446 (447).

Note 6

1. ('68) 9 Suth W R Cr 41 (49, 50): Beng L R Sup Vol. 951 (F B) *Nassir v. Chunder*. ('68) 9 Suth W R Cr Cir 3 (4).

('70) 14 Suth W R Cr 7 (7), *Ruttan Bawa v. Buhur*.

('93-1900) 1893-1900 Low Bur Rul 582, *Empress v. Nga Paw Dun*.

[See also ('91) 5 C P L R Cr 23 (23), *Empress v. Ratiram*.]

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Notes 6-7

for each of the offences, the High Court doubted if this double sentence of whipping was legal and altered the sentence to fifteen stripes for both the offences.² See also Note 4 to S. 392.

6a. Officer in charge of the jail.—A Borstal Institution is not a jail under this section and therefore the superintendent thereof is not an officer in charge of a jail and hence a sentence of whipping cannot be carried out in his presence.¹

7. Whipping in addition to imprisonment for less than three months—Sub-section (3).—When the term of imprisonment to which the accused is sentenced is less than three months, it is illegal to award the sentence of whipping in addition to the imprisonment.¹

Section 392

392.* (1) In the case of a person of or over sixteen years of age whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the *Provincial Government*^a directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instruments, as the *Provincial Government*^a directs.

(2) In no case shall such punishment exceed thirty stripes and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

a. Substituted by A. O. for "Local Government."

Synopsis

- | | |
|--|---|
| 1. Legislative changes. | 3. Mode of inflicting punishment on persons under sixteen years of age. |
| 2. Mode of inflicting punishment on persons of or over sixteen years of age. | 4. Maximum sentence of whipping. |

Other Topics (miscellaneous)

Directions by various Provincial Governments. See Notes 2 and 3. Double whipping. See Note 4. Stripes on hand—Illegal. See Note 2.

1. Legislative changes.—Section 311 of the Code of 1872 corresponds to this section. Under that section, punishment of whipping was to be inflicted in the case of a person of or over sixteen years of age, "with such instrument, in such mode and on such part of the person

* 1882 : S. 392; 1872 : S. 311; 1861 — Nil.

2. ('98) 1898 Rat 955 (955), *Queen-Empress v. Dagdu Janaji*.

Note 6a

1. ('36) AIR 1936 Rang 485 (487, 488) : 38 Cr. L. J. 33 : 14 Rang 625 (F B), *Emperor v. Nga Pyu*.

Note 7

1. ('02) 2 Weir 447 (448), *In re Subbian Chetty*.
('02) 4 Bom L R 436 (437), *Emperor v. Jaiwant*.
(1900) 2 Bom L R 54 (55), *Queen-Empress v. Bhica Trimbak*.

as the Local Government directs" and in the case of a person under sixteen years of age, it was to be inflicted "in the way of school-discipline with a light rattan." It also limited the number of lashes to one hundred and fifty, if whipping was inflicted with the cat-of-nine-tails and to thirty if it was inflicted with a rattan.

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Notes 1-2

Section 392 of the Code of 1852 substituted the words "with a light rattan not less than half an inch in diameter," for the words "with such instrument" and further enacted that in no case shall the punishment of whipping exceed thirty stripes. Section 392 of the present Code has amended the portion relating to persons under sixteen years of age from "in the way of school-discipline with a light rattan" into "in such mode and on such part of the person and with such instrument as the Provincial Government directs" and S. 7 of Act IV of 1900 has added "and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes" to sub-section (2).

2. Mode of inflicting punishment on persons of or over sixteen years of age. — The mode of inflicting the said punishment and the part of the body on which it is to be inflicted have been left to be determined by the Provincial Government. The various Provincial Governments have provided as follows in this behalf :

Bengal :— The punishment of whipping should, in the case of an adult, be inflicted on the breech, with a rattan not exceeding half an inch in diameter; and on all occasions precautions should be taken to prevent the blows from falling on any other part of the person. (Wilkins, 148.)

Bombay :— In the case of a person of sixteen years of age, whipping shall, when inflicted in private, that is, within the precincts of prison, be inflicted on the bare buttocks, and when inflicted in public, that is, without the precincts of prison, across the bare-shoulders. (Bom. G. R. No. 608 of 1897.)

Madras :— In the case of a person of or over sixteen years of age, the whipping is to be inflicted on the posterior and care is to be taken that the person undergoing the punishment is tied up to a triangle, or his immobility under punishment is otherwise secured — in order to preclude the possibility of the rattan falling on any other part of the body. (Gaz. Not. No. 4, 1st Jan. 1883.)

A thin cloth soaked in antiseptic should be spread over prisoner's buttocks.

Punjab :— (1) It is to be inflicted on the buttocks with a rattan not more than four feet in length, and one and a half inches in circumference, not in public or in front of court-houses, but always within some walled enclosure and in the presence of a Magistrate or the Superintendent of the jail, and when practicable, of a Medical Officer. (Punjab Bk. Cir. Vol. 2 S. LV, p. 269). (2) The triangle should be boarded on the side next to the offender, so as to prevent the possibility of the rattan curling round and touching the front or any other part of his person. (3) The punishment is never

Section 392
Notes 2-3

to be inflicted in public, or in front of cutchery, but always within some walled enclosure, either the jail, lock-up, treasury or any other convenient place, and in presence of a Magistrate, and, when practicable, of a Medical Officer. Superintendents of jails have been invested by the Local Government with powers of a Magistrate of third class, with a view to sentences of whipping being executed in their presence. (Smyth 115. Gov. Beng., Feb. 29, 1864.)

United Provinces of Agra and Oudh :— The whipping shall be inflicted on the buttocks with a light rattan half an inch in diameter. (G. O. No. 1290, dated 12th May 1898.)

Central Provinces :— In the case of a person of or over sixteen years of age, the rattan shall be applied to the bare posterior, the offender being tied to a triangle and a leather apron fastened round his waist. (C. P. Gaz. Not. No. 20, 4th January 1899.)

See also the undermentioned case.¹

Burma :— The punishment of whipping shall be inflicted with a light rattan on the breech in the way of school-discipline. (Burma Gaz. Not. No. 193, dated 1st July 1898, Part I. page 307.)

It has been held illegal to inflict stripes on the hand.²

3. Mode of inflicting punishment on persons under sixteen years of age. — Under the Codes of 1872 and 1882, as seen in Note 1 above, the whipping was to be inflicted "in the way of school-discipline, in the case of persons under sixteen years of age." This phrase "in the way of school-discipline" was held to connote the degree of severity with which the punishment was to be inflicted.¹ Now that phrase has been omitted and the Provincial Government is empowered to prescribe the mode of punishment.² The several Provincial Governments have provided as follows :

Bombay :— In the case of a person under sixteen years of age, it shall be inflicted in private with a light rattan across the bare buttocks.

Madras :— In the case of juvenile offenders, a lighter cane than that employed for persons of or above sixteen years of age, shall be employed. (G. O. No. 59, Judicial, dated 10th January 1893.)

Punjab :— In the case of a person under sixteen years of age, it shall be inflicted on the buttocks in the way of school-discipline with a rattan not more than half an inch in diameter. (Not. No. 677, dated 16th May 1899; Punjab Gazette, 1899, part 1, p. 314.)

Central Provinces :— The whipping shall be inflicted on the bare-buttocks or in the case of a boy under twelve, on the hands, at the discretion of the Magistrate. The instrument used shall be a rattan lighter than that used for adults; and while the whipping is being administered, the prisoner shall be held, but not tied to a triangle or

Section 392 — Note 2

1. ('01) 14 C P L R Cr 64, *Emperor v. Gulab Musalman*.
2. ('92) 5 C P L R Cr 31 (31), *Empress v. Sada Ganda*.

Note 3

1. ('92) 5 C P L R Cr 31 (31), *Empress v. Sada Ganda*.
2. ('01) 14 C P L R Cr 64 (64), *Emperor v. Gulab Mussalman*.

in any other convenient way, as the Magistrate or officer present may think fit.

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Notes 3-4

4. Maximum sentence of whipping.—All the Codes have limited the maximum number of stripes to be inflicted with a rattan, to thirty. It is enacted that "in no case" shall this be exceeded. The question arises, if at the same time an accused is convicted of more than one offence, can he be sentenced to more than one sentence of whipping? Referring to S. 46 of the Criminal Procedure Code (in force at that time) Peacock, C. J., said:

"The Code of Criminal Procedure did not intend to allow two punishments of whipping to be inflicted at the same time for two offences, of which an offender might be convicted at the same time."

His Lordship said in reference to the Whipping Act, VI of 1864:

"I do not believe that it was intended to sanction such a cruelty as to allow a double flogging to be inflicted upon a prisoner convicted of two offences at the same time."¹

The words "in no case" in the Codes of 1872, 1882 and 1893 clearly show that at one time not more than thirty stripes should be inflicted and it has been so held² under these Codes. See also S. 391 Note 6.

393.* No sentence of whipping shall be executed by instalments: and none of the following persons shall be punishable with whipping, namely:—

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Not to be executed by instalments.
Exemptions.

- (a) females;
- (b) males sentenced to death or to transportation, or to penal servitude, or to imprisonment for more than five years;
- (c) males whom the Court considers to be more than forty-five years of age.

1. Execution of whipping by instalments.—The sentence of whipping is not to be executed by instalments.¹ Therefore, no enhancement of the sentence of whipping can be made in revision after it has been executed, as it would amount to executing the sentence by instalments. Thus, where, an accused person convicted under S. 382, Penal Code, and sentenced to whipping was whipped and an application

* 1882 : S. 393; 1872 : S. 312; 1861 — Nil.

Note 4

1. ('68) 9 Suth W R Cr 41(49,50):Beng L R Sup Vol.951(FB), *Nassir v. Ghunder*. ('66) 1866 Pun Re No. 82 Cr, p. 86 (87), *Bamjus v. Sookhram*.

[See also ('70) 14 Suth W R Cr 7 (7), *Ruttun Bewa v. Buhur*.]

2. ('06) 4 Cr. L. J. 281(281) : (1906) Upp Bur Rul 47, *Emperor v. Nga Po Kyan*. ('98) 1898 Rnt 955 (955), *Queen-Empress v. Dagdu Janaji*.

Section 393 — Note 1

1. ('66) 1866 Pun Re No. 82 Cr, p. 86 (87), *Bamjus v. Sookhram*. (Case under S. 11 of Act VI of 1864.)

(1864) 3 Mad H O R App i (i). (Ruling under S. 11 of Act VI of 1864.)

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Notes 1-2

was subsequently made to the High Court for enhancement of the sentence, this section was held to bar the awarding of any additional sentence of whipping.²

2. Persons exempted from being punished with whipping.

— Section 7 of the Whipping Act, VI of 1864, provided as follows:

"No female shall be punished with the whipping nor shall any person who may be sentenced to death, or to transportation or to penal servitude, or to imprisonment for more than five years, be punished with whipping."

This section has in addition to these persons exempted such males as the Court considers to be more than 45 years of age.¹ The Burma Whipping Act, VIII of 1927, has extended the period of imprisonment from five to seven years for purposes of this exemption. Persons sentenced to transportation^{1a} or imprisonment² for seven years cannot be sentenced to whipping. Nor can women or persons under sentence of death be so sentenced.³ It is to be noted that the wording of this section "none of the following persons shall be punishable," as compared with the words in S. 391, sub-s. (3), "shall be sentenced" refers to the execution of the sentence of whipping and not to its being passed.⁴ However, a sentence, the execution of which is prohibited by law, is illegal and cannot be passed.⁵ The word "sentenced," in clause (b), it was argued, means "already sentenced" and does not refer to the sentence passed in combination with the sentence of whipping. This contention was rightly rejected⁶ and it was held that the word must be understood in a general sense and if a person is sentenced for any period exceeding that fixed by the Act, whether in conviction in one case, or more than one, he cannot be punished with whipping.⁷

2. ('91) 1891 Rat 537 (537), *Queen-Empress v. Balu Nasir*.

[See ('92) 6 C P L R Cr 36 (37), *Empress v. Padam Singh*. (In this case the accused was convicted of theft.)]

Note 2

1. ('40) 1 L R (1940) Kar 477 (478), *Emperor v. Achar Hamzo*. (Provisions of Whipping Act and Criminal Procedure Code should be read together.)

1a. ('76) 1 Mad 56 (56, 57) : 2 Weir 448 (FB).

(1892-96) 1 Upp Bur Rul 44 (44), *Empress v. Nga Kan Sa*.

2. ('75) 23 Suth W R Cr 49 (49), *Queen v. Poranmal*.

('74) 21 Suth W R Cr 40 (40), *Queen v. Esan Chunder Dey*.

('20) AIR 1920 Lah 364(367):1919 P.R.No. 30 Cr:21 Cr.L.J. 306, *Akbar v. Emperor*.

3. ('76) 1 Mad 56 (56) : 2 Weir 448 (FB).

4. ('20) AIR 1920 Lah 364 (367) : 1919 Pun Re No. 30 Cr : 21 Cr. L. J. 306, *Akbar v. Emperor*.

5. ('20) AIR 1920 Lah 364 (367) : 1919 Pun Re No. 30 Cr : 21 Cr. L. J. 306, *Akbar v. Emperor*.

6. ('80) AIR 1930 Rang 138 (139) : 7 Rang 769 : 31 Cr. L. J. 176, *Nga Nyi Gyi v. Emperor*.

7. ('39) AIR 1939 Pesh 17 (20) : 40 Cr. L. J. 681, *Karim Shah v. Emperor*. (The cumulative sentence of imprisonment of more than five years cannot be maintained in the case of a person who has been ordered to undergo punishment of whipping and *vice versa*.)

('37) AIR 1937 Lah 104 (106) : 39 Cr. L. J. 4, *Nur Ilahi v. Emperor*. (The Section applies even if the sentences aggregating more than five years imprisonment are passed in different cases.)

('76) 1 Mad 56 (57) : 2 Weir 448. (Seven years transportation for one offence and whipping alone for another.)

('37) AIR 1937 Pesh 22 (23) : 38 Cr. L. J. 429, *Sona Khan v. Emperor*. (Whipping in addition to imprisonment for seven years—Order is against this section.)

('30) AIR 1930 Rang 138(139): 7 Rang 769 : 31 Cr.L.J. 176, *Nga Nyi Gyi v. Emperor*.

But in computing the maximum period of imprisonment under this section, the period of imprisonment to which a man has already been sentenced before the commission of the offence for which the sentence of whipping is passed cannot be taken into account.⁸

Section 393
Note 2

394.* (1) The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

Section 394

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

1. Scope. — This section enacts that the sentence of whipping shall not be inflicted on an accused person unless a medical officer certifies, or in his absence, unless the Magistrate considers that the accused is in a fit state of health to undergo the punishment; and it should be finally stopped, if, during the course of its execution, it is found that the accused is not in a fit state of health to undergo the rest of the punishment. "A man, though sentenced to whipping, is not to be whipped unless in a fit state to suffer that punishment. The whipping is not to be commenced if he is unfit to bear it at all, and then he is to be kept in custody till the Court can revise the sentence. But, if it be commenced, it is not to be continued longer than the man is fit to bear it, and when the man has had all he can bear (in the opinion of the medical officer), the executioner is to stay his hand, and the sentence has been fully satisfied; for, it cannot be executed by instalments."¹ It may be noted that when a sentence of whipping has been executed in the presence of the Magistrate, Rule 287 of the Madras Criminal Rules of Practice, 1931, requires the Magistrate to record the fact of such execution.

This section deals with the execution of a sentence of whipping which has been already passed. Where the question is whether such a sentence should be passed, it has been held that a Magistrate should

* 1882 : S. 394; 1872 : S. 312, paras. 1 and 2; 1861 — Nil.

8. ('34) AIR 1934 Rang 58 (59, 60) : 12 Rang 404 : 35 Cr. L. J. 1027, *Emperor v. Nga Nyi Nge*. (A I R 1930 Rang 138, Disting.)

Section 394 — Note 1

1. (1864) 3 Mad H C R App i (i). (Ruling given under S. 11 of Act VI of 1864 wherein the words used were "execution shall be stayed.")

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Notes 1-2

not reject the punishment of whipping merely on the ground that the accused is too young and frail unless he has medical opinion in support of his own.²

2. Certificate of the medical officer. — The medical officer can under sub-s. (1) certify, before the sentence is inflicted, that the accused is, or is not, in a fit state of health to undergo the punishment and under sub-s. (2) he can certify, during the execution of the sentence, that the accused cannot bear the rest of it. But it has been held that he is not empowered to certify, before the whipping is commenced, that the accused is fit to receive only a part of the sentence. Thus, where, before the whipping was inflicted, the medical officer certified that the accused could bear only six out of twenty lashes ordered to be inflicted on him, it was held that (a) the medical officer not being authorized to grant such a certificate before the execution of the sentence, it was not a valid certificate under sub-s. (1), and (b) the certificate, not having been granted during execution, was not a proper certificate under sub-s. (2). Hence, the Magistrate's action in inflicting six out of the twenty lashes and awarding three months' rigorous imprisonment in lieu of the fourteen lashes that were not inflicted was illegal and the imprisonment was set aside.¹ In such a case as this the accused should have been kept in custody with a view to revising the sentence of whipping under section 395.

Section 395

395.* (1) In any case in which, under section 394, a sentence of whipping is, wholly or partially, prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, or to a fine not exceeding five hundred rupees, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which

* 1882 : S. 395; 1872 : S. 313; 1861—Nil.

2. ('39) AIR 1939 Rang 383 (384) : 41 Cr. L. J. 22, *Tin Hlaing Mg. v. The King*.

Note 2

1. ('08) 7 Cr. L. J. 5 (5, 6) : 31 Mad 84 : 17 M L J 555, *In re Public Prosecutor*.
See also S. 395 Note 2.

the accused is liable by law, or that which the said Court is competent to inflict.

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Notes 1-2

Synopsis

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|--|---|
| <p>1. Legislative changes.
2. Scope and object of the section.
3. Court which passed the sentence.</p> | <p>4. Power of revision of sentence.
5. Solitary confinement.</p> |
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Other Topics (miscellaneous)

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| <p>Absence of Magistrate—District Magistrate can act. See Note 3.
Commutation of thirty stripes for twelve months' imprisonment under S. 423—No enhancement. See Note 2.
Conclusion "thirty stripes : Twelve months' imprisonment"—Wrong. See Note 2.
Fine instead of whipping. See Note 4.
No revision of illegal sentence. See Note 4.</p> | <p>Revision by original Court after confirmation in appeal. See Note 3.
Revision of whipping if maximum sentence already given. See Note 4.
Whipping and imprisonment in default—Illegal. See Note 4.
Whipping stopped under illegal certificate — Imprisonment illegal. See Note 2.</p> |
|--|--|

1. Legislative changes.

Changes introduced in 1882 —

- (1) The words "order the discharge of the offender" in S. 313 of the Code of 1872 were substituted by the words "remit such sentence."
- (2) The words "to imprisonment for any period" in S. 313 were substituted by the words "to imprisonment for any period not exceeding twelve months."
- (3) The words "Provided that the whole period of imprisonment to which such offender is sentenced shall not exceed that to which he is liable by law, etc.," were altered into "Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term exceeding that to which the accused is liable by law, etc."

Amendments in 1923 —

The words "or to a fine not exceeding five hundred rupees," were added in sub-s. (1) between the words "twelve months" and "which may be, etc." and the words "or a fine of an amount" were added in sub-s. (2) between the words "for a term" and "exceeding that . . . etc." by the Code of Criminal Procedure (Amendment) Act, 18 of 1923.

2. Scope and object of the section.—In cases where a sentence of whipping cannot be carried out at all, under sub-s. (1) of S. 394, because the accused is not in a fit state of health to undergo the punishment, or where it is carried out only in part, the accused not being in a state of health to undergo the rest of it,¹ this section requires the Court to keep the accused in custody with a view to revise the sentence of whipping. The sentence of whipping can be revised (a) either by remitting it, or, (b) by sentencing the accused to imprisonment for a term not exceeding twelve months in lieu of whipping, or, (c) by imposing a fine not exceeding five hundred rupees. It cannot be said

Section 395 — Note 2

1. ('08) 7 Cr. L. J. 5 (5, 6):31 Mad 84 (85):17 M L J 555, *In re Public Prosecutor*. [See also ('69) 5 Mad H C R App i (i). (S. 12, Whipping Act, 1864, gives Magistrate passing sentence of whipping the power to reserve full sentence of imprisonment which ought to be imposed if whipping cannot be carried out.)]

Section 395
Notes 2-4

that by reading S. 392, sub-s. (2) which fixes the maximum sentence of whipping at thirty stripes, with this section which fixes the maximum sentence of imprisonment that can be given in lieu of whipping at twelve months, that sentences of thirty stripes and twelve months' rigorous imprisonment are of equal degree of severity.² But it may be taken that the Legislature regarded a sentence of twelve months' imprisonment as the maximum sentence of imprisonment which could be substituted for whipping. Thus, it has been held by a Full Bench of the Rangoon High Court³ that a substitute of 30 stripes for a sentence of one year's rigorous imprisonment is not an "enhancement" within the meaning of S. 423, sub-s. (1) (b). It has been seen in S. 394 that a medical officer cannot certify before the sentence of whipping is executed that the prisoner is in a fit state of health to undergo only a portion of the sentence. If such an illegal certificate is given and in pursuance of it the sentence is partially executed, the Magistrate is not entitled under this section to sentence the prisoner to imprisonment in lieu of the unexecuted portion of the sentence of whipping.⁴

3. Court which passed the sentence. — It is the Court that *passed the sentence of whipping* that can revise it.¹ This power to revise the sentence is not taken away by the sentence being confirmed in appeal.²

The words "Court which passed the sentence" do not mean the *same officer* who passed the original sentence of whipping. The word "Court" is impersonal, and its use instead of the words "Magistrate or officer" lends support to this view. Indeed, to confine the power of revision to the particular officer who passed the sentence would, in many cases, make the section unworkable. It certainly cannot be the intention of the Legislature, that, if at the time the sentence of whipping is to be revised under this section, the particular officer who passed the sentence of whipping is not available, he being either dead or transferred, the accused should escape the commuted sentence under this section. It has consequently been held that when the Magistrate who passed the sentence of whipping is absent, the District Magistrate can be held to be "the Court which passed the sentence."³

4. Power of revision of sentence. — As seen already, the sentence may either be remitted or imprisonment or fine inflicted in

2. ('28) AIR 1928 Rang 265 (265) : 30 Cri L Jour 328, *In re Kyaing Nga Hmwe*. [See also ('71) 15 Suth W R Cr 7(8, 9), *Queen v. Bunda Ali*. (20 stripes are not equivalent to rigorous imprisonment for three months.)

3. ('29) AIR 1929 Rang 177 (179) : 7 Rang 319 : 30 Cr. L. J. 986 (FB), *Emperor v. Chit Pon*. (Substitution of 25 stripes for sentence of nine months rigorous imprisonment or more or that of 20 stripes for six months or more is similarly not enhancement.)

[But see ('28) AIR 1928 Rang 265 (265) : 30 Cri L Jour 328, *In re Kyaing Nga Hmwe*.]

4. ('08) 7 Cr. L. J. 5 (5, 6) : 31 Mad 84 : 17 M L J 555, *In re Public Prosecutor*. See also S. 394 Note 2.

Note 3

1. ('89) 1889 Pun Re No. 10 Cr, p. 50 (53, 54), *Empress v. Chetu*.

2. ('89) 1889 Pun Re No. 10 Cr, p. 50 (53, 54), *Empress v. Chetu*.

3. ('01) 1901 Pun Re No. 33 Cr, p. 96 (97, 98) : 1902 Pun L R No. 20, *Chhajju v. Emperor*.

lieu of it. The Court has, however, no power to take a bond under S. 562 from the accused in lieu of it.¹ Before the amendment of this section in 1923, it was held that a sentence of fine cannot be passed in lieu of whipping.^{1a} Since the amendment, those cases are not good law and now fine not exceeding Rs. 500 can be levied.

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The Court can remit the sentence altogether even though it is competent to inflict a term of imprisonment in lieu of whipping.² The word "imprisonment" means a substantive sentence of imprisonment and not imprisonment in default of payment of fine.³ Sub-section (2) enacts that where an accused is sentenced to whipping and imprisonment and where in lieu of such whipping imprisonment is inflicted, the total term of imprisonment should not exceed that which the Court is competent to inflict.⁴ Therefore, where imprisonment for the maximum period is inflicted in addition to whipping, the entire sentence of whipping should be remitted; for, any further sentence of imprisonment will be beyond the competency of the Court.⁵

Where the sentence of whipping that has been passed is illegal, as for example, on a person above forty-five years of age, the Magistrate is not competent to revise such illegal sentence.⁶ The illegal sentence should be reported to the High Court for orders. But, where at the time the sentence of whipping is passed, it is ordered that if the sentence cannot be executed, the accused shall undergo imprisonment, it has been held that the conditional sentence of imprisonment is illegal and the Magistrate should act under this section.⁷

5. Solitary confinement. — When imprisonment in lieu of whipping is awarded, solitary confinement may be ordered, though it is not specifically mentioned in the section.¹

396.* (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping,

Section 396

Execution of sentences on escaped convicts.

* 1882 : S. 396; 1872 : S. 316; 1861 : S. 47.

Note 4

1. ('38) AIR 1938 Rang 218 (218) : 39 Cri L Jour 707, *King v. Ba Kyway*.
- 1a. ('89) 11 All 308 (309) : 1889 All W N 93, *Queen-Empress v. Sheodin*.
- ('92-96) 1 Upp Bur Rul 45 (45), *Queen-Empress v. Nga B Aung*.
- (1900-02) 1 Low Bur Rul 202 (203), *Crown v. Po Thit*.
2. (1900-02) 1 Low Bur Rul 202 (202), *Crown v. Po Thit*.
3. ('89) 11 All 308 (310) : 1889 A W N 93, *Queen-Empress v. Sheodin*.
4. ('98) 21 All 25 (26) : 1898 A W N 156, *Queen-Empress v. Ram Baran Singh*.
- ('01) 1901 Pun Re No. 11 Cr, p. 32 (33) : 1901 Pun L R No. 87, *Crown v. Barkat Ali*. (21 All 25, followed.)
- ('79) 2 Weir 449 (449), *In re Karat Ahamed*.
5. ('79) 2 Weir 449 (449), *In re Karat Ahamed*.
- ('01) 1901 Pun Re No. 11 Cr, p. 32 (33) : 1901 Pun L R No. 87, *Crown v. Barkat Ali*.
- ('98) 21 All 25 (26) : 1898 A W N 156, *Queen-Empress v. Ram Baran Singh*.
6. ('93-1900) 1893-1900 Low Bur Rul 241, *Queen v. Nga Pan Bon*.
7. ('93-1900) 1893-1900 Low Bur Rul 631, *Queen v. Nga Chein*.

Note 5

1. ('99) 1899 Pun Re No. 14 Cr, p. 38 (39), *Queen-Empress v. Gaman*.
- See also S. 32 Note 5.

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Note 1

shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say:—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment;

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

Synopsis

- | | |
|-------------------------|---------------------------|
| 1. Legislative changes. | 3. Sentence. |
| 2. Escaped convict. | 4. Execution of sentence. |

Other Topics (miscellaneous)

Custody during trial — Not a convict. See Note 2.	Imprisonment under S. 123 in default of security is sentence. See Note 2.
Criminal Circular Order No. 9 of Calcutta High Court. See Note 4.	Place of trial for escaped convict. See Note 2.
Detention for security — Not imprisonment—Conviction under S. 224, I. P. C., Illegal. See Note 2.	Sentence overlooked — Execution after discovery. See Note 4.
	Sentence under S. 224, I. P. C., is additional and section applies. See Note 3.

1. Legislative changes. — Section 316 of Act X of 1872 left it to the discretion of the Court to direct the sentence passed on an escaped convict to take effect immediately or after the expiration of the period of the imprisonment or transportation which the convict was undergoing at the time of his escape. But s. 396 of the Code of 1882 and the

present section enact—(a) that the sentence of death, fine or whipping passed on an escaped convict shall be executed immediately and (b) the sentence of imprisonment, penal servitude or transportation shall be deferred or executed immediately, according as the new sentence is lighter or severer in quality than the sentence which the convict was undergoing at the time of his escape.

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2. Escaped convict. — The word “convict” shows that the case of a person who escapes from custody *while under trial* is excluded from the operation of the section. There is a difference of opinion on the question if a person detained in custody for the purpose of giving security for good behaviour is not in custody for an offence though his detention may be lawful. Some cases have held that it is not a “sentence” of imprisonment though the detention is lawful, and that his conviction under s. 224, Penal Code, is illegal.¹ Other cases have held that the word “sentence” applies also to an order of imprisonment passed under s. 123, in default of furnishing security.² It is submitted that the former view is correct having regard to the use of the word *convict*. The place of trial under s. 224, Penal Code, for an escaped convict is the place from where he escaped. Trial and conviction by a Magistrate of another district will be quashed.³

3. Sentence. — The punishment under s. 224, Penal Code, for escaping from lawful custody is to be in addition to the original sentence and the Court in passing such sentence must comply with the provisions of this section.¹

4. Execution of sentence. — As far as the sentence of imprisonment, transportation or penal servitude is concerned, the principle of this section is that the severer in kind of the two sentences shall take effect immediately and the lighter deferred. Thus, when a life-convict under sentence of transportation was convicted under s. 224 of the Penal Code and sentenced to four months’ rigorous imprisonment, it was held that it was illegal to give priority to the sentence of rigorous imprisonment as the transportation is a severer punishment than imprisonment.¹ Similarly, where an accused under sentence of transportation for seven years escaped from where he was confined before transportation, and was convicted and sentenced to two years’ rigorous

Section 396 — Note 2

1. ('67) 3 Mad H C R App xxiii (xxiii).
- ('74) 7 Mad H C R App xli (xli) : 1 Weir 198.
- ('03-04) 2 Low Bur Rul 72 (75) (FB), *King-Emperor v. Nga Po Thin*.
2. ('95) 1895 Rat 774 (774), *Queen-Empress v. Pandu Khandu*.
[See also ('04) 1 Cri L Jour 1114 (1114) : 6 Bom L R 1098, *Emperor v. Durga Bahirav*. (Case under S. 397.)
- ('12) 13 Cri L Jour 849 (849) : 37 Bom 178 : 17 I. C. 785, *Emperor v. Vishnu Balkrishna Ram*. (Do.)
- ('08) 8 Cri L Jour 402 (402) : 31 Mad 515 (517), *In re Joghi Kanigam*. (Do.)]
3. (1864) 1 Bom H C R Cr 139 (139), *Reg. v. Dossa Sera*.

Note 3

1. ('82) 1 Weir 203 (204), *In re Chinna Madakudamban*.
- ('67) 8 Suth W R Cr 85 (86), *Queen v. Dhoonda Bhooja*.

Note 4

1. ('98) 1898 Rat 965 (965, 966), *Queen v. Mahadu Nagu*.

conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced:

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Note 1

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

Synopsis

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|--|---|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. Several sentences — Execution of. 3. "Unless the Court directs . . . concurrently with such previous sentence." 3a. Whipping — Concurrent sentences of. See Note 12 to S. 35. 3b. Imprisonment in default of payment of fine if can be made concurrent. 4. "Already undergoing a sentence of imprisonment," etc. 5. Order for imprisonment under S. 123 — Subsequent sentence for offence — Second proviso. | <ol style="list-style-type: none"> 6. Detention in civil prison if "sentence of imprisonment." 6a. Detention under Madras Borstal Schools Act if can be made consecutive. 7. Effect of reversal of one of two sentences in appeal. 8. Transportation — First proviso. 9. Sentence cannot be ante-dated. 10. Order as to commencement of sentence is not a judgment. 11. Power of High Court to pass concurrent sentences. 12. Appeal. |
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Other Topics (miscellaneous)

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| <p>Compared with S. 35. See Note 2.</p> <p>Ignorance of imprisonment and subsequent discovery. See Note 8.</p> <p>Imprisonment in foreign territories. See Note 4.</p> <p>No order as to transportation during imprisonment — Effect. See Note 8.</p> <p>No transportation in default of fine. See Note 8.</p> <p>Order as to commencement of sentences — Subsequent to delivery of judgment — Legal. See Note 10.</p> | <p>Order under S. 123 subsequent to sentence for another offence. See Note 5.</p> <p>Section 64, I. P. C. See Note 4.</p> <p>Security given under S. 108 — Withdrawn after conviction for another offence — Effect. See Note 4.</p> <p>Sentence of transportation for a second time. See Note 8.</p> <p>Sentences to be executed immediately. See Note 2.</p> <p>Several sentences same day. See Note 4.</p> <p>Subsequent sentence for offence committed after order under S. 123. See Note 5.</p> |
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1. Legislative changes.

Changes introduced in 1872 —

There was no provision in the Code of 1861 as to how a sentence of transportation on an offender already undergoing a sentence of *transportation*, was to take effect. This was provided for in the Code of 1872, but in other respects there was no difference between the two Codes.

Changes introduced in 1882 —

- (1) The Code of 1872 referred only to sentences of *imprisonment* and

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Notes 1-3

transportation. The sentence of *penal servitude* was also added in 1892.

- (2) The proviso to S. 317 of the Code of 1872 was enacted as a separate section in 1892, namely S. 308.

Changes introduced in 1898 —

There were no changes introduced in 1898.

Changes introduced by Act XVIII of 1923 —

- (1) The words "unless previous sentence" were newly added. See Note 3.
(2) The second proviso was newly added. See Note 5.

2. Several sentences — Execution of. — The general principle is that sentences should take effect immediately on conviction and cannot be postponed.¹ In cases, however, where *several sentences* are passed against the same person, the Code has enacted a different rule, namely, that such sentences should run consecutively; the one *after the expiration* of the other, unless the Court *directs* that they should run concurrently.² Section 35 enacts this rule, where a person is convicted at *one trial* of several offences and several sentences are given. This section enacts the rule, where a person *already undergoing a sentence* is sentenced to imprisonment, etc.³

3. "Unless the Court directs concurrently with such previous sentence." — Before the amendment of the Code in 1923, S. 35 enabled a Magistrate, in a case where several sentences were passed at *one trial*, to order that the punishments shall run concurrently.¹ But there was no such provision (except in one particular specified) in this section, and it was consequently held in cases not falling within S. 35 that the Court had no power to order that the sentences should run concurrently.^{1a} The addition of the words "unless the Court directs

Section 397 — Note 2

1. ('69) 12 Suth W R Cr 47 (48); 3 Beng L R App Cr 50, *In the matter of Kishen Soonder Bhattacharjee*. (Deputy Magistrate postponing execution of sentence, pending appeal, on request of accused illegal.)
2. (1864) 1 Suth W R Cr Cir 2 (2).
(178) 1878 Rat 132 (132).
(20) AIR 1920 All 211 (211); 21 Cri L Jour 393, *Emperor v. Bhikhi*.
(28) AIR 1923 Oudh 507 (508); 30 Cri L Jour 473, *Hazari Beria v. Emperor*.
[See also ('25) AIR 1925 Oudh 374 (376); 27 Oudh Cas 385; 26 Cri L Jour 1412, *Murli Brahman v. King-Emperor*.]
3. ('36) 38 P L R 223 (223), *Tikaya Ram v. Emperor*.
(10) 11 Cri L Jour 679 (680); 8 Ind Cas 550 (Lah), *Sheo Narain v. Emperor*.
[See also ('70) 3 Beng L R App Cr 50 (51); 12 Suth W R Cr 47, *In the matter of Kishen Soonder Bhattacharjee*. (S. 48 of the Code of 1861 was held to be an exception to the rule that sentences begin to run from the moment they are passed.)]

Note 3

1. [See ('69) 1869 Rat 19 (19, 20), *Reg v. Ramchandra*. (Court may direct that they should run concurrently.)]
[See also ('21) AIR 1921 All 126(127); 22 Cr.L.J. 520, *Harakh Narain v. Emperor*.]
- 1a. ('69) 1869 Rat 18 (18). (Case under S. 48 of the Code of 1861.)
(21) AIR 1921 All 126 (127); 22 Cri L Jour 520, *Harakh Narain v. Emperor*.
(88) 1898 Rat 391 (391), *Queen-Empress v. Hari*. (Case under first proviso which was already there in the Code of 1882.)
(73) 20 Suth W R Cr 70 (70), *Queen v. Sobrai Gowallah*.
(02) 4 Bom L R 876 (877), *Emperor v. Tukaram Hari*.

that the subsequent sentence shall run concurrently with the previous sentence" by the amendment of 1923, now makes it clear that such orders are competent.² See also S. 35 Note 10.

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Notes 3-3b

3a. Whipping—Concurrent sentences of. — See Note 12 to Section 35.

3b. Imprisonment in default of payment of fine if can be made concurrent. — Section 64 of the Penal Code lays down that a sentence of imprisonment in default of payment of fine should be *in excess* of any other imprisonment to which the accused may have been sentenced. This implies that a sentence of imprisonment in default is not a sentence of imprisonment within the meaning of S. 35 of the Code¹ or of this section.² It has, therefore, been held in the under-mentioned cases,³ decided under S. 35 that sentences of imprisonment in default cannot be ordered to run concurrently. Following this view, the High Court of Lahore⁴ has held in a case coming under this section that it is illegal to make various sentences of imprisonment in default of payment of fine awarded in *separate trials* concurrent with each other. In *Emperor v. Punjabi Lalaji*,⁵ the High Court of Bombay has, however, held that the word 'imprisonment' in this section includes imprisonment in default of payment of fine and that, therefore, where a person undergoing a sentence of imprisonment in default of payment of fine is sentenced to a substantive term of imprisonment, the

('20) AIR 1920 All 211 (211) : 21 Cri L Jour 398, *Emperor v. Bhikhi*.

(1900) 2 Bom L R 111 (112), *Queen-Empress v. Bhagwandas Baldas*.

('02) 15 C P L R Cr 57 (57), *Emperor v. Buddhu*.

('12) 13 Cri L Jour 3 (3) : 13 Ind Cas 109 (Lah), *Emperor v. Ganda Singh*.

('08) 7 Cri L Jour 445 (445) : 4 Low Bur Rul 147, *Emperor v. San E*.

('03) 1903 Upp Bur Rul Cr P C 19 *Nga Tok Gyi v. Emperor*.

('09) 10 Cri L Jour 236 (237) : 2 Sind L R 23, *Imperator v. Khuda Bux*.

('91) 1891 Rat 552 (553), *Queen-Empress v. Mahomed*.

('12) 13 Cr.L.J. 466 (467) : 15 I.C. 306 (Mad), *Advocate-General v. Govindaswamy*.

('17) AIR 1917 Cal 416 (417) : 18 Cr.L.J. 410, *Kamal Mandal v. King-Emperor*.

('23) AIR 1923 Rang 197 (198) : 1 Rang 306 : 25 Cr.L.J. 85, *Emperor v. Nga Sein Po*.

[See also ('94) 1894 Pun Re No. 12 Cr, p. 38 (38, 39), *Muza ffar v. Empress*.

('86) 1886 Rat 300 (301), *Queen-Empress v. Sagram Nath*.

('13) 14 Cri L Jour 240 (240) : 19 Ind Cas 336 (All), *Makbul Hussain v. Emperor*.

('13) 14 Cri L Jour 388 (388) : 20 Ind Cas 212 (L B), *Nga Pya v. Emperor*.]

See also S. 35 Note 10 and S. 240 Note 3.

2. ('24) AIR 1924 Rang 307 (308) : 25 Cr.L.J. 1310, *Emperor v. Nga Po Thaung*.

('26) AIR 1926 Nag 426 (429) : 27 Cri L Jour 807, *Mahadeo v. King-Emperor*.

[But see ('25) AIR 1925 Lah 334 (335) : 26 Cr.L.J. 731, *Batan Singh v. Emperor*.

(The decision, it is submitted, is not correct—The amendment of 1923 was apparently not brought to the notice of the Court.)]

Note 3b

1. ('26) AIR 1926 Bom 62 (62) : 27 Cri L Jour 111, *Emperor v. Subrao Sesharao*.

2. ('40) AIR 1940 Lah 388 (388) : ILR (1940) Lah 143, *Emperor v. Chanan Singh*.

3. ('12) 13 Cr.L.J. 536 (536) : 5 S L R 263 : 15 I.C. 808, *Imperator v. Akidullah*.

('29) AIR 1929 Sind 179 (179) : 30 Cri L Jour 907, *Emperor v. Ghulam Ahmed*.

('26) AIR 1926 Bom 62 (62) : 27 Cri L Jour 111, *Emperor v. Subrao Sesharao*.

See also S. 35 Note 13.

4. ('40) AIR 1940 Lah 388 (389) : ILR (1940) Lah 143, *Emperor v. Chanan Singh*.

5. ('39) AIR 1939 Bom 174 (176, 177) : 40 Cri L Jour 602 : ILR (1939) Bom 160. (Broomfield J., however, observed that it was doubtful if an order to make the subsequent substantive sentence run concurrently with the previous term of imprisonment in default was legal — It is difficult to understand this, in view of his Lordship's view clearly expressed, that the term imprisonment in this section includes imprisonment in default of payment of fine.)

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Notes 3b-5

latter sentence will begin to run only on the expiry of the imprisonment for default.

4. "Already undergoing a sentence of imprisonment," etc.

— A is sentenced *on the same day* to two separate terms of imprisonment on two separate convictions. Can A be said, at the moment the second sentence is passed, to be *undergoing a sentence of imprisonment* in respect of the first sentence? It was held by the High Court of Allahabad, in a case arising before the amendment of 1923, that he cannot, the reason being that a person cannot be said to undergo a sentence of imprisonment until he is *actually put in jail*.¹ It was, however, held in the same case following the undermentioned case^{1a} of the Bombay High Court that where several sentences were passed on the same day, they might be considered to have been passed at *one trial* within the meaning of S. 35 and that, therefore, the Court could order the sentences to run concurrently. The High Courts of Madras and Rangoon and the Judicial Commissioner's Court of Nagpur have, on the other hand held that a person sentenced to imprisonment must be deemed to be undergoing that imprisonment within the meaning of this section *from the moment the sentence is passed* and that, therefore, this section will apply.²

A person who has *furnished security* under S. 108 of the Code and is subsequently convicted under S. 500 of the Penal Code, cannot be said to be undergoing any sentence of imprisonment at the time the sentence under S. 500 is passed, though after such conviction the accused withdraws his security and is consequently committed to prison.³

A person undergoing a sentence of imprisonment in a *foreign territory* will, for the purposes of this section, be considered to be "undergoing the sentence" and consequently, a Magistrate is competent to direct that a sentence passed by him should commence after the expiration of the sentence which the accused is undergoing in the foreign territory.⁴

5. Order for imprisonment under section 123—Subsequent sentence for offence—Second proviso.—Before the addition of the

Note 4

1. ('18) AIR 1918 All 303 (303) : 19 Cri L Jour 207, *Makhan v. Emperor*.
- 1a. ('11) 12 Cri L Jour 241 (241) : 10 Ind Cas 769 (769) (Bom), *Emperor v. Mahomed Isaf Habib*. (In this case the offences could have been joined together under S. 234 of the Code.)
2. ('91) 2 Weir 451 (451, 452), *In re Muthusami Goundan*. (Case before 1923 — Sentences held only to run consecutively.)
- ('24) AIR 1924 Rang 307 (308) : 25 Cri L Jour 1310, *Emperor v. Nga Po Thaung*. (Case under the amended section—Sentences could be directed to run concurrently.)
- ('26) AIR 1926 Nag 426 (429) : 27 Cri L Jour 807, *Mahadeo v. Emperor*. (Do.)
- [See ('35) AIR 1935 Rang 456 (458) : 37 Cri L Jour 217, *N. N. Burjorjee v. Emperor*. (But sentences should not be ordered to run concurrently, where the offences are totally unconnected with each other.)]
3. ('23) AIR 1923 Oudh 56 (57) : 25 Oudh Cas 249 : 24 Cri L Jour 577, *Ganesh Shankar Vidyarathi v. King-Emperor*.
4. ('97) 20 Mad 444 (444) : 2 Weir 452, *Queen-Empress v. Venkatarama Jetti*. (Prisoner undergoing sentence of imprisonment in Mysore.)
- [See ('88) 1888 Rat 391 (391), *Queen-Empress v. Bhika*. (Case under 1st proviso.)]

second proviso to this section in 1923, there was a difference of opinions as to whether an order for commitment to prison under S. 123 in default of furnishing security was a *sentence of imprisonment* within the meaning of this section. On the one hand, it was held that it was not¹ and that the subsequent sentence could not, therefore, under this section, be postponed till after the expiry of the imprisonment ordered under S. 123.² The High Court of Allahabad held, on the other hand, that a commitment under S. 123 is a *sentence of imprisonment* within the meaning of this section and that, consequently, the subsequent sentence for an offence would, under this section, commence after the expiry of the imprisonment under S. 123.³ By the addition, in 1923, of the second proviso to this section and the use therein of the words "sentenced to imprisonment by an order under S. 123," the Legislature has adopted the view of the Allahabad High Court that the words "sentence of imprisonment" include an order for commitment to prison under S. 123⁴ but has enacted that, where the subsequent sentence is for an offence committed *prior* to the order under S. 123,

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Note 5

Note 5

1. ('16) AIR 1916 Pat 182 (182) : 17 Cri L Jour 528 : 1 Pat L Jour 212, *Marakandar v. Emperor*.
(14) AIR 1914 Sind 22 (22) : 7 Sind L R 203 : 15 Cr.L.J. 592, *Emperor v. Ghulam*.
(12) 13 Cr. L. J. 189 (189, 190) : 8 Nag L R 20 : 13 I. C. 1005, *Emperor v. Lekria*.
(04) 1 Cri L Jour 1090 (1090) : 27 Mad 525, *Emperor v. Muthukomaran*.
(03) 2 Weir 452 (452), *In re Venkatigadu*.
(1900.02) 1 Low Bur Rul 14 (15), *Queen-Empress v. Nga Kyon*.
(12) 17 I. C. 785 (785) : 13 Cr. L. J. 849 (Bom), *Emperor v. Vishnu Balakrishna*.
(03.04) 2 Low Bur Rul 72 (75, 76) (FB), *King-Emperor v. Nga Po Thin*. (Thirkell White, C. J., dissenting.)
[But see ('95) 1895 Rat 774 (774), *Queen-Empress v. Pandu*.]
2. ('92.96) 1 Upp Bur Rul 46 (46), *Queen-Empress v. Nga So*.
(01) 1 Cri L Jour 1114 (1114) : 6 Bom L R 1098, *Emperor v. Durga Bahirav*.
(03) 2 Weir 452 (453), *In re Venkatigadu*.
(21) AIR 1921 Sind 96 (96, 97) : 15 S L R 205 : 23 Cr.L.J. 255, *Sukhal v. Emperor*.
(12) 13 Cr.L.J. 849 (849):37 Bom 178:17 I C 785, *Emperor v. Vishnu Balakrishna*.
(10) 11 Cri L Jour 15 (15) : 3 Sind L R 114 : 4 I C 603, *Emperor v. Pandhi*.
(08) 8 Cri L Jour 402 (402) : 31 Mad 515 : 4 M L T 223, *In re Joghi Kannigan*.
(10) 11 Cri L Jour 271 (271) : 34 Bom 326 : 5 I C 861, *Emperor v. Arjun Ambo*.
(98) 1898 Rat 970 (971), *Queen-Empress v. Tulshya Bahiru*.
(95) 1895 Pun Re No. 14 Cr, p. 45 (46, 47), *Queen-Empress v. Divanchand*.
(72.92) 1872-92 Low Bur Rul 364 (365), *Queen-Empress v. Nga Shwe Byo*.
[See ('17) AIR 1917 Low Bur 159(159) : 17 Cr.L.J. 480, *Shin Taung v. Emperor*.
(Person detained in civil prison is not undergoing sentence of imprisonment.)]
[See also ('19) AIR 1919 Lah 136 (136) : 20 Cri L Jour 316, *Emperor v. Chet Singh*. (Sentence under S. 176, Penal Code should commence at once according to the Punjab Jail Manual, 1916, R. 461 (2).)]
(16) AIR 1916 Mad 1144 (1144) : 16 Cri L Jour 622, *In re Pichari Anthu*.
(15) AIR 1915 Mad 587 (587) : 16 Cri L Jour 137, *In re Ramudu*.
(03) 5 Bom L R 26 (27), *Emperor v. Kanji Jay Singh*.
(23) AIR 1923 Oudh 56 (57) : 25 Oudh Cas 249 : 24 Cr.L.J. 577, *Ganesh Shankar Vidyarthi v. King-Emperor*. (For application of S. 397, accused should have been undergoing sentence of imprisonment on the date on which he is convicted of substantive offence.)
(75) 24 Suth W R Cr 13 (14), *Queen v. Shona Dagee*. (When conviction of offence is contemporaneous with order for security for good behaviour, the sentence for substantive offence is to be first carried out.)]
3. ('08) 7 Cri L Jour 427 (430, 431, 432) : 30 All 334 (340, 342) : 5 A L J 318 (FB), *Emperor v. Tula Khan*.
4. ('31) AIR 1931 Rang 127 (129):9 Rang 110:32 Cr.L.J. 714 (FB), *In re Nga Pye*.

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such sentence should commence immediately.^{4a}

Where the subsequent sentence is for an offence *committed after* the order under S. 123, this proviso has no application. In such cases the first paragraph of this section will come into operation and the subsequent sentence will run after the expiry of the sentence under S. 123 unless the Court directs that they shall run concurrently.⁵ The proviso will not also apply where the *order under section 123* is passed *subsequent* to a sentence of imprisonment for an offence and, in such cases also, it is submitted, the first paragraph of this section applies and the sentences will run only *consecutively*. A contrary view has, however, been taken by a Full Bench of the Judicial Commissioner's Court of Sind.^{5a} In that case X was sentenced to imprisonment for an offence, after the date of an order for security and before the date fixed for furnishing security. On failure to furnish security on the latter date an order under S. 123 was not passed but was suspended until the expiry of the sentence for the offence. It was held by their Lordships, *firstly*, that the order under S. 123 could not be suspended and *secondly*, the imprisonment under S. 123 would run concurrently with the previous imprisonment. As has been seen before, this latter view is not correct. Where after an order for security was passed X was convicted of an offence and sentenced to imprisonment and thereafter an order under S. 123 for imprisonment was passed for default of security, it was held by the High Court of Bombay that the order under S. 123 should not have been passed on a later date at all and that on the assumption that the order under S. 123 was on the date of the order for security as it should have been, the subsequent sentence for the offence ran concurrently with the former.⁶

When the sentence for the offence is *fine*, S. 64 of the Penal Code requires that any imprisonment in default of the payment of fine should be *in excess of any other imprisonment to which the accused may be sentenced*. Hence, in such cases, even though the offence in question may have been committed prior to the passing of the order under S. 123, the effect of S. 64 of the Penal Code would be to postpone the imprisonment in default of fine till the expiration of the imprisonment in default of security.⁷

6. Detention in civil prison, if "sentence of imprisonment."

— The detention in *civil* prison is not a sentence of imprisonment within the meaning of this section. Where therefore a person undergoing detention in a civil jail is convicted of an offence and sentenced to a term of imprisonment, this section has no application and the sentence will commence, under the general principle of law, from the

4a. ('33) AIR 1933 Oudh 381 (381) : 34 Cri L Jour 1152, *Emperor v. Jagmohan*.

5. ('31) AIR 1931 Rang 127 (128, 129) : 9 Rang 110: 32 Cr. L. J. 714 (FB), *In re Nga Pye*.

5a. ('26) AIR 1926 Sind 273 (275) : 20 Sind L R 163 : 27 Cri L Jour 865 (FB), *Emperor v. Ahmed*.

6. ('27) AIR 1927 Bom 657 (657): 28 Cr.L.J. 652, *Emperor v. Aba Farid Bargir*.

7. ('32) AIR 1932 Rang 50 (51): 9 Rang 612: 33 Cr.L.J. 174, *Emperor v. Nan E.*

date of the order.¹

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6a. Detention under Madras Borstal Schools Act, if can be made consecutive. — This section does not apply to sentences of detention under S's of the Madras Borstal Schools Act. Consequently, a direction in a case that the sentence of detention should commence after the expiration of the previous sentence of detention is illegal.¹

7. Effect of reversal of one of two sentences in appeal. — Where x is convicted and sentenced to imprisonment first in one case and subsequently in another, and the former conviction is reversed in appeal, it has been held by the High Court of Bombay that the second sentence will commence from the date of such *reversal*.¹ According to the High Court of Madras, the sentence already undergone in respect of the conviction which was set aside should be reckoned as imprisonment in the second conviction.² The Judicial Commissioner's Court of Sind has held that the second sentence will commence only on the date of the acquittal in appeal in respect of the first conviction, but that the High Court has power under S.439 of the Code, to reduce, on equitable considerations, the second sentence by the period of imprisonment already undergone by the accused.³

8. Transportation — First proviso. — Where an accused who is already undergoing a sentence of imprisonment is sentenced to transportation, the Court has got a discretion under the first proviso to direct the sentence of transportation to commence immediately or after the expiration of the sentence of imprisonment.¹ If no order is made directing it to commence immediately, the sentence of transportation will commence only after the expiry of the sentence of imprisonment.² Where, however, at the time the sentence of transportation is passed, the Magistrate is ignorant of the previous sentence of imprisonment, an order directing the sentence of transportation to commence immediately can be made later on.³ By the amendment of sub-s.(1) this discretion has been given even in the case of a subsequent sentence of imprisonment or penal servitude. The first proviso, therefore, appears to be redundant and unnecessary. Where a person already sentenced to transportation for *life* is for the second

Note 6

1. ('17) AIR 1917 Low Bur 159 (159) : 17 Cr. L. J. 480, *Shin Taung v. Emperor*.
(Subsequent imprisonment under the Prisons Act.)
- ('25) AIR 1925 Rang 202 (203):3 Rang 93:26 Cr.L.J. 821, *Emperor v. Ma Kha Gyi*.

Note 6a

1. ('38) AIR 1938 Mad 613 (614) : 39 Cr. L. J. 795, *In re Public Prosecutor*.

Note 7

1. ('79) 1879 Rat 139 (139).
- ('90) 1890 Rat 523 (523), *Queen-Empress v. Khandu*.
2. ('79) 2 Weir 450 (450).
3. ('32) AIR 1932 Sind 159 (160) : 34 Cr. L. J. 24, *Emperor v. Koural Shah*.

Note 8

1. ('02) 2 Weir 453 (453), *In re Pattayil Kooru*.
- ('09) 10 Cr. L. J. 236 (237) : 2 Sind L R 23, *Imperator v. Khuda Bux*.
2. ('88) 1888 Rat 391 (391), *Queen-Empress v. Bhika*.
3. ('88) 1888 Rat 391 (391), *Queen-Empress v. Bhika*.

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time sentenced to transportation, this section has been held not to apply though, for purposes of calculation, a sentence of transportation for life is reckoned as 20 years.⁴ It may be noted, in passing, that transportation cannot be ordered in default of payment of fine.⁵

9. Sentence cannot be ante-dated. — A sentence cannot be made to operate from a date prior to the date on which the sentence was passed. Thus, where a prisoner was arrested on 27-1-1931 and was convicted and sentenced on 8-4-1931, it was held that the sentence could not be made to run from 27-1-1931.¹

10. Order as to commencement of sentence is not a judgment. — An order made by a Court under this section as to the commencement of sentences is not a part of its judgment and may, therefore, be made after the judgment is signed.¹

11. Power of High Court to pass concurrent sentences. — The High Court has power, under this section, to pass concurrent sentences in the same manner as the Court which originally passes the sentences.¹

12. Appeal. — Where an accused is sentenced to concurrent terms of imprisonment, no one of which alone is appealable, he is not entitled to appeal against them collectively.¹ Likewise when an Assistant Sessions Judge sentences an accused to imprisonment for a period not exceeding four years, under each of two sections of the Penal Code, directing the sentences to run concurrently, an appeal lies to the Sessions Court and not to the High Court.²

Section 398

398.* (1) Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

* 1898 : S. 398, sub-section (1); 1882 : S. 398; 1872 : S. 317, proviso; 1861 : S. 48, proviso.

4. ('93-1900) 1893-1900 Low Bur Rul 13, *Nga Tha Byit v. Queen-Empress*.

5. ('80) 1880 Pun Re No. 17 Cr, p. 29 (30), *Empress v. Nuran*.

See also S. 31 Note 4 and S. 33 Note 5.

Note 9

1. ('33) AIR 1933 Rang 28 (28) : 34 Cr. L. J. 447, *Emperor v. Nga Po Min*.

Note 10

1. ('88) 1888 Rat 391 (391), *Queen-Empress v. Bhika*.

Note 11

1. ('29) AIR 1929 All 585 (585) : 51 All 888 : 30 Cr. L. J. 904, *Sis Ram v. Emperor*.

('31) AIR 1931 Bom 529 (529) : 33 Cr. L. J. 77, *Nagappa v. Emperor*.

See also S. 423 Note 36.

Note 12

1. ('13) 14 Cr. L. J. 254 (254, 255) : 19 Ind Cas 510 : 40 Cal 631, *Aziz Sheikh v. Emperor*.

('12) 17 Ind Cas 531 (532) : 13 Cr. L. J. 787 (Cal), *Suknandan Singh v. Emperor*.

[But see ('12) 17 Ind Cas 813 (813) : 13 Cr. L. J. 877 (Cal), *Abdul Khalek v. Emperor*.]

2. ('16) AIR 1916 Cal 464 (464) : 17 Cr. L. J. 266, *Lakhimi Ram v. Emperor*.

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Notes 1-2

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

1. Scope of the section. — This section provides that no person will be excused from undergoing any part of the punishment to which he is liable under former or subsequent convictions.¹

Where an accused was convicted under S. 447, Penal Code, and sentenced to undergo rigorous imprisonment for three months and a fine, in default of payment of which he was sentenced to imprisonment for twenty days and the substantive sentence was by some mistake overlooked with the result that the accused served only the sentence of imprisonment in default of payment of fine, and was released, it was held that the accused could be re-arrested and sent to jail to serve the substantive sentence and the substantive sentence could be directed to begin from the date of his re-arrest.²

2. Sub-section (2). — This sub-section was first introduced in the Code of 1898. It supersedes the view held in the undermentioned case¹ that where a convict is imprisoned under two warrants which order consecutive punishments, the first warrant should be completely executed, both in respect of the substantive sentence of imprisonment and the imprisonment in default of fine, before any effect is given to the second warrant. Where a person is already undergoing a sentence of imprisonment in default of payment of fine when a substantive sentence of imprisonment is passed against him, an order directing that the subsequent sentence should take effect immediately and that the unexpired portion of the prior sentence should begin to run on the expiry of the subsequent sentence, is not justified under this sub-section. The reason is that this sub-section only provides for the postponement of the imprisonment in default and not for its interruption.²

Section 398 — Note 1

1. ('03) 2 Weir 453 (453), *In re Pattayil Kooru*.
(94) 1894 Pun Re No. 12 Cr, p. 38 (39), *Muzaffar v. Empress*.
2. ('97-01) 1 Upp Bur Rul 89 (89, 90), *King-Emperor v. Ngwe Gaing*.

Note 2

1. ('78) 1878 Rat 132 (132).
2. ('39) AIR 1939 Bom 174 (176, 177) : 40 Cri L Jour 602 : ILR (1939) Bom 160, *Emperor v. Punjaji Lalaji*.

ction 399

399.* (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the *Provincial Government*^a as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the *Provincial Government*^a prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

a. Substituted by A. O. for "Local Government."

Synopsis

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|--------------------------------------|-----------------------------------|
| 1. Scope of the section. | 5. "Instead of being imprisoned." |
| 2. "Under the age of fifteen years." | 6. Sub-section (3). |
| 3. "Is sentenced to imprisonment." | 7. "Imprisonment." |
| 4. "May direct." | 8. Revision. |

Other Topics (miscellaneous)

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| Act VIII of 1897—Reformatory Schools Act. See Notes 8, 1, 3, 5 and 6. | Period of detention. See Note 5. |
| Comparison with S. 562. See Note 1. | Points not to be considered. See Note 3. |
| Detention is not sentence — Suspension of sentence does not prevent detention. See Note 4. | Procedure. See Note 3. |
| Inquiry as to age. See Note 2. | Section 31 of Act VIII of 1897—Powers under. See Note 4. |
| Grounds for sending to reformatory school. See Note 4. | Sentences not coming under this section. See Note 3. |

1. Scope of the section. — This section may be compared with S. 562. The points of difference are as follows :

- (1) This section applies to offenders below the age of 15 years, while S. 562 applies to *all* offenders.
- (2) Under this section the offender need not be a first offender, whereas under S. 562 the offender must be a *first* offender.
- (3) In order that this section may apply, the offender must be *sentenced* to imprisonment.¹ Under S. 562, the Court may, *instead of sentencing him*, release him on probation.

* 1882 : S. 399; 1872 : S. 318; 1861 : S. 433.

Section 399 — Note 1

1. ('82) 1882 Rat 180 (180), *Queen-Empress v. Ravji*.

This section is analogous to s.8 of the Reformatory Schools Act, 1897, under which *male* youthful offenders can be sent to a reformatory. Where the latter Act applies, this section has no application.

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Notes 1-3

2. "Under the age of fifteen years." — Under the previous Codes the age limit was *sixteen* years.

Where the accused is not under the age of fifteen years he cannot be ordered to be detained in a reformatory.¹ The Magistrate should determine precisely the age of the accused by enquiry before action is taken under this section.²

3. "Is sentenced to imprisonment." — The same words "is sentenced" occur also in s.8 of the Reformatory Schools Act, 1897. It has been held in cases arising under that section that where the accused is not *sentenced* to imprisonment for any offence the Magistrate has no jurisdiction to make an order for detention in a reformatory school.¹ The same view must prevail in cases arising under this section. Where it is deemed necessary to have a convicted person sent to a reformatory, the proper procedure is to impose a substantive sentence and then direct that, in lieu thereof, the accused be detained in a reformatory.² The

Note 2

1. ('98) 25 Cal 333 (337):2 CWN 11, *Deputy Legal Remembrancer v. Ahmed Ali*. ('97) 1897 Rat 905 (906), *Queen-Empress v. Bhavsing*. ('24) AIR 1924 Rang 16 (16) : 24 Cri L Jour 918, *Hamid v. Emperor*. ('97-01) 1 Upp Bur Rul 375 (375), *Queen-Empress v. Nga Po Su*. ('98) 1 Weir 879 (879, 880), *In re Nachi*. (Proceedings under, Reformatory Schools Act, 1897.) ('31) 1931 Mad W N 401 (401), *Ramalinga Ayyer v. Emperor*. (Madras Borstal Schools Act V of 1896 lays down age below 21.) ('93-1900) 1893-1900 Low Bur Rul 79 (79), *Queen-Empress v. Nga Me*.
2. ('93) 15 All 208 (209) : 1893 A W N 107, *Queen-Empress v. Narain*. ('89) 14 Bom 381 (383) : 1889 Rat 494 (496), *Queen-Empress v. Manaji*. ('94) 1894 Rat 726 (726), *Queen-Empress v. Gopala*. ('99) 3 Cal W N 576 (579), *Empress v. Haridas Mukerjee*. (1900) 4 Cal W N 225 (226), *Deputy Legal Remembrancer v. Kopil Kahar*. ('98) 1 Weir 879 (880), *In re Nachi*. (1900-1902) 1 Low Bur Rul 126 (127), *Crown v. Po Sein*. (Merely asking accused his age and recording his reply is not enough.) ('01) 24 Mad 13 (15) : 1 Weir 882, *Queen-Empress v. Rama*. ('25) AIR 1925 Rang 302 (303) : 3 Rang 218 : 26 Cr. L. J. 852, *Emperor v. Seion Choung*.

Note 3

1. ('97) 20 All 160 (161) : 1897 A W N 231, *Queen-Empress v. Billar*. (The High Court can revise this illegal order and S. 16 is no bar to such revision.) ('90) 1890 Rat 518 (519), *Queen-Empress v. Purushotam*. (Mere conviction not enough—There should be a legal sentence.) ('01) 5 Cal W N 210 (211), *Radha Kristo v. Gokula Nut*. ('98) 1 Weir 879 (880), *In re Nachi*. ('94) 1894 Rat 726 (726), *Queen-Empress v. Gopala*. (Reformatory Schools Act, 1876.) ('10) 12 Cr. L. J. 56 (57) : 8 Ind Cas 1166 : 1910 Pun Re No. 34 Cr, *Emperor v. Bakhtawar*. (The High Court cannot pass a sentence to legalise the order of detention.) [See however ('32) AIR 1932 Sind 175 (176) : 26 Sind L R 295 : 34 Cri L Jour 11, *Issa Angario v. Emperor*. (Under Bombay Borstal Schools Act, mere conviction is enough—Actual sentence is not necessary.)]
2. ('99) 1 Bom L R 162 (163), *Queen-Empress v. Kaidya Hussain*. ('96) 1896 All W N 27 (27), *Queen-Empress v. Babu Ram*. (Reformatory Schools Act V of 1876.)

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Notes 3-4

liability to be sent to a reformatory school³ or a non-existence of a reformatory⁴ is not a matter to be considered in estimating the sentence to be passed on a juvenile offender. A person who is ordered to execute a bond to keep the peace or for good behaviour and in default to undergo imprisonment for that period is not "sentenced to imprisonment" and so cannot be sent to a reformatory.⁵ Similarly, a person sentenced to pay fine or in default to undergo imprisonment is not "sentenced to imprisonment."⁶ Nor is a sentence of whipping a "sentence of imprisonment" for the purpose of sending the accused to a reformatory.⁷

4. "May direct." — It is not every boy that is convicted of an offence that can be sent to a reformatory school; only such boys as are found to be proper persons to be the inmates of such a school could be ordered to be so sent. As a rule, no boy should be sent to a reformatory on first conviction unless there is a reasonable cause for supposing that he is being trained up to or is likely again to lapse into crime, being without parental or other control.¹ The order for detention in a reformatory school is not a sentence and the suspension of the sentence by the Sessions Judge will not prevent the carrying out of the detention.² As to power to act under S.31 of the Reformatory Schools Act, 1897, see the undermentioned decisions.³

3. ('22) AIR 1922 Bom 169 (170) : 46 Bom 429 : 23 Cr. L. J. 93, *Abdul Rehman Ismail v. Emperor*. (Reformatory Schools Act, 1897 — Adult and juvenile convicted — Former given one year's imprisonment — Latter's punishment should not exceed it.)

4. ('84) 2 Weir 453 (451), *In re Burri Subbadu*.

5. (1900.02) 1 Low Bur Rul 42 (42), *Mahomad Kasim v. Queen-Empress*. (Security under S. 109.)

('97-01) 1 Upp Bur Rul 375 (376), *Queen-Empress v. Nga Po Su*. (Security under S. 110.)

[But see under Madras Borstal Schools Act, 1926. ('34) AIR 1934 Mad 457 (457) : 57 Mad 928 : 35 Cr. L. J. 1153, *In re Chengadu*.]

See also S. 123 Note 2.

6. ('93-1900) 1893-1900 Low Bur Rul 491 (492), *Queen-Empress v. Nga Po Sin*.

('11) 12 Cri L Jour 244 (244) : 10 Ind Cas 773 (LB), *Nga Po Tok v. Emperor*.

7. ('93-1900) 1893-1900 Low Bur Rul 493 (493), *Puttu v. Queen-Empress*.

Note 4

1. ('95) 1 Weir 878 (879), *In re Abdul Gaffar*.

('21) AIR 1921 Oudh 190 (191) : 24 Oudh Cas 305 : 23 Cri L Jour 145, *Mt. Parbati v. Emperor*. (S. 31, cl. (b), Reformatory Schools Act, 1897, applied and accused delivered to parents on latter's bond.)

('25) AIR 1925 Rang 302 (303) : 3 Rang 218 : 26 Cri L Jour 852, *Emperor v. Seion Choung*. (S. 11, Reformatory Schools Act, 1897.)

('31) AIR 1931 Mad 771 (771) : 54 Mad 764 : 32 Cri L Jour 1044, *Sellappa Goundan v. Emperor*. (Detention in Borstal School held improper.)

('34) AIR 1934 Rang 125 (127) : 12 Rang 344 : 35 Cri L Jour 959, *Emperor v. Nga Ohn Shwe*. (Detention in Borstal School is not proper where accused merely fails to keep under control his passion or gives way to violence.)

('34) AIR 1934 Rang 123 (124) : 12 Rang 349 : 35 Cr. L. J. 903, *Emperor v. Shwe Bein*. (Detention in Borstal School held bad.)

2. ('15) AIR 1915 Mad 1067 (1068) : 16 Cr. L. J. 134, *Emperor v. Krishna Pandaram*. (S. 426 does not apply.)

3. ('21) AIR 1921 Oudh 190 (191) : 24 Oudh Cas 305 : 23 Cr. L. J. 145, *Mt. Parbati v. Emperor*.

('05) 2 Cri L Jour 720 (721) : 3 Low Bur Rul 30 (30), *King-Emperor v. Ha Taw*. (S. 31, Reformatory Schools Act, does not apply when accused is sentenced to whipping.)

('23) AIR 1923 Pat 297 (297) : 25 Cr. L. J. 1312, *Jagarnath Chaubey v. King-Emperor*.

5. "Instead of being imprisoned." — Since the detention is only *instead* of imprisonment in jail, the Court which sentences an accused person for any particular period of imprisonment cannot direct detention in a reformatory for a longer period.¹ Thus, where a confinement in a reformatory for one year was ordered on a sentence of imprisonment for one day the sentence was held illegal.² The period of detention should be defined and words like "or until he attains majority" should not be used.³ See also S. 8 of the Reformatory Schools Act, 1897 and the undermentioned cases.⁴

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Notes 5-6

6. Sub-section (3). — This section does not apply where the Reformatory Schools Act, 1897 is in force.¹ In such cases the authority to send a youthful offender to a reformatory school must be found in that Act. Section 8 of that Act provides that only the Magistrates *specified* therein can make an order under this section.^{1a} A second class Magistrate who is not so specified cannot order a youthful offender to be sent to a reformatory school where the Reformatory Schools Act, 1897 is in force.² See also the undermentioned cases.³

('34) AIR 1934 All 976 (977): 36 Cri L Jour 368: 57 All 395, *Lur Khur v. Emperor*. (United Provinces Rules require minimum sentence of four years for detention in reformatory.)

Note 5

1. ('76) 1876 Rat 109 (109), *Reg v. Ganpaya*.
2. ('89) 1889 All W N 131 (131), *Queen-Empress v. Hira*. (Also there were other irregularities in this case.)
3. ('13) 14 Cri L Jour 256 (256): 19 Ind Cas 512 (Bom), *Emperor v. Rama Sudama*. ('01) 24 Mad 13 (16), *Queen-Empress v. Rama*. ('01) 1 Low Bur Rul 63 (64), *Crown v. Valu*.
4. ('97-1900) 1 Upp Bur Rul 375 (375, 376), *Queen-Empress v. Nga Po Su*. ('05) 2 Cri L Jour 738 (738): 3 Low Bur Rul 46 (47), *San Hlaing v. King-Emperor*. (Lower Burma Judicial Department Notification No. 237, dated 12th June 1897, provides that youthful offender should be detained till majority.) ('98) 21 Mad 430 (432): 1 Weir 880, *Queen-Empress v. Ramalingam*. (Rules passed by Government require detention until the age of eighteen—Per Shephard, Offg. C. J. and Moore, J.—Davies, J., dissenting.) (1900) 1 Weir 884 (884), *Public Prosecutor v. Bantoo*. (Government of India Notification dated 30th June 1887, does not require detention till eighteen years in every case.) ('91) 1891 Rat 564 (572), *Queen-Empress v. Bali*.

Note 6

1. ('97) 1897 Rat 929 (930), *Queen-Empress v. Harprasad Latta*. ('96) 1896 Rat 864 (864), *Queen-Empress v. Tukaram Keshav*. (Act of 1876.) ('97) 1897 Rat 915 (916), *Queen-Empress v. Fakira Dharmappa*. (Do.) ('18) AIR 1918 Lah 27 (28): 1918 Pun Re No. 17 Cr: 19 Cr. L. J. 917, *Emperor v. Nur Muhammad*. ('89) 12 Mad 94 (95, 97): 1 Weir 875 (FB), *Queen-Empress v. Madasami*. ('82) 1882 Pun Re No. 6 Cr, p. 6, *Empress v. Muhamadu*.
- 1a. ('97) 1897 Rat 947 (948), *Queen-Empress v. Bhagia Bhao*. ('72-92) 1872-92 Low Bur Rul 330 (331), *Queen-Empress v. Nga Hmaing*. ('97-01) 1 Upp Bur Rul 375 (376), *Queen-Empress v. Nga Po Su*. [See ('97) 1897 Rat 936 (936), *Queen-Empress v. Bhujia Gujia*.]
2. ('89) 12 Mad 94 (95, 97): 1 Weir 875 (FB), *Queen-Empress v. Madasami*.
3. ('15) AIR 1915 Mad 841 (841): 16 Cr. L. J. 32, *Kanukayya v. Emperor*. (A second class Magistrate not empowered to act under S. 8 of the Act must refer the case to the District Magistrate under S. 9.) ('28) AIR 1928 Bom 348 (348, 349): 29 Cri L Jour 1016, *Emperor v. Lakshman*. (High Court can order detention of a boy in reformatory school not only on appeal but in revision also.) ('91) 1891 Rat 536 (536), *Queen-Empress v. Lallubhai*. (Case under S. 7, Act V of 1876.)

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Notes 7-8

7. "Imprisonment."—Transportation is only a particular form of imprisonment and consequently, this section will apply also to cases when an offender under the age of 15 years is sentenced to transportation.¹

8. Revision.—As to the power of the High Court in revision in cases arising under the Reformatory Schools Act (VIII of 1897), see section 435, Note 15 and the undermentioned cases.¹

Section 400

400.* When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

1. "Has been fully executed." — Where a person has been convicted under an Ordinance issued by the Governor-General, his sentence does not become fully executed till the expiry of the period

* 1882 : S. 400; 1872 : S. 305; 1861 : S. 385.

Note 7

1. ('08) 9 Cri L Jour 99 (102) : 4 Nag L R 180, *Rama v. Emperor*. (Ordinarily, however, youthful offender convicted of murder should not be sent to a reformatory school.)

Note 8

1. *The order of a Magistrate under S. 8 of the Reformatory Schools Act 1876 is not an executive but a judicial proceeding and the High Court has power to revise :*

('89) 14 Bom 381 (383) : 1889 Rat 494 (495), *Queen-Empress v. Manaji*.

High Court has no power to interfere with the order of detention under S.7 of Act V of 1876:

('96) 1896 All W N 43 (43), *Queen-Empress v. Anrudh Singh*.

Where the order is not made in substitution of an order for transportation or imprisonment or where it is made without jurisdiction High Court can interfere:

('97) 20 All 160 (161) : 1897 All W N 231, *Queen-Empress v. Billar*.

('99) 21 All 391 (395) : 1891 All W N 138 (F B), *Queen-Empress v. Hari*.

('93-1900) 1893-1900 Low Bur Rul 493 (493), *Puttu v. Queen-Empress*.

Revisional jurisdiction excluded only as to the age of offender and order for detention in reformatory for transportation or imprisonment :

('04) 1 Cr. L. J. 609 (610) : 6 Bom L R 550, *Emperor v. Amir Bhikan*. (21 All 391 (F B), referred to.)

('99) 27 Cal 133 (136), *Queen-Empress v. Makimuddin*.

('99) 3 Cal W N 576 (579), *Queen-Empress v. Haridas Mukherjee*.

('93-1900) 1893-1900 Low Bur Rul 255 (255), *Queen-Empress v. Nga Tun Zan*.

('93-1900) 1893-1900 Low Bur Rul 441 (442), *Queen-Empress v. Nga Nyan Wan*.

('1900) 1 Low Bur Rul 42 (43), *Md. Kasim v. Queen-Empress*.

('01) 1 Low Bur Rul 63 (64), *Crown v. Valu*.

('01) 1 Low Bur Rul 68 (68, 69), *Crown v. Dawood Sahib*.

('32) AIR 1932 Sind 175 (176) : 26 Sind L R 295 : 34 Cri L Jour 11, *Issa Angario v. Emperor*. (Section 21, Bombay Borstal Schools Act, 1929.)

High Court can alter the sentence passed :

('01) 28 Cal 423 (424) : 5 Cal W N 211, *Reasut v. Courtney*.

(1900) 5 Cal W N 210 (211), *Radha Kristo v. Gokula Nut*.

('07) 6 Cr. L. J. 129 (130) : 1907 Pun Re No. 18 Cr, p. 59 : 1908 Pun L R No. 55, *Ram Singh v. King-Emperor*.

('31) AIR 1931 Nag 179 (179) : 27 Nag L R 242 : 32 Cr.L.J.1268, *Md. Azimuddin v. Emperor*. (28 Cal 423 followed.)

('11) 13 Cri L Jour 44 (44) : 13 I. C. 284 : 5 S L R 173, *Imperator v. Rajabali*. [See also ('02) 15 C P L R Cr 151 (152), *Emperor v. Jagan*. (Observation.)]

of the sentence, though the term of the Ordinance has expired, the detention after the period of Ordinance is not illegal.¹

Section 400
Note 1

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

401.* (1) When any person has been sentenced to punishment for an offence, [* * *]^a the *Provincial Government*^b may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

Section 401

(2) Whenever an application is made to [* * *] the *Provincial Government*^b for the suspension or remission of a sentence, [* * *]^a the *Provincial Government*^b [* * *]^c may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion [and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists].^d

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion [* * *]^a of the *Provincial Government*,^b [* * *]^c not fulfilled, [* * *]^a the *Provincial Government*^b may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one

* 1882 : S. 401; 1872 : S. 322; 1861 : S. 54.

Section 400 — Note 1

1. ('33) AIR 1933 Cal 280 (282) : 60 Cal 742 : 34 Cri L Jour 291, *Jagendra Chandra v. Superintendent of the Dum Dum Special Jail*. (Ordinance 2 of 1932.)
(‘33) AIR 1933 Cal 516 (519) : 60 Cal 545 : 34 Cri L Jour 879, *Jogendra Mohan v. Emperor*. (Bengal Emergency Powers Ordinance 11 of 1931.)

Section 401 to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A)^o The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere with the right of [His Majesty or of the *Central Government*^s when such right is delegated to *it*^h]^f to grant pardons, reprieves, respites or remissions of punishment.

(5A)^o Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to *it*,^h by the *Central Government*,^s any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The [* * *]ⁱ *Provincial Government*^b may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

- a. The words "the Governor General in Council or" were repealed by A. O.
- b. Substituted by A. O. for "Local Government."
- c. The words "as the case may be" were repealed by A. O.
- d. The words "and also to forward as exists" were inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.
- e. Sub-sections (4A) and (5A) were inserted by Act, XVIII of 1923.
- f. Substituted by Act XVIII of 1923 for "Her Majesty."
- g. Substituted by A. O. for "Governor General."
- h. Substituted by A. O. for "him."
- i. The words "Governor General in Council and the" were repealed by A. O.

Synopsis

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| <ol style="list-style-type: none"> 1. Scope and applicability of the section. 1a. Powers of Provincial Government—Sub-section (1). 2. Statement of opinion of the presiding Judge—Sub-s.(2). 3. Procedure to be followed by the Court. | <ol style="list-style-type: none"> 4. Violation of condition of remission of punishment—Sub-s. (3). 5. "If at large." 6. His Majesty's prerogative of pardon—Sub-section (5). 7. Release on medical grounds. See Madras Police Manual Vol. I, pp. 319-320. |
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Other Topics (miscellaneous)

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| <p>Advice for King's pardon. See Note 6</p> <p>Circumstances for mercy. See Note 2.</p> <p>Court's reference for Government mercy. See Note 2.</p> <p>Madras Police Manual. See Note 7.</p> | <p>Non-applicability to approvers under S. 337. See Note 1.</p> <p>Opinion pending petition to Privy Council. See Note 2.</p> <p>Suspension of death sentence for appeal to Privy Council. See Note 1.</p> |
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1. Scope and applicability of the section.—This section does not disturb the *conviction* of an accused. It deals only with the power to suspend the execution of a *sentence* or remit the whole or any part of the *punishment*. The Provincial Government may act of its *own* accord (sub-section (1)),¹ or may be moved by an application (sub-section (2)). The Provincial Government has power under this section to *suspend* the execution of a death sentence to enable the accused to appeal to the Privy Council.² Though an order passed under this section by the Provincial Government is in the name of the Governor because that is the constitutional form it has to take, it is in reality an order of the Provincial Government.³

Section 401
Notes 1-2

The special authority conferred by this section relates to persons *sentenced to punishment* and does not touch cases under S. 337 in which a person charged along with others with a crime has, under a conditionally tendered pardon, given evidence against such persons.⁴ The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation.⁵

1a. Powers of Provincial Government — Sub-section (1).—Sub-section (1) of this section confers on the Provincial Government the power to suspend the execution of sentence or remit the whole or any part of the sentence with or without conditions. But where the Provincial Government has remitted a sentence unconditionally, it is not open to it to cancel the order and restore the sentence subsequently, except in cases of fraud or mistake. The general power of cancellation of orders under S. 21 of the General Clauses Act, 1897, cannot be invoked in such a case.¹

2. Statement of opinion of the presiding Judge — Sub-section (2).— On the receipt of an *application* the Provincial Government may require, from the presiding Judge of the Court before or by which the conviction was had or confirmed, a statement of his opinion with reasons and a certified copy of the available record. The object of calling for such a statement is to avoid a possible misapprehension about the legality of the sentence passed or a mistake as

Section 401 — Note 1

1. See ('32) AIR 1932 All 232 (232):33 Cri L Jour 830, *In re Ram Dawan Singh*.
2. ('31) AIR 1931 Lah 359 (360) : 33 Cri L Jour 126, *Chint Ram v. Emperor*.
[See also ('15) AIR 1915 P C 29 (30) : 42 Cal 739; 42 I A 133; 16 Cri L Jour 494 (PC), *Balmukund v. Emperor*. (Privy Council is unable to interfere with regard to staying of execution of death sentence.)]
3. ('38) AIR 1938 Nag 513 (516) : 40 Cri L Jour 397 : I L R (1940) Nag 1 (FB), *Venkatesh Yeshwant v. Emperor*.
4. ('88) 11 All 79 (89) : 1888 A W N 289, *Queen-Empress v. Ganga Charan*.
5. ('38) AIR 1938 Nag 513 (520) : 40 Cri L Jour 397 : I L R (1940) Nag 1 (FB), *Venkatesh Yeshwant v. Emperor*.

Note 1a

1. ('38) AIR 1938 Nag 513 (518, 520) : 40 Cr. L. J. 397 : I L R (1940) Nag 1 (FB), *Venkatesh Yeshwant v. Emperor*. (Sub-s. (3) of this section indicates that except where there is a breach of the conditions on which a sentence has been remitted, the Provincial Government cannot cancel the order of remission — Held further that in the circumstances of this case, the Provincial Government had lost its *locus penitentiæ* in the matter.)

Section 401
Note 2

to the propriety of a particular punishment inflicted.¹ The Judge may also *suo motu* send his opinion whenever he considers that the prerogative of mercy should be exercised in favour of an accused. The following are instances where the Courts have thus recommended the accused to the mercy of the Government —

- (1) discovery of facts *after* the final judgment is pronounced and signed, showing that the accused has committed no offence ;^{1a}
- (2) an oversight on the part of a counsel or omission on the part of the Court to notice a *relevant* fact in the proceedings resulting in an error of fact or law ;²
- (3) unsoundness of mind not *strictly* covered by S.84 of the Penal Code ;³ see also Note 3 under S. 376.
- (4) the punishment prescribed by the law being more rigorous than the circumstances of the case deserve ;⁴

Note 2

1. See ('34) AIR 1934 Rang 125 (126, 127) : 12 Rang 344 : 35 Cri L Jour 959, *Emperor v. Nga Ohn Shwe*.
- 1a. ('23) AIR 1923 All 473(474):45 All 143:24 Cr.L.J. 766, *Kale v. King-Emperor*. ('66) 6 Suth W R Cr 42 (42), *Nussur Ali v. G. Hart*.
- ('26) 27 Cri L Jour 1254 (1256) : 98 Ind Cas 102 (104) (Cal), *Arajali v. Emperor*.
- ('19) AIR 1919 Cal 409 (410) : 46 Cal 60 : 20 Cr. L. J. 265, *Rajab Ali v. Emperor*. [See ('85) 7 All 672 (673) : 1885 A W N 177, *Empress v. Durga Charan*.]
2. ('85) 10 Bom 176 (180, 181) (FB), *Queen-Empress v. C. P. Fox*. ('95) 1895 Rat 791 (791), *Queen-Empress v. Mohun Abhesing*.
- ('09) 9 Cri L Jour 226 (245):33 Bom 221:2 I. C. 277, *In re Bal Gangadhar Tilak*.
- ('66) 5 Suth W R Cr 61 (64) : Beng L R Sup Vol 436 (FB), *Queen v. Godai Raout*.
3. ('96) 23 Cal 604 (609), *Queen-Empress v. Kader Nasyer Shah*.
- ('32) AIR 1932 All 233 (236) : 33 Cri L Jour 714, *Pancha v. Emperor*.
- ('24) AIR 1924 All 413(413, 414):46 All 243:25 Cr.L.J. 683, *Lachhman v. Emperor*.
- ('86) 10 Bom 512 (518, 519), *Queen-Empress v. Lakshman Dagdu*.
- ('01) 28 Cal 613 (619) : 5 C W N 665, *Ghatu Pramanik v. Emperor*.
- ('23) AIR 1923 Cal 460 (463), *Emperor v. Tincouri Dhopi*.
- ('31) AIR 1931 Lah 276 (278) : 32 Cri L Jour 1230, *Bagga v. Emperor*.
- ('27) AIR 1927 Lah 674 (677) : 8 Lah 684:28 Cr. L. J. 598, *Tola Ram v. Emperor*.
- ('19) AIR 1919 Lah 470 (470):1918 PunRe No.30 Cr:20 Cr.L.J.1, *Ramzan v. Emperor*.
- ('31) 1931 Mad W N 719 (723), *Narayanawamy Goundan v. Emperor*.
- ('19) AIR 1919 Mad 128 (129) : 20 Cri L Jour 828, *In re Muthusami Asari*.
- ('89) 12 Mad 459 (461, 462) : 1 Weir 42, *Queen-Empress v. Venkatasami*.
- ('10) 11 Cri L Jour 105 (110) : 4 Ind Cas 985 (Lah), *Chajju Mal v. Emperor*.
- ('13) 14 Cr. L. J. 81 (91) : 15 Oudh Cas 321:18 I.C. 641, *Mad. Husain v. Emperor*.
- ('20) AIR 1920 Cal 39 (40) : 21 Cri L Jour 317, *Mantajali v. Emperor*.
4. ('37) AIR 1937 Lah 689 (691):39 Cr.L.J. 16, *Aziz Begum v. Emperor*. (Girl less than seventeen years of age convicted of being accessory to murder on forfeiture of pardon tendered to her—Her statement as approver leading to successful investigation and conviction of principal offender — Considerable portion of sentence already served—Sentence of transportation though could not be reduced by Court, case held strong for exercise of prerogative of mercy.)
- ('23) AIR 1923 All 355 (356) : 24 Cri L Jour 753, *Emperor v. Umrao*. (Absence of intention to kill — Accused striking only one blow with a lathi.)
- ('20) AIR 1920 All 199 (200) : 21 Cr. L. J. 607, *Goshain v. Emperor*. (Grave but not sudden provocation due to infidelity of wife which all the world over results in death.)
- ('95) 1895 Rat 792 (792), *Empress v. Salu*. (A young woman deserted by her husband and left to maintain child, murdering it due to want and misery.)
- (1864) 1864 Suth W R Gap Cr 27 (27), *Queen v. Dabee*.
- (1864) 1 Suth W R Cr L 9 (9). (Judge considering accused innocent contrary to verdict of jury.)
- (1865) 3 Suth W R Cr L 16 (16).
- ('66) 5 Suth W R Cr 73 (75), *Queen v. Durwan Guccr*. (Murder committed by accused while acting against a burglar and killing him though exceeding right of private defence of person or property.)

(5) other mitigating circumstances.⁵

Section 401
Note 2

It has been held that the Court ought not to express an opinion in a case where stay of execution of sentence is prayed for until a petition to His Majesty in Council is disposed of and that it is a matter which lies entirely with the Government.⁶ In the undermentioned case, where the accused were proved to be guilty of the grievous offence of waging war against the King, the Rangoon High Court refused to recommend the accused to mercy on the ground that the matter was entirely in the hands of Government.⁷

('67) 7 Suth W R Cr 6 (7), *Queen v. Chand Bagdee*. (Want of positive evidence though the jury passed a verdict of guilty.)

5. ('67) 7 Suth W R Cr 64 (64), *Queen v. Sajowpa*. (Offence under S. 125, Penal Code.)

('72) 18 Suth W R Cr 45 (46), *Queen v. Nidheeram Bagdee*. (Unsatisfactory verdict of jury.)

('16) AIR 1916 Lah 408 (410) : 17 Cri L Jour 267 (269) : 1916 Pun Re No. 12 Cr, *Kaimi v. Emperor*. (Capital sentence against five for murder of one.)

('26) AIR 1926 Lah 144 (144) : 26 Cri L Jour 1373, *Mt. Daulan v. Emperor*. (Age of the accused.)

('26) AIR 1926 Lah 271 (272) : 7 Lah 70 : 27 Cri L Jour 627, *Ghulam Jannat v. Emperor*. (Young age of accused—Anxiety of concealing shame—Mitigating circumstances.)

('29) AIR 1929 Lah 601 (603), *Joga Singh v. Emperor*. (Young age—Minor part played—Influence of bad company.)

('32) AIR 1932 Lah 259 (260) : 33 Cri L Jour 484, *Kartar Singh v. Emperor*. (Youth of accused—Participation in crime under influence of his father and brother.)

('32) AIR 1932 Lah 297 (297) : 33 Cri L Jour 448, *Mt. Alam Bibi v. Emperor*. (Causing death of child—Reduction of sentence—Mitigating circumstances.)

('32) AIR 1932 Lah 308 (310) : 33 Cri L Jour 580, *Nawab v. Emperor*. (Deceased found in adultery with female relative of accused—Tender age of the accused.)

('33) AIR 1933 Lah 718 (720) : 34 Cri L Jour 1251, *Mt. Sardaran v. Emperor*. (Illiterate and superstitious young woman causing the death of a child of her sister-in-law, believing her to be the cause of death of her own issues.)

('33) AIR 1933 Lah 1021 (1022) : 35 Cr. L. J. 430, *Ghulam Mohamad v. Emperor*. (Young age—Influence of relations.)

('34) AIR 1934 Lah 31 (32) : 35 Cr. L. J. 652, *Mt. Dhauln v. Emperor*. (Woman committing murder of her child on account of weak intellect, ill-treatment of relation and extreme poverty.)

('68) 4 Mad H C R App xix (xix). (Circumstance that the Sessions Court thinks that he ought not to have believed the evidence.)

('26) AIR 1926 Mad 1165 (1166) : 50 Mad 474 : 27 Cri L Jour 1357, *Mayandi Thevan v. Emperor*. (Sentence for third conviction under Criminal Tribes Act being transportation for life being harsh.)

('31) AIR 1931 Rang 235 (244) : 9 Rang 404 : 33 Cri L Jour 205 (SB), *Aung Hla v. Emperor*. (Political offence.)

('16) AIR 1916 Sind 65 (66) : 9 Sind L R 205 : 17 Cri L Jour 231, *Jiwanji & Co. v. Emperor*. (Right of appeal and revision barred—Erroneous conviction—Recommendation to Government.)

('90) 14 Mad 36 (37, 38) : 2 Weir 390, *Empress v. Chinna Thevan*. (The circumstances that Judge disagrees with the verdict.)

[See (1865) 3 Suth W R Cr 1 (2), *Queen v. Gobindo Bagdee*. (There are remarks in this decision suggesting that where the evidence in support of conviction is manifestly weak and insufficient, the prisoner can be recommended for mercy—It is submitted this view is not correct—Such a case is one for acquittal.)

(1900.02) 1 Low Bur Rul 359 (361), *Nga Pyan v. Crown*. (Youth of the offender.)]

6. ('24) AIR 1924 Cal 64 (66,67) : 50 Cal 585 : 24 Cr. L. J. 362, *Tulsi Telini v. Emperor*.

('15) AIR 1915 P C 29 (30) : 42 Cal 739 : 42 I A 133 : 16 Cri L Jour 494 (PC), *Balmukund v. Emperor*.

7. ('31) AIR 1931 Rang 235 (244) : 33 Cri L Jour 205 : 9 Rang 404 (SB), *Aung Hla v. Emperor*.

**Section 401
Notes 3-7**

3. Procedure to be followed by the Court. — A Sessions Judge, required to state his opinion under this section, must forward his reply through the High Court whether the requisition for the opinion has been received through the High Court or not — *Madras H. C. Cir. dated 15th November 1895.*

When any Court shall be of opinion that there are grounds for recommending to the Provincial Government to exercise the powers vested in it by S. 401 and S. 402, of suspending, remitting or commuting the punishment to which any accused person has been sentenced, the recommendation shall be submitted with the proceedings in the case through the Court of the Judicial Commissioner — *C. P. Criminal Circulars, Part II, No. 40.*

All recommendations for remission or suspension of a sentence made under section 401 by an officer of any subordinate Court to the Provincial Government, in regard to a convict whose case has been before the High Court on appeal, shall be made through the High Court — *Calcutta G. R. and C. O. P. 40.*

4. Violation of condition of remission of punishment — Sub-section (3).—Section 227 of the Penal Code runs thus: "Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered." Under this section it is for the Court to decide whether a conditionally released prisoner has violated the conditions on which the remission was granted.¹

5. "If at large." — Under S. 21 of the Prisoners Act of 1900, the Provincial Government may grant to any person under sentence of penal servitude a license to be at large within such part of the province and during such portion of his term of penal servitude as may be specified in the license and upon such conditions as the Provincial Government may, by general or special order, prescribe.

6. His Majesty's prerogative of pardon — Sub-section (5). — Primarily the power of *pardon* rests in the Sovereign; and the provisions contained in this section in no way interfere with the prerogative of the Crown in that respect.¹ The tendering of advice to His Majesty as to exercise of his prerogative of pardon is a matter for the Executive Government and is outside the province of the Judicial Committee of the Privy Council.²

7. Release on medical grounds. — See Madras Police Manual, Vol. I, pages 319-320. .

Note 4

1. ('33) AIR 1933 Rang 28 (29) : 34 Cri L Jour 447, *Emperor v. Nga Po Min.*

Note 6

1. ('88) 11 All 79 (89) : 1888 A W N 289, *Queen-Empress v. Ganga Charan.*

2. ('15) AIR 1915 P C 29 (30) : 42 Cal 739 : 42 I A 133 : 16 Cri L Jour 494 (PC), *Balmukund v. Emperor.*

402.* (1) The [* * *]^a *Provincial Government*^b **Section 402**
 Power to commute may, without the consent of the
 punishment. person sentenced, commute any one
 of the following sentences for any other mentioned
 after it:—

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2)^c Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code.

a. The words "G. G. in Council or the" were repealed by A. O.

b. Substituted by A. O. for "Local Government."

c. Section 402 was renumbered as S. 402, sub-s. (1) and sub-s. (2) was inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

1. Scope of the section. — Certain accused persons were sentenced to death by a special Tribunal under Ordinance 3 of 1930. The execution of the sentence was stayed by the Provincial Government pending the decision of the Privy Council in the appeal against the sentence. Before the appeal was disposed of, the special Tribunal ceased to exist, and on the dismissal of the appeal it was contended that as the Tribunal ceased to exist and the time for execution had expired the custody of the prisoners was illegal. It was held that even if there was difficulty in carrying out the death sentence, still the Provincial Government could commute the sentence under this section.¹ See also the undermentioned cases.²

402A. *The powers conferred by sections 401* **Section 402A**
and 402 upon the Provincial Government
 Sentences of death. *may, in the case of sentences of death, also*
be exercised by the Governor General in his discretion.

This section was newly inserted by the A. O; compare Govt. of India Act, 1935, Section 295.

* 1882 : S. 402; 1872 : S. 322; 1861 — Nil.

Section 402 — Note 1

1. ('31) AIR 1931 Lah 359 (360) : 33 Cri L Jour 126, *Chint Ram v. Emperor*.
2. ('19) AIR 1919 All 445 (447) : 20 Cr. L. J. 767, *Garib v. Emperor*. (Co-offenders tried separately, received a lesser sentence on the same facts — Held that case might be brought to notice of Government so that the inequalities in sentences might be removed.)
- ('68) 1868 Rat 10 (11), *Reg. v. Jeeva Amtha*. (In view of the long delay in execution of the sentence of death, High Court recommended to Government that sentence should be commuted to transportation for life.)

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

Section 403

403.* (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such

* Code of 1882 : S. 403.

Subs-section (5) was added in 1898 ; otherwise the section was the same.

Code of 1872 : Ss. 460 ; 147, para. 2 ; 195, Expln. 2 and 215, Expln. 2.

460. A person who has once been tried for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again on the same facts for the same offence, nor for any other offence, for which a different charge from the one made against him might have been made under S. 455, or for which he might have been convicted under section 456.

A person convicted or acquitted of any offence may be afterwards tried for any offence for which a separate charge might have been made against him in the former trial under S. 454, para. 1.

A person acquitted or convicted of any offence in respect of any act causing consequences which together with such act, constituted a different offence from that for which such person was acquitted or convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was acquitted or convicted.

A person acquitted or convicted of any offence in respect of any facts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

Illustrations

(a) *A* is tried upon a charge of theft as a servant and acquitted. He cannot afterwards be charged upon the same facts, either with theft as a servant, with theft simply, or with criminal breach of trust.

(b) *A* is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that *A* committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for robbery.

(c) *A* is tried for an assault and convicted. The person afterwards dies. *A* may be tried again for culpable homicide.

(d) *A* is tried under S. 270, I. P. C., for maliciously doing an act likely to spread the infection of a disease dangerous to life and is acquitted. The act so done afterwards causes a person permanently to lose his eye-sight. *A* may be charged, under S. 325, with voluntarily causing grievous hurt to that person.

(e) *A* is charged before the Court of Session and convicted of the culpable homicide of *B*. *A* may not afterwards be tried for the murder of *B* on the same facts.

(f) *A* is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt to *B*, on the same facts, unless the case comes within paragraph 3.

(g) *A* is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of *B*. *A* may be subsequently charged with, and tried for robbery on the same facts.

(h) *A*, *B* and *C* are charged by a Magistrate of a first class with, and convicted by him of, robbing *D*. *A*, *B* and *C* may afterwards be charged with, and tried for, dacoity on the same facts.

147.

The dismissal of a complaint shall not prevent subsequent proceedings.

195.

Explanation II. — A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

215.

Explanation II. — A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

Code of 1861 : Ss. 55 and 60.

Party tried upon formal charge not liable to renewed prosecution.

Proviso

for the act which cause the death, if at the time of his conviction for the said act death shall not have resulted, or shall not have been known by the Court which passed sentence to have resulted.

60. No person charged and tried for an offence under any section of the Penal Code in the last four sections of this Act mentioned, and found guilty of another offence under the provisions of any other of the said sections of the Penal Code, shall be liable to be afterwards prosecuted upon the same facts under the section under which he was charged, or under the section under which he was found guilty.

55. A person who has once been tried for an offence and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence. Provided that any person may be tried for the offence of culpable homicide and punished for that offence, notwithstanding he may have been tried and punished

Section 403

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation. — The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section.

Illustrations

(a) *A* is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) *A* is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that *A* committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery.

(c) *A* is tried for causing grievous hurt and convicted. The person injured afterwards dies. *A* may be tried again for culpable homicide.

(d) *A* is charged before the Court of Session and convicted of the culpable homicide of *B*. *A* may not afterwards be tried on the same facts for the murder of *B*.

(e) *A* is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt to *B* on the same facts, unless the case comes within paragraph 3 of the section.

(f) *A* is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of *B*. *A* may be subsequently charged with, and tried for, robbery on the same facts.

(g) *A*, *B* and *C* are charged by a Magistrate of the first class with, and convicted by him of, robbing *D*. *A*, *B* and *C* may afterwards be charged with, and tried for, dacoity on the same facts.

Synopsis

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| 1. Scope of the section. | 8. "Acquittal" — Meaning of. |
| 2. In what cases fresh trial is barred. | 9. "Conviction" — Meaning of. |
| 3. "Same offence." | 10. "While such conviction or acquittal remains in force." |
| 4. Any other offence for which a different charge might have been made under S. 236. | 11. Court of competent jurisdiction. |
| 5. "Any distinct offence." | 12. Identity of accused necessary for application of section. |
| 6. Consequences of act happening after previous conviction — Sub-section (3). | 13. Dismissal of complaint or discharge of accused. |
| 7. "Tried." | 14. "Discharge" — Meaning of. |
| | 15. General Clauses Act, S. 26. |
| | 15a. Section 188 of the Code. |
| | 16. Practice. |

Other Topics (miscellaneous)

Absence of sanction or complaint for trial — Court trying—Whether one of competent jurisdiction. See Note 11.
 Acquittal—Implies trial. See Note 7.
 Acquittal — Establishes innocence of accused — Such innocence cannot be disputed in subsequent proceedings. See Note 1.

Acquittal or discharge. See Note 8.
 Appeal—Not fresh trial. See Note 7.
 Bar of extradition proceedings — Not affected. See Note 15a.
 Complaint dismissed by one Magistrate — Another Magistrate — Whether can start fresh prosecution. See Note 13.

Conviction in Native State — Whether can be pleaded as bar. See Note 11.

Conviction or acquittal by Court established under local or special law is by competent Court. See Note 11.

Departmental punishment — Not conviction. See Note 9.

Dismissal of complaint or discharge — Fresh prosecution not barred. See Note 13.

Distinct offences — Test. See Note 5.

Fresh trial — Not barred under this section — Court may refuse re-trial on other grounds. See Note 2.

Fresh trial — When barred and when not—Illustrations. See Note 2.

Legal Practitioners Act — Disciplinary proceedings—Not trial. See Note 7.

Magistrate's successor — Whether can start fresh proceedings. See Note 13.

Offence consisting of parts—One of parts itself offence—Not distinct. See Note 5.

Offence triable as warrant-case — Tried as summons-case — Acquittal order is only discharge. See Note 14.

Offences by same acts or omissions—Not distinct. See Note 5.

Plea — Can be raised at any stage. See Note 16.

Plea — Onus of proof on accused. See Note 16.

Plea — To be determined only after hearing evidence. See Note 16.

Principle of section. See Note 1.

Re-trial with new jury—No fresh trial. See Note 7.

"Same offence"—Meaning. See Note 3.

Security proceedings or proceedings under S. 145 or S. 488—Not trial. See Note 7.

Setting aside conviction without anything further is acquittal. See Note 8.

Several acts — One or more of acts forming certain offence—Acts combined different offence — Offences are not distinct. See Note 5.

Section 403 Note 1

1. Scope of the section. — This section embodies the ancient maxim *nemo debet bis vexari pro eadem causa* (no person should be twice disturbed for the same cause),¹ and provides that where a person has once been tried and convicted or acquitted of an offence he cannot again be tried for the same offence or for any other offence which is not distinct from the one previously tried. (See Note 2). It incorporates the common law principle of the well-known pleas of *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted),² namely, that no one shall be punished or put in peril twice for the same matter.³ The principle does not rest on any doctrine of estoppel, but on grounds of public policy.⁴ There is nothing like *res judicata* in a criminal trial so long as it does not terminate in either acquittal or conviction so as to attract the provisions of this section. Hence the mere fact that a question was determined in a particular way in a prior proceeding against the accused will not preclude its being raised again.⁵

Section 403 — Note 1

1. ('35) AIR 1935 Mad 56 (57): 58 Mad 513: 36 Cr.L.J. 311, *A. M. Rangachariar v. Venkataswami Chetty*. (Overruled on another point by A I R 1938 Mad 847.)

2. ('39) AIR 1939 Cal 65 (71): 40 Cr. L. J. 199: I L R (1939) 1 Cal 1 (FB), *Purnananda Das v. Emperor*.

('13) 14 Cr. L. J. 135 (137): 18 I C 887: 9 Nag L R 26, *Mahadeogir v. Emperor*.

('28) AIR 1928 Rang 252 (253): 6 Rang 386: 29 Cr.L.J. 930, *Yeok Kuk v. Emperor*.

('18) AIR 1918 Nag 126 (128): 19 Cri L Jour 796, *Nanakram v. Emperor*.

('32) AIR 1932 Cal 871 (874): 60 Cal 149: 34 Cr.L.J. 181, *Nafur Sardar v. Emperor*.

3. ('34) AIR 1934 Mad 311 (313): 57 Mad 554: 35 Cr.L.J. 783, *Janakiramaraju v. Emperor*.

('28) AIR 1928 Rang 252 (253): 6 Rang 386: 29 Cr.L.J. 930, *Yeok Kuk v. Emperor*.

('30) AIR 1930 Pat 26 (27): 9 Pat 585: 30 Cr. L. J. 806, *Babulal Mahton v. Ram Saran Singh*.

4. ('28) AIR 1928 Rang 252 (253): 6 Rang 386: 29 Cr.L.J. 930, *Yeok Kuk v. Emperor*.

5. ('36) AIR 1936 Nag 55 (58): 37 Cr.L.J. 474, *Diwan Singh v. Emperor*. (Revision proceedings against conviction—Certain defence raised by accused rejected by High Court in such proceedings but retrial ordered on other grounds—Accused not precluded from raising same defence at the re-trial.)

Section 403
Notes 1-2

The provisions contained in this section are complete by themselves on the subject of the effect of previous acquittals or convictions.⁶

Even in cases in which a trial is not barred under this section, it has been held in a series of decisions,⁷ following *Rex v. Plummer*,⁸ that a judgment of acquittal fully establishes the innocence of the accused and that the fact of such innocence cannot be disputed in any subsequent proceedings. Thus, where A was acquitted of an offence and later on B was prosecuted under ss. 213 and 214, Penal Code, (concealing offence and screening offender) with reference to the same offence, it was held that the fact, established by the acquittal of A, *viz.*, that no offence was committed by him, could not be disputed in the prosecution of B.⁹

2. In what cases fresh trial is barred. — The question in what cases a fresh trial is barred under this section and in what cases it is not, can best be discussed by reference to the following illustrative cases :—

- (1) A is tried for offence X and is convicted or acquitted. He is again sought to be tried for same offence X.
- (2) A is tried for offence X and is convicted or acquitted. He is again sought to be tried for offence Y, for which a charge might have been framed against him in the former trial, under s. 236 of the Code or of which he might have been convicted under s. 237 of the Code.
- (3) A is tried for offence X and is convicted or acquitted. He is again sought to be tried for offence Y. X and Y are *distinct* offences

6. ('39) AIR 1939 Cal 65 (71) : 40 Cr.L.J. 199 : 1 L R (1939) 1 Cal 1 (FB), *Purnananda Das v. Emperor*. (The language of the section cannot be stretched nor the principles extended so as to give an accused the benefit of the spirit underlying its provisions.)

('37) AIR 1937 Cal 99 (113, 114) : 38 Cr.L.J. 818 (SB), *Jitendra Nath v. Emperor*.

7. ('11) 12 Cri L Jour 396 (397) : 11 Ind Cas 580 (Cal), *Emperor v. Noni Gopal*.

('11) 12 Cri L Jour 286 (288) : 10 I C 582 : 38 Cal 559, *Emperor v. Noni Gopal*.

('34) AIR 1934 All 61 (65) : 35 Cri L Jour 1349, *Ram Das v. Emperor*. (Evidence of particular offences which are objects of alleged conspiracy and of which accused has been acquitted cannot be used in subsequent trial for conspiracy.)

('13) 14 Cr.L.J. 5 (18, 26) : 18 Ind Cas 149 (Cal), *Rajendra Narayan v. Emperor*.

('11) 12 Cr L.J. 94 (96) : 9 Ind Cas 511 (Lah), *Ganesh Das v. Emperor*. (Acquittal on charge of enticement away married woman—Magistrate holding that accused was not present when the woman ran away with her children—Fresh trial for kidnapping children—Finding of fact in previous trial cannot be ignored.)

('33) AIR 1933 Oudh 470 (472) : 35 Cri L Jour 36, *Emperor v. Munnoo*. (Charge of burglary—Evidence of possession of certain rifle cartridges sought to be let in as proof of complicity of accused—Prior acquittal under Arms Act, S. 19 (f), of offence of possession of same cartridges—Question cannot be reopened.)

('12) 15 Cal L J 517 (596) : 13 Cr.L.J. 609 : 16 I.C. 257, *Pulin Behari Das v. Emperor*.

('35) 1935 M W N 1342 (1343), *Veerayya Vandayar v. Emperor*. (Acquittal of murder on ground that accused acted in private defence — Finding that he did so is binding in subsequent prosecution against him under Arms Act, S. 19 (f).)

[But see ('67) 7 Suth W R Cr 15 (21), *Queen v. Dwarka Nath*. (Court before which a second trial is held has nothing to do with the evidence given in the former trial except for the purpose of ascertaining whether the offence in the two trials is the same.)

('74) 22 Suth W R Cr 14 (15, 16) : 14 Beng L R 54, *Queen v. Mt. Itwarya*. (Do.)]

8. (1902) 2 K B 339 (349) : 71 L J K B 805 : 86 L T 836 : 51 W R 137 : 66 J P 647 : 20 Cox C C 269 : 18 T L R 659.

9. ('13) 14 Cr. L. J. 453 (455) : 20 I. C. 613 : 37 Bom 658, *Emperor v. Sanatala Lal Bhui*.

Section 403
Note 2

forming parts of the same transaction but not falling within s. 236 or s. 237 of the Code.

- (4) A is tried for offence X and is convicted or acquitted. He is again sought to be tried for offence Y. X and Y are "distinct" offences forming *separate* transactions.
- (5) A is tried for offence X. He is again sought to be tried for offence Y. X and Y are *not* distinct offences and do not fall within ss. 236 and 237 of the Code, but *form part of the same transaction*.

In cases 1 and 2 the subsequent trial is barred under sub-s. (1) of the section.¹ Sub-section (2) provides that in case 3 the subsequent trial is not barred. Case 4 does not fall either under sub-s. (1) or sub-s. (2). The subsequent trial is, however, obviously not barred. The reason is that if a subsequent trial for a distinct offence *forming part of the same transaction*, is not barred, a subsequent trial for a distinct offence *not* forming part of the same transaction cannot be barred.

Case 5 is not within sub-s. (1) of the section. Sub-section (2) also does not in terms apply to it; but it *implies* that a subsequent trial is barred, and decisions which have held that a subsequent trial in such cases is barred can only be supported in this view.² Thus, where A gives Z fifty strokes with a stick, each stroke is a different offence, but all the strokes form part of the same transaction. The offences are, however, not *distinct* and a conviction or acquittal in respect of one such stroke would operate as a bar to a subsequent trial for other strokes.

From the above discussion, it will be clear that a subsequent trial of an accused person in regard to an affair will be barred in the following cases :—

- (1) Where the offence subsequently charged is the same as the one previously tried.

Note 2

1. *Same offence* :—

- ('09) 3 Cr. L. J. 115 (116) : 2 C L J 622, *Suresh Chandra v. Banku Sadhu*.
 ('07) 5 Cri L Jour 412 (412) : 3 Low Bur Rur 253, *San Mya v. Emperor*.
 ('34) AIR 1934 Oudh 259 (259) : 35 Cri L Jour 570, *Gaya Din Lal v. Emperor*.
 ('17) AIR 1917 Lah 143 (143) : 18 Cri L Jour 324, *Saifuddin v. Emperor*.
 (1900) 5 Cal W N 72 (73), *Jaliram Alom v. Rajkumar Umarsing*. (First charge of being member of unlawful assembly with common object of assaulting complainant and also assault on complainant—Acquittal—Subsequent proceedings for offence under S. 323, Penal Code, *held* could not be reopened until order of acquittal was set aside.)
 ('04) 1 Cri L Jour 504 (506) (Lah), *Emperor v. Dina Nath*.
 ('30) AIR 1930 Mad 785 (785) : 32 Cr. L. J. 27, *Kolandaswami Pillai v. Rajaratna Mudaliar*. (Fresh trial barred, though complainant different.)
 ('27) AIR 1927 Sind 10 (15) : 21 Sind L R 1 : 27 Cr. L. J. 1105, *Fakir Mahomed v. Emperor*. (Do.)
 ('19) AIR 1919 All 90 (90) : 21 Cri L Jour 164, *Ram Chander v. Emperor*. (Do.)
Different offences :
 See also Notes 4, 5.

2. ('29) AIR 1929 All 899 (900) : 51 All 977 : 30 Cr. L. J. 1089, *Ghamandi Nath v. Babu Lal*. (Express limitation of sub-s. (2) to S. 235, sub-s. (1) necessarily implies the exclusion from its operation cases falling under the other sub-sections of S. 235.)
 ('28) AIR 1928 Bom 177 (178) : 29 Cr. L. J. 522, *Dagdi Dagdy v. Emperor*. (Do.)
 ('13) 14 Cri L Jour 135 (137) : 18 Ind Cas 887 : 9 Nag L R 26, *Mahadecogir v. Emperor*. (Do.)

[See also ('28) AIR 1928 Rang 252 (254) : 6 Rang 386 : 29 Cr. L. J. 930, *Fook Kuk v. Emperor*. (The key to sub-s. (2) lies in words "distinct offence.")]

Section 403
Notes 2-3

- (2) Where the offence subsequently charged is one for which a charge might have been framed under S. 236 or of which the accused might have been convicted under S. 237 at the previous trial.
- (3) Where the offence subsequently charged is not distinct from the one previously tried (except in cases coming under sub-ss. (3) and (4)). A second trial will not be barred in any other case, although the offence subsequently charged may have been committed in the course of the same transaction as the one previously tried.³

Further, even with regard to offences which are not distinct, a second trial will not be barred in cases coming under sub-ss. (3) and (4) of this section.

As to the meaning of the words "same offence" and "distinct offences," see Notes 3 and 5.

Even in cases in which a fresh trial may not be barred under this section, the Court may refuse to proceed against a person on the ground that it is not desirable or proper in the circumstances of a particular case to prosecute a person for a second time on the same facts.⁴

3. "Same offence." — The word "offence" has been defined in s. 4 (1) clause (o) as any act or omission made punishable by any law for the time being in force. That definition applies, however, where a different intention does not appear from the subject or context. Sub-section (4) of this section shows that the *same act* may constitute different offences. The words "same offence" in this section, therefore,

('24) AIR 1924 Oudh 64 (64) : 26 Oudh Cas 282 : 25 Cr. L. J. 794, *Ram Nidh v. Ram Saran*. (Acquittal of an offence arising out of certain facts under a wrong section will prevent a further enquiry into any offence based on the same facts until that acquittal is set aside.)]

3. ('37) AIR 1937 Cal 99 (113) : 38 Cr. L. J. 818 (SB), *Jitendra Nath v. Emperor*. (The true test is not so much whether the facts are the same in both trials as whether the acquittal or conviction from the first charge necessarily involves an acquittal or conviction on the second charge.)

('39) AIR 1939 Cal 65 (70) : 40 Cr. L. J. 199 : 1 L R (1939) 1 Cal 1 (FB), *Purnananda Das v. Emperor*. (Do.)

('36) AIR 1936 Rang 174 (175) : 14 Rang 24 : 37 Cri L Jour 492, *Abdul Hamid v. Emperor*. (Do.)

4. ('38) AIR 1938 Lah 625 (627) : 39 Cri L Jour 960 : 1 L R (1939) Lah 373, *Emperor v. Ram Rakha*. (Accused acquitted on charge under S. 211, Penal Code — Subsequent trial under S. 182 after obtaining sanction under S. 195, Criminal P. C. though technically legal savours of unnecessary harassment.)

('32) AIR 1932 Cal 291 (292) : 33 Cr. L. J. 439, *Ajodhyanath v. Kshitish Chandra*.

('30) AIR 1930 Cal 60 (60) : 31 Cr. L. J. 613, *Kailaspati Upadhyaya v. Gopi Koiri*. (Prosecution for offence under Railways Act—Assault committed by accused taken into account in awarding sentence—Subsequent prosecution for assault — Held, it was not just to prosecute accused again for assault.)

('05) 2 Cri L Jour 790 (793) : 2 A L J 673 : 1905 A W N 238, *Emperor v. Inamullah*. (Circumstances showing that forgery of six documents constituted one transaction—Accused charged in respect of three only and acquitted—Subsequent trial for other three forgeries quashed and ordered to be discontinued.)

('29) AIR 1929 Cal 457 (459) : 57 Cal 268, *Nripendra Chandra v. Ekherali*. (In cases of criminal breach of trust or misappropriation, it is not desirable that a man should be tried as many times when he could have been tried at one trial.)

[See also ('36) AIR 1936 Lah 47 (48) : 37 Cr. L. J. 427, *Chaman Lal v. Emperor*. (Though a previous order dismissing a complaint under S. 203, is not a bar to the institution of a fresh complaint, it is only in exceptional circumstances that the second complaint should be entertained on the same facts.)]

must be taken to mean the *same act or omission* made punishable under the *same provision of law*. Where an act or omission is punishable under different provisions of law, the person committing it cannot be said to "commit the same offence" within the meaning of this sub-section.¹ Hence, the expressions "same offence" and "same act or omission" cannot be treated as inter-changeable. The judgment in the undermentioned case² is, it is submitted, not correct in this respect.

The view has sometimes been expressed³ that the words "same offence" in sub-s. (1) refer to the same *transaction*. It is submitted that such an interpretation is too broad. Sub-sections (2) to (4) show that though the transaction may be the same the offences involved may be different.

4. Any other offence for which a different charge might have been made under section 236. — The expression "might have been made" means "might have been lawfully made."¹ As to when a charge may be framed under S. 236, see Notes to S. 236. See also the cases cited below.²

5. "Any distinct offence." — Before the amendment of 1923, S. 35 of the Code provided that where at one trial, a person was convicted of two or more *distinct* offences the Court may sentence him to the several punishments prescribed therefor. An Explanation to the section provided that separable offences within the meaning of S. 71 of the Penal Code were not *distinct* offences within the meaning

Note 3

1. ('30) AIR 1930 Pat 26 (27): 9 Pat 585; 30 Cr.L.J. 806, *Babu Lal v. Ramsaran Singh*.
2. ('34) AIR 1934 Mad 311 (313): 57 Mad 554; 35 Cr.L.J. 783, *Janakiramraju v. Emperor*. (In trial under S. 397, Penal Code, jury never addressing themselves to alternative charge under S. 307, Penal Code—*Held*, that this fact cannot justify another trial under S. 307 on the same facts, as offence under S. 397 includes one under S. 307.)
3. ('03) 6 Oudh Cas 153 (158), *Raghubar v. King-Emperor*.
[See also ('13) 14 Cri L Jour 135 (138): 18 IC 887: 9 Nag L R 26, *Mahadeogir v. Emperor*. (When person is tried and convicted or acquitted for offence arising out of a particular set of facts, he cannot, while acquittal or conviction remains in force, be again tried in respect of any offence, based on the same facts.)]

Note 4

1. ('30) AIR 1930 Pat 26 (27): 9 Pat 585; 30 Cr.L.J. 806, *Babu Lal v. Ramsaran Singh*.
2. ('36) AIR 1936 Mad 353 (360, 372): 37 Cri L Jour 637 (FB), *Emperor v. John McIver*. (Accused acquitted of cheating subsequently put on trial for criminal breach of trust—Facts identical in both—Subsequent trial barred—Cornish and Mockett JJ., applied this principle but Lakshmana Rao J. held that the offences were distinct and that the subsequent trial was not barred.)
- ('34) AIR 1934 Cal 240 (241): 35 Cri L Jour 1270, *Hira Lal v. Emperor*. (Trial under certain sections expressly reserved—Charges cannot have been framed for such offences.)
- ('24) AIR 1924 Mad 478 (479): 25 Cri L Jour 244, *In re Chinnappa Naidu*. (Trial and acquittal for mischief on certain facts—Subsequent trial on same facts for rioting, held, barred, as alternate charges under mischief and rioting could have been framed in previous trial.)
- ('15) AIR 1915 Low Bur 60 (61): 16 Cri L Jour 267, *Nga Shaue Yi v. Emperor*. (Conviction for lesser offence—Discovery of fresh evidence showing that graver offence was committed—Fresh trial for graver offence barred.)

Section 403
Note 5

of that section. Separate offences not falling within S. 71 of the Penal Code, were, therefore, distinct offences. The word "distinct" which had been used in this section also even before 1923 continues to exist even now in this section, though by the amendment of 1923, it has been deleted in S. 35. But the test to determine whether the offences charged at two trials are distinct for purposes of this section would be the same, namely, whether, if the offences were charged at the same trial, separate sentences could be passed in respect thereof under S. 71 of the Penal Code.¹ Hence, the following considerations based on S. 71 of the Penal Code may be applied in determining whether two offences are distinct:—

- (1) Where the offences are constituted by the same acts or omissions they are not distinct.² See also Note 6.

Illustrations

(a) A person who has been tried for an offence under S. 202 of the Penal Code, cannot be tried again, on the same facts, for an offence under S. 176 of the Penal Code because the offences under the two sections would be constituted by the same acts.³

(b) A person who is acquitted of the offence of disorderly behaviour on a public thoroughfare under a Police Act [for example, the Rangoon Police Act, S. 41, sub-s.(16)] cannot again be tried under the Penal Code for rioting where the same acts constitute both the offences.⁴

(c) An acquittal of a person under S. 211 of the Penal Code, would bar his trial again on the same facts for an offence under S. 182 of the Penal Code.⁵

(d) A person tried under S. 353 of the Penal Code cannot again be tried in respect of the same act under S. 186 of the Penal Code.⁶

See also the undermentioned cases.⁷

Note 5

1. ('34) AIR 1934 Mad 311 (313) : 57 Mad 554: 35 Cr.L.J. 783, *Janakirammaraju v. Emperor*.
2. ('89) 2 C P L R Cr 66 (68, 69), *Empress v. Ganesh Prasad*. (Trial and acquittal of accused on charge of murder—Second trial on same facts and for same criminal act but for offence of culpable homicide not amounting to murder, *held*, barred.)
- (‘34) AIR 1934 Mad 311 (313): 57 Mad 554: 35 Cri L Jour 783, *Janakirammaraju v. Emperor*. (*Autrefois convict* forbids a man to be punished twice for the same offence, *i. e.*, the same acts and omissions.)
See also cases in Foot-notes 3 to 7.
3. ('06) 3 Cr. L. J. 388 (389, 390): 10 C W N 518, *Sharbekhan v. Emperor*.
[See also ('13) 14 Cri L Jour 135 (138) : 9 Nag L R 26, *Mahadecgir v. Emperor*. (Acquittal under S. 203 precludes trial under S. 177, Penal Code.)]
4. ('35) AIR 1935 Rang 436 (438): 37 Cr.L.J. 189, *Nga Myat Thaung v. Emperor*.
5. ('13) 14 Cri L Jour 214 (216) : 19 I C 310 : 36 Mad 308, *Ganapathi Bhatta v. Emperor*.
6. ('29) AIR 1929 All 940 (940):30 Cr.L.J. 1153, *Abdul Rashid v. Harish Chandra*.
7. ('38) AIR 1938 Lah 614 (614, 615): 39 Cri L Jour 870 : I L R (1938) Lah 127, *Bhag Singh v. Emperor*. (Acquittal of charge under S. 323, Penal Code—Subsequent retrial for charge under S. 324 barred.)
- (‘37) AIR 1937 All 117 (118, 119): 38 Cr.L.J. 368, *Mahadeo v. Emperor*. (Acquittal on charge under S. 408 or Ss. 408/109, I. P. C.—Subsequent charge under S. 477A—Acts amounting to offence in both cases same—Trial on latter charge is barred.)
- (‘36) AIR 1936 Cal 686 (687): 38 Cri L Jour 1, *Shib Chandra v. Emperor*. (Person, prosecuted under S. 283, Penal Code, for obstructing river by extending tank-banks, acquitted on appeal—Subsequent prosecution under Embankment Act for meddling with embankment—Subsequent offence *held* not distinct offence and principle of *autrefois acquit* applied.)
- (‘30) AIR 1930 Pat 26 (27) : 30 Cri L Jour 806 : 9 Pat 585, *Babu Lal Mahton v. Ram Saran Singh*. (Accused suddenly rising in Court and shouting out, assaulting another with shoe—He commits offences under Ss. 228 and 355, Penal Code, but sub-s. 2 of S. 403 does not apply because the entire series of acts constitute both the acts.)

The undermentioned decisions⁸ in so far as they are inconsistent with the above view are, it is submitted, not correct.

Section 403
Note 5

- (23) AIR 1923 Cal 407 (408) : 25 Cri L Jour 149, *Fazzar Pramanic v. Emperor*. (First trial under S. 426, (Mischief) Penal Code—Second trial under S. 379, Penal Code, for same act and on same facts barred.)
- (71) 16 Suth W R Cr 3 (3) : 7 Beng L R App 25, *Kaplan v. G. M. Smith*. (Trial for assault (S. 352, Penal Code) bars trial for causing hurt where act constituting offences is same.)
- (90) 1890 Rat 519 (520), *Queen Empress v. Wali Asmal*. (Trial under S. 324, Penal Code, bars trial under S. 323, Penal Code, for same act.)
- (27) AIR 1927 Cal 224 (225) : 28 Cri L Jour 233, *Alfred v. Emperor*. (Conviction of officer of ship under S. 68 of Calcutta Police Act for drunken and disorderly behaviour by assaulting captain of ship bars trial on same facts for assault under S. 103 (4) of the Merchants Shipping Act.)
- (26) AIR 1926 Lah 639 (639) : 8 Lah 52 : 27 Cr. L. J. 1019, *Fatteh Muhammad v. Emperor*. (Cutting tree in Mahomedan graveyard — First trial under S. 297, Penal Code, and acquittal — Second trial under S. 379 barred, the reason being that the act is the same though it may have two distinct results.)
- (28) AIR 1928 All 191 (191) : 29 Cr. L. J. 271, *Gur Narayan v. Emperor*. (Trial under S. 5, Motor Vehicles Act, for reckless driving precludes trial under S. 279, Penal Code, for rash driving on public road so as to endanger human life or to be likely to cause injury or hurt to any other person — But conviction for rash driving does not protect accused from prosecution for consequences of such driving under S. 323 or S. 338, Penal Code.)
- (28) AIR 1928 Cal 240 (241), *Chaito Kalwar v. Emperor*. (Where the goods which formed the subject of a charge under Ch. 17, Penal Code, and of a charge under S. 54-A, Calcutta Police Act, were identical—*Held*, second trial barred.)
- (25) AIR 1925 Lah 157 (158) : 25 Cri L Jour 1241, *Hussain v. Emperor*. (Trial under S. 121-A (conspiracy to wage war against the king) precludes trial on same facts for offence under S. 120B, criminal conspiracy.)
- (28) AIR 1928 Rang 252 (254) : 6 Rang 386 : 29 Cri L Jour 930, *Yeok Kuk v. Emperor*. (Trial under Burma Forest Act for extracting teak timber without license and for counterfeiting akauk mark on teak timber stolen by him — Fresh trial on same facts under Ss. 379 and 411, Penal Code, is barred.)
- (23) AIR 1923 Cal 179 (179) : 24 Cr. L. J. 509 : 49 Cal 924, *Emperor v. Jhabbar Mull*. (Trial for offence under S. 408, (criminal breach of trust) in respect of certain sums — Misappropriation alleged by prosecution to have been carried out by means of certain false entries in accounts — Fresh trial under S. 477-A is barred.)
- (21) AIR 1921 Pat 22 (22, 23) : 22 Cr. L. J. 63, *Maksuddan Mistry v. Emperor*. (Acquittal under S. 338, Penal Code, for rash and negligent driving motor car bars fresh trial under Motor Vehicles Act, S. 16, for driving without license — Applicability of S. 403 does not depend upon additional evidence being available or not—The observation of the Judge that the accused cannot be tried a second time on the same facts cognate to or involved in the offence with which he was previously charged held to be of a somewhat general character in AIR 1936 Pat 508.)
- (18) AIR 1918 Lah 49 (50) : 1918 Pun Re No. 23 Cr : 19 Cri L Jour 931, *Raj Bahadur v. Emperor*. (Selling married girl by misrepresenting that she is virgin, — Conviction under S. 372, Penal Code, precludes trial for cheating.)
- (19) AIR 1919 Pat 70 (71) : 20 Cri L Jour 526, *Muhammad Saleh v. Emperor*. (Acquittal under S. 363, Penal Code, (kidnapping) bars trial under Ss. 365, 366, and 368, Penal Code.)
- (01) 24 Mad 284 (292) : 10 M L J 405, *Jagannadha Rao v. Kamaraju*. (A charge of kidnapping from lawful guardianship under S. 366, Penal Code, in general terms and not stating from whose guardianship kidnapping took place—Acquittal on such a charge may be pleaded in bar of a trial of a charge of kidnapping from the guardianship of particular person.)
8. (32) AIR 1932 Mad 362 (363) : 55 Mad 788 : 33 Cr. L. J. 522, *Subbiah Kone v. Kandaswami Kone*. (Offences under S. 323, Penal Code, and S. 3 (12), Madras Towns Nuisances Act — Though same act may constitute both offences, separate trials not barred.)
- (10) 11 Cr. L. J. 325 (325, 326) : 6 Ind Cas 352 : 37 Cal 604, *Ram Sewak Lal v. Maneswar Singh*. (False information to public servant—Ss. 482 and 500, Penal Code — Acquittal on charge under S. 182, Penal Code — No bar to trial under Section 500.)

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Note 5

- (2) Where anything which is an offence consists of parts, any of which parts is itself an offence, the offences are not distinct. Thus, where a person receives or retains different items of stolen property at the same time, he does not commit so many distinct offences.⁹ See also the case cited below.¹⁰ In this view, the undermentioned decision¹¹ must be deemed incorrect.
- (3) Where several acts, of which one or more than one, would, by itself, or by themselves, constitute an offence, constitute, when combined, a different offence, the offences are not distinct.¹² Thus, A is a member of an unlawful assembly, the common object of which is to cause hurt to B. In pursuance of the common object, A causes hurt to B. In such a case, the act of being a member of an unlawful assembly, and that of causing hurt constitute offences in themselves under Ss. 143 and 323 of the Penal Code respectively,

(¹⁰) 11 Cri L Jour 420 (421) : 6 Ind Cas 944 : 1910 Pun Re No. 20 Cr, *Thakar Singh v. Chattar Pal*. (Acquittal under S. 182 no bar to trial under S. 211, Penal Code.)

(²⁸) AIR 1928 Bom 231 (232) : 29 Cri L Jour 981, *Emperor v. Ram Deoji*. (Conviction for driving car while drunk no bar to trial for rash and negligent driving.)

(²⁶) AIR 1926 All 405 (406):48 All 496:27 Cr. L. J. 767, *Deoki Kocri v. Emperor*. (Where the accused was convicted for theft as he was found removing gunny bags with opium inside — Held his conviction for theft does not bar the trial for being in possession of opium under S. 9, Opium Act.)

(²⁵) AIR 1925 All 299 (300) : 47 All 284 : 26 Cr. L. J. 688, *Ram Sukh v. Emperor*. (Conviction for affray does not bar trial for hurt caused in course of affray.)

(²⁰) AIR 1920 Pat 449 (450):22 Cr. L. J. 222, *Tanuk Lal v. Emperor*. (Conviction for rioting—Common object of unlawful assembly to obstruct public servant in discharge of duty — Subsequent trial under S. 186, Penal Code, for causing obstruction to public servant in discharge of duty not barred.)

(³³) AIR 1933 Oudh 470 (472):35 Cr. L. J. 36, *Emperor v. Munno*. (Conviction in respect of possession of stolen revolver under Ss. 411 and 414, Penal Code, is no bar to conviction under S. 19 (f), Arms Act, in respect of such possession.)

[See also (³²) AIR 1932 Cal 723 (725): 60 Cal 179: 34 Cr. L. J. 177, *Hanuman Sarma v. Emperor*. (Accused not found guilty under S. 376, (Rape), Penal Code, does not amount to acquittal under Ss. 376 and 511.)]

9. (²⁵) AIR 1925 Pat 20 (24, 25) : 3 Pat 503 : 25 Cri L Jour 738, *Emperor v. Bishun Singh*.

(²⁵) AIR 1925 Oudh 298 (299) : 26 Cri L Jour 1, *Munwa v. Emperor*.

(⁹³) 15 All 317 (318) : 1893 A W N 101, *Queen-Empress v. Makhani*.

(⁸⁸) 15 Cal 511 (513, 514), *Ishan Muchi v. Queen-Empress*.

(²³) AIR 1923 Cal 557 (558):50 Cal 594:24 Cr. L. J. 707, *Ganesh Sahu v. Emperor*.

(⁰⁶) 1906 All W N 22 (22, 23): 28 All 313: 3 Cr. L. J. 207, *Emperor v. Mianjan*.

[See (²⁷) AIR 1927 Sind 53 (54) : 27 Cri L Jour 1256 : 21 Sind L R 154, *Dadlo Mal v. Emperor*. (Properties received on different dates — Separate trials not barred — Where it is proved that the properties were stolen on different occasions, it may be presumed that they were received also at different times.)]

See also S. 233 Note 3.

10. (²⁷) AIR 1927 Mad 444 (445): 28 Cr. L. J. 235, *In re Mooka Pillai*. (Accused inducing complainant to buy certain property by misrepresenting that it was unencumbered and that he would make a deposit—Two separate trials for cheating in respect of the two facts misrepresented not maintainable.)

11. (²⁹) AIR 1929 Pat 710 (711):31 Cr. L. J. 472, *Ghana Mahapatra v. Emperor* (Unlawful assembly and rioting resulting in damage to several holdings—Charge of separate offences legal.)

12. See the following cases where it was held that offences coming under sub-s. 3, S. 235 of the Code (which deals with offences of the above kind) cannot be separately tried:

(¹³) 14 Cr. L. J. 135 (137, 138):18 I. C. 887: 9 Nag L R 226, *Mahadeogir v. Emperor*.

(²⁹) AIR 1929 All 899 (900): 51 All 977: 30 Cri L Jour 1089, *Ghamandi Nath v. Babu Lal*.

and constitute when combined a different offence, *viz.*, rioting under S.147 of the Penal Code. But the offences under Ss.148, 323 and 147 are not *distinct* and cannot be made the subject of separate trials.¹³

Where the offences in question do not fall within any of the above categories, they are distinct.¹⁴

**Section 403
Note 5**

13. (1900) 5 Cal W N 72 (73), *Jaliram v. Rajkumar*. (Unlawful assembly with common object of assaulting complainant—Complainant assaulted by accused in prosecution of common object—Accused tried and acquitted under S. 147, Penal Code (rioting)—He cannot be tried again on same facts for causing hurt to complainant.)
14. ('38) 42 C W N 1232 (1231), *Kali Charan v. S. K. Brahmachari*. (Trial and conviction of an accused person along with certain others under S. 45 of the Calcutta Police Act does not bar his subsequent trial on the same facts under S. 41 of that Act.)
- ('39) 1939-2 M L J 814 (814), *Thanammal v. Alamelu Ammal*. (Conviction of a person under S. 75 of the Madras City Police Act is no bar to his trial for an offence under Ss. 323 and 352, Penal Code.)
- ('39) AIR 1939 Cal 65 (69, 70): 40 Cr.L.J. 199 : 1 L R (1939) 1 Cal 1 (FB), *Purnananda Das v. Emperor*. (Conspiracy—Person once tried on charge of conspiracy—S. 403 is no bar to trial of entry into fresh conspiracy.)
- ('36) AIR 1936 Pat 503 (501) : 37 Cri L Jour 785, *Sankatha Rai v. Khaderan Mian*. (Accused acquitted on a charge of affray—Subsequent trial and conviction for causing hurt during the affray is not barred—AIR 1930 Pat 26 and AIR 1921 Pat 22, Explained.)
- ('29) AIR 1929 Bom 451 (452) : 30 Cri L Jour 965, *In re Dadbu Kalu*. (Conviction for affray does not bar trial for hurt caused in course of affray.)
- ('38) 1938 M W N 586 (587), *Diran Sahab v. Emperor*. (Acquittal on charge under S.323, Penal Code, does not bar trial for offence under Madras Towns Nuisances Act.)
- ('37) AIR 1937 Cal 99 (114) : 38 Cri L Jour 818 (811), *Jitendra Nath v. Emperor*. (Charges under S. 120B, Penal Code—Subsequent charge under S. 121A — Facts in the two not same—Offences held distinct and S. 403 (2) applied.)
- ('37) 1937 M W N 1217 (1248), *Gurunatha Goundan v. Emperor*. (Trial and acquittal under Ss. 379 and 411, Penal Code — Subsequent trial on charge under Forest Act not barred.)
- ('36) AIR 1936 Rang 174 (175) : 37 Cri L Jour 492 : 14 Rang 21, *Abdul Hamid v. Emperor*. (Acquittal on charge of cheating by filing false affidavit — Subsequent trial for swearing a false affidavit is not barred.)
- ('29) AIR 1929 All 940 (940) : 30 Cr.L.J. 1153, *Abdul Rashid v. Harishchandra*. (Prosecution under S. 155 of U. P. Municipalities Act for evasion of octroi duty does not bar trial for the offence of obstructing the municipal peons.)
- ('29) AIR 1929 Bom 283 (285) : 30 Cri L Jour 1059 : 53 Bom 601, *Manjubhai v. Emperor*. (Offence under S. 19 (e), Arms Act, is distinct from offence under S. 321, Penal Code.)
- ('28) AIR 1928 All 191 (191):29 Cr.L.J. 271, *Gur Narayan v. Emperor*. (Accused driving car recklessly—Accident resulting—Person injured—Prior conviction for reckless driving under S. 5, Motor Vehicles Act, is no bar to trial for causing hurt.)
- ('28) AIR 1928 Bom 177 (178) : 29 Cri L Jour 522, *Dagdi Dagdya v. Emperor*. (Two contradictory statements — Accused charged under S. 193, Penal Code, but acquitted—Subsequent charge under S. 182, Penal Code, in respect of earlier statement is not barred.)
- ('30) AIR 1930 All 92 (95):30 Cri L Jour 1149, *Hakum Singh v. Emperor*. (Where two indictments are essentially different and relate to independent transactions, acquittal under one does not bar complaint with reference to other.)
- ('35) AIR 1935 Cal 316 (330) : 86 Cri L Jour 982 : 62 Cal 749, *Abdul Rahman v. Emperor*. (Prosecution and conviction for one conspiracy is no bar to trial for a different conspiracy.)
- ('21) AIR 1921 Cal 181 (183) : 48 Cal 78 : 21 Cri L Jour 614, *Ram Sahay Ram v. Emperor*. (Trial for rioting in course of which accused are said to have wrongfully confined certain persons — Previous trial for wrongful confinement is not a bar to subsequent trial for rioting—Real test is whether acquittal on first charge necessarily involves acquittal on the second charge.)

Section 403
Note 5

- (104) 1 Cri L Jour 714 (716) : 31 Cal 1007 : 8 C W N 717, *Prosunno Kumar Das v. Emperor*. (Previous conviction for being in possession of counterfeit coin under S. 243, Penal Code, does not bar a trial under S. 240 for passing the coins, the two offences being distinct.)
- (174) 22 Suth W R Cr 14 (16) : 14 Beng L R 54, *Queen v. Mt. Itwarya*. (Murder of A, and the subsequent attempt to murder B are distinct offences.)
- (21) AIR 1921 Lah 186 (186) : 24 Cri L Jour 636, *Nadar v. Emperor*. (Trial for detention of married woman under S. 498, Penal Code, at a particular time is no bar to trial for detention at a different period.)
- (28) 29 Cri L Jour 3 (3) : 106 I. C. 339 (Lah), *Waryam Singh v. Emperor*. (Do.)
- (24) AIR 1924 Lah 330 (331) : 24 Cri L Jour 780, *Mahbub Ali Khan v. Emperor*. (Acquittal of a person on a charge of abduction does not bar a trial for detaining the same person—But see (130) AIR 1930 Rang 360 (360) : 32 Cri L Jour 205, *Chit Hlaing Mg v. Emperor*—Acquittal for abduction of female precludes trial for rape on her — Submitted decision is not correct.)
- (33) AIR 1933 Pat 670 (671) : 35 Cri L Jour 486, *Balchand Ram v. Emperor*. (Accused charged and acquitted of suffering prisoner to escape can be again tried for breach of departmental rule in omitting to rouse night officer.)
- (106) 3 Cri L Jour 93 (94) : 3 A L J 2 : 1906 A W N 32, *Baldeb Prasad v. Emperor*. (Attacking a certain person in his house and carrying away a woman in the house — Conviction for attacking is no bar to trial for abduction.)
- (27) AIR 1927 Rang 303 (304) : 28 Cr. L. J. 908, *Me Tok v. Emperor*. (A, representing himself to be B, executing a mortgage and registering it — Trial of A for cheating under S. 419, I. P. C., does not bar his trial under S. 82 (c), Registration Act, for false personation at the registration office as the offences are distinct.)
- (31) AIR 1931 Sind 116 (117, 118) : 25 Sind L R 9 : 33 Cr. L. J. 41, *Muhammad Rafiq v. Emperor*. (A sending telegram to Mrs. B asking her to send a certain sum of money wording the telegram as though it was despatched by B — A tried under S. 420, I. P. C., for cheating—Subsequent trial of A under S. 468, I. P. C., and S. 29, Telegraph Act, not barred.)
- (105) 2 Cri L Jour 790 (792) : 1905 A W N 238 : 2 A L J 673, *Emperor v. Inam-ullah*. (Forgery of six documents — First trial for three of them — Second trial for remaining three held not legally barred — But under circumstances of the case, second trial not proceeded with.)
- (67) 7 Suth W R Cr 15 (21), *Queen v. Dwarkanath Dutt*. (Forgery of different documents — Separate trials legal.)
- (18) AIR 1918 Pat 165 (167) : 19 Cr. L. J. 121, *Hayat Khan v. Emperor*. (Accused assaulting A—B interfering and accused attacking B also and causing hurt to him—Trial for assault on A is no bar to trial for causing hurt to B.)
- (34) AIR 1934 Cal 240 (241) : 35 Cri L Jour 1270, *Hira Lal Ahir v. Emperor*. (Trespass into jail in order to have communication with prisoner and offering bribe to warder — Trespass and offering bribe constitute distinct offences and separate trials not barred.)
- (99) 1 Bom L R 15 (18), *Queen-Empress v. Subedar Krishnappa*. (Acquittal of an accused on a charge under S. 400, I. P. C., cannot operate under S. 403, Criminal P. C., as a bar to his being prosecuted again on a charge under S. 395, I. P. C., for committing one of the dacoities in respect of which evidence was given in the previous trial under S. 400.)
- (30) 1930 Mad W N 692 (694), *Venkataswami Naidu v. Narappa Naicken*. (A trespassing on B's land, trampling upon his crops and hurting B's servant C who came to resist — C complaining of all three offences but trial only for hurt and case compounded — Trial for offence of criminal trespass and mischief by B not barred.)
- (97) 20 All 107 (108) : 1897 A W N 210, *Queen-Empress v. Yusuf*. (Acquittal on charge of murder no bar to trial under S. 404 or S. 411, Penal Code.)
- (96) 23 Cal 174 (178, 179), *Queen-Empress v. Croft*. (Conviction of offence under S. 61, Bengal Excise Act, no bar to trial for offence under Ss. 486 and 487, I. P. C., and Ss. 6 and 7, Merchandise Marks Act.)
- (19) AIR 1919 Cal 1063 (1064) : 20 Cri L Jour 43, *Bejoy Krishna Pal v. Belai Chand Bhandari*. (Trial for offence under S. 352, I. P. C., (assault) is no bar to trial for offence under S. 504 (insult) committed in course of same transaction.)
- (34) AIR 1934 Mad 673 (674) : 58 Mad 178 : 35 Cr. L. J. 1503, *Srirangachariar v. Emperor*. (Person prosecuted and acquitted for theft of blank railway ticket — Subsequent trial for forgery thereon is not barred.)

('15) AIR 1915 Bom 203 (204, 205) : 40 Bom 97 : 16 Cr. L. J. 761, *Jivram Dan-karji v. Emperor*. (Abetment of forgery of a document and using such document as genuine are distinct offences and separate trials are legal—But see (1865) 3 Suth W R Cri Letters No. 519 at p. 9 (9)—Acquittal for theft bars fresh trial for abetment of theft on same facts—Submitted decision is not correct.)

('30) AIR 1930 Lah 57 (59) : 30 Cri L Jour 954, *Mangalsen v. Emperor*. (Conviction of director of company under S. 91-B, Companies Act (for voting on contract in which he was personally interested) is no bar to his trial for criminal breach of trust.)

('35) AIR 1935 Cal 571 (572) : 36 Cr.L.J. 1364, *Saroda Devi v. Satyeswar Santra*. (Complaint disclosing several offences — Accused summoned for one offence and acquitted — Fresh complaint in respect of other offences is not barred.)

('02) 4 Bom L R 575 (577), *Municipality of Bombay v. Javer Jagjivan*. (Trial for building without license from Municipality is no bar to trial for failure to comply with notice for removal of building.)

('15) AIR 1915 Lah 147 (147) : 16 Cri L Jour 605, *Emperor v. Mohan Lal*. (Do.)

('09) 9 Cri L Jour 578 (580, 581) : 2 Ind Cas 357 : 5 Low Bur Rul 12, *Oborno Charan v. Emperor*. (Disobedience of notice under Municipal Act to leave passage while building under construction—Acquittal for such disobedience does not bar trial for disobedience of notice to alter building after construction.)

('35) 1935 Mad W N 1342 (1343), *Veerayya v. Emperor*. (Acquittal of murder by firing gun is no bar to trial for possession of gun under S. 19 (f) Arms Act, either before or subsequent to occurrence.)

('32) AIR 1932 Cal 291 (292) : 33 Cr.L.J. 439, *Ajodhya Nath v. Kshitish Chandra*. (Complaint alleging offence under Ss. 453 and 379—Charge framed under S. 453 — Acquittal — Subsequent trial for S. 379 not barred—Magistrate held to be in error in not framing charge under both sections.)

('25) AIR 1925 Lah 537 (538) : 26 Cri L Jour 1097, *Chhajju v. Emperor*. (Being member of gang for the purpose of habitually committing theft, trial for—Acquittal—Receiving stolen property, trial for, not barred.)

('30) AIR 1930 Oudh 455 (459), *Bachchu v. Emperor*. (Acquittal of offence for receiving property stolen in dacoity no bar to trial for taking part in dacoity.)

Criminal breach of trust or criminal misappropriation committed of different items at various times between certain dates—Charge under S. 222 for an aggregate sum omitting some of the items—Trial on such charge no bar to trial in respect of an omitted item :

('30) AIR 1930 Mad 978 (980) : 32 Cri L Jour 223, *Kanakayya v. Emperor*.

('10) 11 Cr.L.J. 337 (337, 338) : 5 I. C. 970 (Bom), *Emperor v. Kasinath Bagaji*.

('29) AIR 1929 Cal 457 (458, 459) : 57 Cal 17 : 31 Cri L Jour 747, *Sidh Nath v. Emperor*. (Though S. 403 may not strictly apply, a second trial in such circumstances ought not to be allowed in the ends of justice.)

('23) AIR 1923 Cal 654 (656) : 50 Cal 632 : 25 Cri L Jour 156, *Nagendra Nath v. Emperor*. (Suhrawardy J., dissenting.)

('31) AIR 1931 All 209 (209) : 32 Cr.L.J. 376 : 53 All 411, *Brijivan Das v. Emperor*. [But see ('17) AIR 1917 Mad 524 (525) : 17 Cr. L. J. 30, *In re Appadurai Ayyar*. (Submitted not correct.)]

See also S. 222 Note 8.

Conspiracy to commit an offence is distinct from the offence the commission of which is the object of the conspiracy :

('34) AIR 1934 All 61 (65) : 35 Cri L Jour 1349, *Ram Das v. Emperor*.

('33) AIR 1933 Bom 447 (448, 449) : 58 Bom 23 : 35 Cr. L. J. 112, *In re Ochhavlal Bhikabhai*. (Conviction for criminal conspiracy — Acts of cheating committed in pursuance of the conspiracy—S. 403 is no bar to subsequent trial for cheating.)

('24) AIR 1924 Cal 809 (811) : 25 Cri L Jour 1048, *Emperor v. Osman Sardar*. (Conspiracy to murder is not same as murder and conviction for conspiracy is no bar to trial for murder.)

[But see ('26) AIR 1926 Cal 450 (450) : 26 Cri L Jour 1023, *Cheragali Bepari v. Satish Chandra*. (After person is acquitted of offence under S. 193, Penal Code, he cannot be proceeded against on facts wholly inseparable from the facts of the prior prosecution case for an offence under Ss. 467 and 471 read with S. 120B, Penal Code.)]

Previous trial for abetment of forgery is no bar to trial for offence under Section 82, Registration Act :

('15) AIR 1915 All 114 (115) : 37 All 107 : 16 Cri L Jour 144, *Emperor v. Jiwan*.

Section 403
Notes 5-6

It has sometimes been said¹⁵ that the test for determining, whether an offence is distinct from one previously tried, is to see whether the evidence necessary to prove the two offences is the same or different. It is submitted that such a test is not conclusive¹⁶ as it is possible that though the evidence necessary to prove two offences is different, the offences may not be distinct.

Further, the observation in the undermentioned case¹⁷ that, in order to constitute distinct offences, the offences must be *totally* unconnected, is not correct, as the same transaction may involve distinct offences, in which case they cannot be said to be totally unconnected.

6. Consequences of act happening after previous conviction
— **Sub-section (3).** — *A* is tried for causing grievous hurt and convicted. The person injured afterwards dies. *A* may be tried again for culpable homicide (Illustration c).¹

[But see ('24) AIR 1924 Rang 213 (213) : 1 Rang 299 : 25 Cr. L. J. 191, *Maung Saing v. Emperor*.]

Non-compliance with notice under S. 159 (1), Madras Local Boards Act, for removal of encroachment—Prosecution for—Fresh prosecution for disobedience of fresh notice regarding same encroachment is not barred :

('38) AIR 1938 Mad 847 (848, 849) : 39 Cri L Jour 712 : ILR (1938) Mad 902, *Public Prosecutor v. Sabhapathy Chetty*. (Prosecution for failure to obey notice to remove encroachment — Acquittal does not bar prosecution for failure to obey fresh notice — AIR 1935 Mad 56, overruled; AIR 1932 Mad 535; AIR 1932 Mad 537, approved; AIR 1925 Mad 1067, dissent.)

('32) AIR 1932 Mad 535 (536) : 33 Cr.L.J. 626, *Moidi Beary v. President, Taluk Board of Mangalore*.

('32) AIR 1932 Mad 537 (537) : 33 Cri L Jour 629, *President Panchayat Board, Velgode v. Venkata Reddy*.

('27) 1927 Mad W N 645 (646), *Narayan Aiyar v. Rakkupayal*.

Section 35, Madras Planter's Labour Act (1903), does not limit the number of directions to fulfil the contract that can be made or to the number of prosecutions following on default :

('16) AIR 1916 Mad 527 (529, 530) : 16 Cr. L. J. 777:39 Mad 889, *N. C. Whitton v. Mammad Maistri*.)

[But see ('13) 14 Cr. L. J. 79 (79, 80) : 36 Mad 427 : 18 I. C. 415, *Ponga Maistry v. Emperor*.]

15. ('28) AIR 1928 Pat 577 (578) : 29 Cr.L.J. 760, *Chhannu Prasad v. Emperor*.

('27) AIR 1927 Bom 629 (630) : 28 Cri L Jour 1032, *Emperor v. Kallasani*.

('30) AIR 1930 All 92 (95) : 30 Cri L Jour 1149, *Hukum Singh v. Emperor*.

('30) AIR 1930 Pat 26 (27) : 30 Cri L Jour 806 : 9 Pat 585, *Babu Lal Mahton v. Ram Saran Singh*.

('99) 1 Bom L R 15 (18), *Queen-Empress v. Subedar Krishnappa*.

[See ('18) AIR 1918 Cal 406 (407) : 19 Cri L Jour 198 : 45 Cal 727, *Manhari v. Emperor*. (Second trial relating to same act or acts as the subject of previous trial — Same evidence relevant at both trials — Second trial held barred.)]

16. ('32) AIR 1932 Mad 362 (363) : 55 Mad 788 : 33 Cr. L. J. 522, *Subbiah Kone v. Kandaswami Kone*.

17. ('28) AIR 1928 Rang 252 (253) : 6 Rang 386 : 29 Cr. L. J. 930, *Yekol Kuk v. Emperor*.

Note 6

1. ('14) AIR 1914 All 191 (192) : 15 Cri L Jour 64 : 36 All 4, *Sailani v. King-Emperor*. (*A* and *B* tried for grievous hurt to *C*—Case compounded and *A* and *B* acquitted—*C* subsequently died — Second trial of *A* and *B* for culpable homicide not barred.)

('01) 1901 Pun Re No. 3 Cr, p. 6 (8), *Crown v. Sarbiland*.

In such a case a fresh trial will be competent even while the accused is undergoing the previous sentence.²

Section 403
Notes 6-7

But a fresh trial will not be competent if the death had occurred, and was known to the Court to have occurred, at the time of the previous conviction.³ The reason is that sub-s.(3) will not apply to such a case while at the same time, the offences charged at the two trials would be constituted by the *same* acts and as such would not be *distinct* offences. See Notes 2 and 5.

7. "Tried."—This section does not apply unless the accused has been *tried*¹ and convicted or acquitted. But the previous trial need not be one on the merits;² so that an acquittal under S. 247, in a summons-case on the ground of the complainant's absence will be a valid bar under this section,³ although the summons had not been served on the accused.⁴ The same principle applies in case of a withdrawal under

2. ('35) AIR 1935 Pesh 18 (19) : 36 Cri L Jour 813, *Arsala Khan v. Emperor*.

3. ('79) 2 All 349 (350), *Empress of India v. Banni*.

('13) 14 Cri L Jour 135 (137, 138) : 18 Ind Cas 887 : 9 Nag L R 26, *Mahadeogir v. Emperor*.

Note 7

1. ('34) AIR 1934 Mad 716 (717) : 36 Cr. L. J. 550 : 58 Mad 256, *Narayanaswamy v. Karumbayiram Periyari*. (Conviction set aside on ground that trial Bench had no jurisdiction and therefore there was no trial — Another complaint on same facts before same Court — S. 403 was no bar.)

('18) AIR 1918 Mad 212 (213) : 40 Mad 977 : 19 Cr. L. J. 497, *Kottayya v. Venkayya*.

2. ('11) 12 Cr. L. J. 41 (42) : 34 Mad 253 : 9 I. C. 253, *In re Guggilapu Peddaya*. ('29) AIR 1929 Cal 189 (189, 190) : 30 Cr. L. J. 585, *Suku Ram Koch v. Krishna Deb Sarma*.

('27) AIR 1927 Nag 388 (388) : 28 Cr. L. J. 183, *Mt. Yeshoda v. Mt. Bannu Bai*.

('18) AIR 1918 Mad 231 (233) : 40 Mad 976 : 19 Cr. L. J. 501, *In re Duda Kula Lal*.

('35) AIR 1935 Cal 491 (493) : 36 Cr. L. J. 1238 : 62 Cal 1119, *Bhupati Bhusan v. Amio Bhusan*.

('29) AIR 1929 Bom 408 (409, 410) : 53 Bom 693 : 31 Cri L Jour 1000, *Shankar Dattatraya v. Dattatraya Sadasiva*.

3. ('11) 12 Cri L Jour 41 (41, 42) : 34 Mad 253 : 9 I. C. 253, *In re Guggilappu Peddaya*.

('24) AIR 1924 Pat 140 (141) : 24 Cri L Jour 815, *Kiran Sarkar v. Emperor*.

('35) AIR 1935 Cal 491 (493) : 62 Cal 1119 : 36 Cri L Jour 1238, *Bhupati Bhusan v. Amio Bhusan*.

('29) AIR 1929 Cal 189 (190) : 30 Cri L Jour 585, *Sukuram Koch v. Krishnadeo Sharma*.

('21) AIR 1921 Pat 311 (312) : 22 Cr. L. J. 331, *Ram Mahto v. Emperor*. (Although it cannot be said that the accused person was tried.)

('27) AIR 1927 Nag 388 (388) : 28 Cr. L. J. 183, *Mt. Yeshoda v. Mt. Bannu Bai*.

('23) AIR 1923 All 360 (360) : 45 All 58 : 24 Cri L Jour 862, *Dulla v. Emperor*.

('86) 2 Weir 457 (457), *Suraiya Sastri v. Venkata Rao*.

('18) AIR 1918 Mad 628 (630), *Krishnamacharlu v. Govinda Ramanuja*.

('29) AIR 1929 Bom 408 (409) : 53 Bom 693 : 31 Cr. L. J. 1000, *Sankar Dattatraya v. Dattatraya Sadasiva*.

[But see ('18) AIR 1918 Mad 212 (212, 213) : 40 Mad 977 : 19 Cri L Jour 497, *Kotayya v. Venkayya*. (Acquittal under S. 247 does not entitle acquitted person to plead bar under S. 403 to fresh prosecution on same facts — Term tried in S. 403 is not surplusage.)]

See also Note 8.

4. ('35) AIR 1935 Cal 491 (493) : 62 Cal 1119 : 36 Cr. L. J. 1238, *Bhupati Bhusan v. Amio Bhusan*.

('24) AIR 1924 Pat 140 (140, 141) : 24 Cri L Jour 815, *Kiran Sirkar v. Emperor*.

[But see ('18) AIR 1918 Mad 212 (212, 213) : 40 Mad 977 : 19 Cri L Jour 497, *Kottayya v. Venkayya*. (Trial of summons case does not begin until particulars of offence are stated to accused under S. 242 of Code.)]

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Note 7

section 494 of the Code.^{4a}

Security proceedings⁵ or proceedings under section 145⁶ do not constitute a *trial* within the meaning of this section. Similarly, a proceeding for maintenance under S. 488 of the Code is not a trial and a prior application for maintenance does not bar a fresh application. But where a Magistrate knows or has reason to believe that a prior application has been made and disposed of, he ought not to act on a later application without taking into consideration the adjudication on the prior application. See S. 488 Note 28a.

Disciplinary proceedings under the Legal Practitioners' Act are not trials.⁷ But the Rangoon High Court has held that such proceedings are *quasi* criminal and that the principle of this section will apply to them.⁸

Where in a sessions trial in a High Court the jury is discharged on a difference of opinion between the Judge and the jury and the case is retried with a new jury, there is no fresh trial, for the purpose of this section.⁹ It has been held by the High Court of Calcutta that the retrial of an accused on remand owing to misdirection to the jury is part of the same trial which is not concluded till the appeal is heard and determined.¹⁰ Similarly, an appeal is not a fresh trial but only a continuation of the trial in the lower Court.¹¹

This section does not say that a person who has been tried and convicted or acquitted shall be *acquitted* if an attempt is made to prosecute him again for the same offence. It says that he shall not be *tried* at all.¹² Therefore the *acquittal* of a person on the ground of his trial being barred under this section is illegal, the reason being that

4a ('18) AIR 1918 Mad 231 (232, 234, 236) : 40 Mad 976 : 19 Cri L Jour 501, *In re Dudikula Lalsahib*.

5. ('13) 14 Cr. L. J. 559 (561) : 36 Mad 315 : 21 I. C. 159, *In re Muthia Moopan*. [See however (28) AIR 1928 Rang 135 (136) : 30 Cri L Jour 630, *Nga Mya Gyi v. Emperor*. (Accused sent to jail for failure to furnish security for keeping peace — Subsequent trial for sedition in connexion with the same speeches is against spirit of S. 403.)]

6. ('18) AIR 1918 Upp Bur 8 (9) : 3 Upp Bur Rul 33 : 19 Cri L Jour 389, *Nga Chit v. Nga Ya*.

7. ('31) AIR 1931 Pat 369 (376) : 11 Pat 365 : 32 Cr. L. J. 1256 (FB), *In re Ram Gobind Sinha*.

8. ('25) AIR 1925 Rang 110 (110) : 2 Rang 491 : 26 Cr. L. J. 1111, *In the matter of Maung Po Tok*.

9. ('14) AIR 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460, *Emperor v. Nirmal Kanta Ray*.

10. ('36) 37 Cri L Jour 707 (707) : 62 Cal 928, *Abdul Khan v. Emperor*.

11. ('14) AIR 1914 Mad 258 (259) : 37 Mad 119 : 15 Cri L Jour 180, *Bali Reddi v. Emperor*.

('96) 23 Cal 975 (977), *Queen-Empress v. Jabanulla*.

('32) AIR 1932 Nag 121 (123) : 28 Nag L R 233 : 33 Cr. L. J. 849 (FB), *Mad. Gul Rohilla v. Emperor*.

[See ('95) 22 Cal 377 (381, 382, 383), *Krishna Dhan Mandal v. Queen-Empress*. (Accused acquitted by jury of some offences and convicted of others — Appeal from conviction — High Court ordering re-trial without express limitation as to charges — Re-trial to be on all original charges — Previous acquittal is no bar to those charges being re-tried — S. 403 does not apply to such cases.)]

See also Note 1.

12. ('38) AIR 1938 Mad 847 (848) : 39 Cr. L. J. 712 : ILR (1938) Mad 902, *Public Prosecutor v. Sabhapathy Chetty*.

an acquittal implies a trial.¹³

Section 403 Notes 7-8

8. "Acquittal" — Meaning of. — The acquittal of an accused under s. 247 of the Code on the ground of the complainant's absence¹ or under s. 494 on withdrawal of a prosecution by the Public Prosecutor² is an acquittal within the meaning of this section. Similarly the acquittal of an accused on the case being lawfully compounded is an acquittal for the purposes of this section.³

The dismissal of a complaint,⁴ the discharge of an

13. ('08) 8 Cri L Jour 139 (140) : 10 Bom L R 628, *In re S. E. Dubash*.
('09) 9 Cr. L. J. 578 (580, 581) : 5 Low Bur Rul 12 : 2 I. C. 357, *Oborno Charan Chowdhury v. Emperor*.

Note 8

1. ('40) AIR 1940 Nag 357 (359, 360), *Emperor v. Laxmi Prasad*.
('29) AIR 1929 Bom 408 (409, 410) : 53 Bom 693 : 31 Cri L Jour 1000, *Shankar Dattatraya v. Dattatraya Sadasiva*. (Even though summons had not been served on the accused.)
('35) AIR 1935 Cal 491 (493) : 62 Cal 1119 : 36 Cr. L. J. 1238, *Bhupati Bhusan v. Amio Bhusan*.
('24) AIR 1924 Cal 96 (96) : 24 Cr. L. J. 716, *Nityananda Koer v. Rakhahari Missra*.
('11) 12 Cr. L. J. 41 (41, 42) : 34 Mad 253 : 9 I. C. 253, *In re Guggilapu Peddaya*.
('29) AIR 1929 Cal 189 (189, 190) : 30 Cr. L. J. 585, *Suku Ram v. Krishna Deb*.
('34) AIR 1934 Lah 211 (212) : 36 Cr. L. J. 29, *Abdul Aziz v. Noor Ellahi*.
('21) AIR 1921 Pat 311 (312) : 22 Cr. L. J. 331, *Ram Mahto v. Emperor*.
('27) AIR 1927 Nag 388 (388) : 28 Cr. L. J. 183, *Mt. Yesodha v. Mt. Banu Bai*.
('14) AIR 1914 Mad 628 (630) : 38 Mad 1028 : 15 Cr. L. J. 236, *In re Sinnu Goundan*.
('24) AIR 1924 Pat 140 (141) : 24 Cri L Jour 815, *Kiran Sirkar v. Emperor*.
('23) AIR 1923 Cal 407 (408) : 25 Cr. L. J. 149, *Fazzaar Pramanick v. Emperor*.
('23) AIR 1923 Cal 657 (658), *Musa Singh v. Gostha Behari*. (Do.)
('15) AIR 1915 Cal 119 (120) : 42 Cal 365 : 16 Cr. L. J. 148, *Achambit Mondal v. Mahatab Singh*. (Void order under S. 247 does not amount to acquittal.)
('15) AIR 1915 Cal 263 (263) : 15 Cr. L. J. 726, *Madho Chowdhury v. Turab Mian*. (Do.)
('29) AIR 1929 Cal 657 (658), *Musa Singh v. Gostha Behari*. (Do.)
[See ('08) 8 Cri L Jour 139 (140) : 10 Bom L R 628, *In re S. E. Dubash*. (Order striking off case not proper—Proper order would be acquittal.)]
[But see ('18) AIR 1918 Mad 212 (212, 213) : 49 Mad 977 : 19 Cri L Jour 497, *Kotayya v. Venkayya*. (The word 'tried' in the early part of S. 403 (1) should not be treated as surplusage and the section does not apply to a case where even the particulars of the offence were not stated to the accused.)]

See also Note 7.

2. ('13) 14 Cr. L. J. 135 (138) : 9 Nag L R 26 : 18 I. C. 887, *Mahadeogir v. Emperor*.
('18) AIR 1918 Mad 231 (233, 235) : 40 Mad 976 : 19 Cr. L. J. 501, *In re Dude Kula Lal*.
('88) 12 Mad 35 (36) : 2 Weir 457, *Queen-Empress v. Sivarama*. (Prosecution withdrawn under S. 494—Sessions Judge discharging accused—Second trial for same offence but on fresh sanction—First order, held, should have been one of acquittal—Second trial, held, barred.)

3. ('36) AIR 1936 Mad 353 (360, 372) : 37 Cr. L. J. 637 (FB), *Emperor v. John McIver*. (Charge of criminal breach of trust and cheating based on same facts—Charge of cheating compounded with permission of Court and accused acquitted of cheating—It operates as a bar to trial of charge of criminal breach of trust.)
('13) 14 Cri L Jour 458 (459) : 20 Ind Cas 618 (Cal), *Basireddi v. Khairat Ali*.
[See ('38) AIR 1938 Lah 739 (740, 741) : 40 Cr. L. J. 131, *Mt. Harbans Kaur v. Lahari Ram*. (Complaint on behalf of minor daughter filed and compounded by father without Court's permission—Consequent acquittal does not bar complaint by daughter.)
('93-1900) 1893-1900 Low Bur Rul 240 (241), *Queen-Empress v. Po Ba*. (No lawful compromise—No bar to fresh trial.)]

See also S. 345 Note 18.

4. ('37) AIR 1937 Rang 35 (37), *Chin Hone On v. C Ah Foo*.
('34) AIR 1934 All 877 (879) : 35 Cri L Jour 1177, *Ali Bux v. Emperor*. (Dismissal of the complaint after recording of the prosecution evidence and framing of a charge, on discovery that the complainant had not been examined under S. 200, Criminal P. C., does not amount to an acquittal.)

Section 403
Note 8

accused⁵ or an order stopping proceedings under S. 249⁶ of the Code is not an acquittal for the purposes of this section. See Note 13. Similarly, an order refusing to take cognizance of an offence does not amount to an acquittal.⁷

See also S. 240 Note 5.

Where an Appellate Court sets aside a conviction without doing anything further, the order amounts to an acquittal.⁸ But where the

5. ('29) AIR 1929 Mad 260 (261):30 Cr.L.J. 403, *Venkatasubba Ayyar v. Soundra-
raja Ayyangar*. (Assumed.)
 - ('66) 5 Suth W R Cr 58 (58), *In re Shoodun Mundle*. (Discharge by Magistrate in
warrant-case is not final like an acquittal and Sessions Judge can order accused
to be put upon his trial again.)
 - ('07) 5 Cr. L. J. 309 (318):31 Bom 335:9 Bom LR 331, *Emperor v. Bhagwan Das*.
 - ('32) AIR 1932 Mad 505 (506, 507):55 Mad 795:33 Cri L Jour 653, *Nannier v.
Dasalier*. (Discharge under S. 259.)
 - ('34) AIR 1934 All 340 (341):56 All 750:36 Cri L Jour 65, *Suraj Bali v. Emperor*.
(Dismissal of complaint for default in warrant-case operates as discharge under
S. 259 and not acquittal.)
 6. ('12) 13 Cri L Jour 860 (861):1913 Pun Re No. 9 Cr:17 I. C. 796, *Achhru v.
Emperor*.
 7. ('32) AIR 1932 Cal 871 (874, 875):60 Cal 149:34 Cr. L. J. 181, *Nafar Sardar
v. Emperor*
(1900) 24 Mad 337 (339):2 Weir 251, *Queen-Empress v. Kunijil Raru*.
(1933) AIR 1933 Pat 242 (243):12 Pat 234:34 Cr. L. J. 1198, *Uma Singh v. Emperor*.
(Magistrate's order directing case reported to him by police to be struck off is
purely administrative or ministerial order and not judicial one—The principle of
autrefois acquit does not apply to it.)
[But see ('03) 7 Cal W N 711 (713), *Kedar Nath Biswas v. Adhin Manji*. (Police
sending charge to Magistrate in respect of four persons — Only some tried and
acquitted—Magistrate holding case against others to be false — Until this order
is set aside such other persons cannot be proceeded against.)
(1903) 7 C W N 493 (494), *Bishun Singh Ghose v. Emperor*. (Do.)
(1900) 4 C W N 346 (347), *Panchusingh v. Umor Mohamad Sheikh*. (Case against
two accused — Attendance of one not procurable—Complainant absent—Present
accused acquitted under S. 247, and case dismissed—Unless order of dismissal is
set aside, case could not be proceeded with as regards absent accused.)]
- As regards revival of proceedings see the following cases.
- ('07) 6 Cri L Jour 34 (36):11 C W N 832, *Mokamiji Das v. Emperor*. (Informa-
tion of cognizable and noncognizable offence—Police reporting cognizable case to
be false and charge only of noncognizable case — Magistrate accepting report —
Magistrate's subsequent order calling for charge-sheet of cognizable offence held
not legal.)
 - ('81) 5 Bom 405 (407), *Govt. of Bombay v. Shidapa*. (Information as to cognizable
and noncognizable offence—Police enquiring only into latter and reporting that
no prima facie case made out — Magistrate directing that offence to be expunged
from charge-sheet—Held, that revival of complaint as regards former offence not
barred.)
 - ('26) AIR 1926 Sind 198 (199):22 S L R 427:27 Cri L Jour 302, *Morrison v.
Crowder*. (One Magistrate refusing to issue process — Another Magistrate may
issue process without necessity of upsetting order of first Magistrate—Such refusal
does not give criminal immunity from all processes for ever.)
 - ('14) AIR 1914 Oudh 406 (406):17 O C 273:15 Cri L Jour 638, *Allaudin Khan v.
Emperor*. (Refusal of Magistrate to take cognizance on complaint does not bar
subsequent revival of the proceedings.)
[But see ('89) 1889 All W N 8 (9), *Empress v. Raghunandan Lal*. (Magistrate
expressly refraining from dealing with and disposing of the charge under S. 204,
Penal Code, and not acquitting in terms the accused upon such charge—Held the
action of the Magistrate might be taken as a stay of the trial of such charge under
S. 240 of the Code and the subsequent trial was not barred.)]
- See also S. 190 Note 17.
8. ('33) 1933 Mad W N 224 (224), *Similan v. Similan*.
 - ('18) AIR 1918 Nag 126 (127):19 Cri L Jour 796, *Nanakram v. Emperor*.

appellate Court sets aside a conviction and orders a re-trial, its order does not amount to an acquittal.⁹ In some decisions¹⁰ it has been held that an order setting aside a conviction on the ground of the lower Court having had no jurisdiction, does not amount to an acquittal but only to a discharge. See also the cases cited below.¹¹ See also Note 11.

Section 403
Notes 8-9

9. "Conviction" — Meaning of. — A finding of guilty by a Magistrate, proceeding under S. 349, is not a conviction.¹ But it has been held that the finding of guilty by a Magistrate who commits a

[But see ('06) 3 Cri L Jour 15 (17) : 3 Low Bur Rul 87 (FB), *Hla Gyi v. Emperor*. (Accused convicted at criminal sessions in Chief Court and sentenced to death—Conviction and sentence set aside by Bench but accused not acquitted—District Magistrate's action in taking cognizance of the case with a view to recommitment held legal in view of S. 403 read with Ss. 273 and 333.)]

9. ('35) 36 Cri L Jour 1333 (1334) : 158 I. C. 200 (All), *Emperor v. Bahrai Chi*. ('32) AIR 1932 All 409 (411) : 54 All 756 : 33 Cri L Jour 669, *Bajinath v. Emperor*. (Conviction under one section set aside and commitment for offence under another section ordered—*Held*, that there was no acquittal.)

[See ('26) AIR 1926 Cal 585 (586) : 53 Cal 192 : 27 Cri L Jour 733, *Emperor v. Miajan*. (Conviction set aside—Question of re-trial left to District Magistrate—Order setting aside conviction is not acquittal.)]

('19) AIR 1919 Cal 115 (116) : 20 Cri L Jour 225 : 46 Cal 212n (214n), *Benimadhao Kundu v. Emperor*. (Do.)]

See also S. 423 Note 21.

10. ('02) 29 Cal 412 (414), *Abdul Ghani v. Emperor*.

('81) 3 Mad 48 (50, 51) : 2 Weir 756, *In re Rami Reddi and Seshu Reddi*.

('26) AIR 1926 Pat 302 (304) : 5 Pat 452 : 27 Cri L Jour 849, *Mohammad Yasin v. Emperor*.

('34) AIR 1934 Mad 716 (717, 718) : 58 Mad 256 : 36 Cri L Jour 550, *Narayanawami Vannier v. Karumbayiram Pariyari*.

('32) AIR 1932 Cal 683 (684) : 33 Cr. L. J. 770, *Nagendra Nath Sirkar v. Emperor*. (Such order of the appellate Court amounts to discharge.)

('17) AIR 1917 All 410 (412) : 18 Cri L Jour 546 : 39 All 293 (296, 297), *Hussain Khan v. Emperor*. (Second trial held not barred.)

('18) AIR 1918 Nag 126 (128) : 19 Cri L Jour 796 : 46 Ind Cas 716 (718), *Nanakram v. Emperor*. (Do.)

(1865) 2 Suth W R Cr, 9 (10), *Queen v. Muthoorapershad*. (Do.)

11. ('40) 1940 Mad W N 962 (963), *Abdul Hamced Rowther v. Mahomed Sali Rowther*. (De novo trial under S. 350 — Charge already framed — Discharge in de novo trial amounts to acquittal—When that order is in force, accused cannot be tried again.)

('37) AIR 1937 Bom 152 (152) : 38 Cri L Jour 571, *Emperor v. Yemanya Kallappa*. (Appeal from acquittal—High Court setting aside order of acquittal on ground of trial having been illegal, but not ordering retrial—Fresh trial not barred.)

('72) 18 Suth W R Cr 10 (10), *Ramjoy Surma v. Mirza Ali*. (Order for the release of the accused, as being not guilty amounts to an acquittal.)

('24) AIR 1924 All 778 (779) : 26 Cri L Jour 98, *Harbans v. Emperor*. (Acquittal of accused brought about by fraud established against third person in proceedings to which the accused were not parties is valid unless set aside by independent proceedings.)

('13) 14 Cri L Jour 404 (404) : 9 Low Bur Rul 35 : 20 I. C. 228, *Krishna Perdan v. Pasand*. (Dismissal for default of application under S. 1 of Workman's Breach of Contract Act—No acquittal.)

('21) AIR 1921 Cal 1 (15) : 48 Cal 388 : 22 Cri L Jour 31 (SB), *Satish Chandra v. Ram Dayal De*. (Dismissal of application for sanction to prosecute does not attract the operation of S. 403.)

('30) AIR 1930 Sind 315 (315) : 24 Sind L R 446 : 32 Cri L Jour 521, *Rajabali Hassanali v. Emperor*. (Doctrine of *autrefois acquit* does not apply to a refusal by a Magistrate under S. 476 to file complaint against the accused.)

Note 9

1. ('28) AIR 1928 Bom 240 (240) : 52 Bom 456 : 29 Cr. L. J. 904, *Emperor v. Narayan Dhaku Bhal*.

Section 403
Notes 9-11

case under S. 348 would bar the trial of the accused for the offence to which the finding relates.² Departmental punishment is not a conviction for the purposes of this section.³ See also the undermentioned cases.⁴

10. "While such conviction or acquittal remains in force."

— The bar of a fresh trial under this section applies only where the previous conviction or acquittal *is in force*.¹

11. Court of competent jurisdiction. — The bar of a fresh trial under this section will apply only where the previous conviction or acquittal has been by a Court of competent jurisdiction.¹ It is also necessary for the application of this section that the Court by which the accused was first tried should have been competent to try the offence

2. ('14) AIR 1914 Mad 149 (149):38 Mad 552:15 Cr.L.J.188, *In re Kora Sellandi*. See also S. 347 Note 3.

3. ('87) 1887 Rat 318 (319), *Queen-Empress v. Ramnaik*.

('15) AIR 1915 Lah 350 (351): 1915 Pun Re No. 26 Cr: 16 Cr.L.J. 788, *Emperor v. Gul Muhammad*.

('94) 17 Mad 278 (279, 280): 1 Weir 839, *Queen-Empress v. Fakruddeen*.

('10) 12 Cri L Jour 143 (144): 9 Ind Cas 831 (Lah), *Sohan Singh v. Emperor*.

See also S. 190 Note 17.

4. ('70) 7 Bom H C R Cr 55 (56), *Reg. v. Durgaram*. (Fine levied by pound-keeper is no punishment imposed on conviction for offence and is no bar to trial for offence.)

('72) 17 Suth W R Cr 15 (18, 19): 9 Beng L R 36, *Queen v. Amir Khan*. (Issuing a warrant of commitment and placing a person under restraint under Regulation III of 1818 is not in the nature of a conviction.)

Note 10

1. ('40) 1940 Mad W N 962 (963), *Abdul Hamid v. Md. Sali Rowther*.

('19) AIR 1919 Pat 384 (385): 20 Cri L Jour 667, *Emperor v. Nand Kishore*. (Two accused convicted under S. 420, Penal Code—On appeal conviction against one set aside—Revision petition by the other—Conviction under S. 420, set aside and committal to sessions for trial under S. 477A ordered—Former accused also cannot be tried again upon the same record.)

('29) AIR 1929 All 710 (719): 31 Cri L Jour 230, *Azam Ali v. Emperor*.

('17) AIR 1917 All 410 (412): 39 All 293: 18 Cri L Jour 546, *Husain Khan v. Emperor*. (Previous conviction when set aside for want of jurisdiction does not bar second trial on same facts.)

('75) 7 N W P H C R 371 (373), *Queen v. Panna*.

('84) 1 Weir 759 (759, 760), *In re Kunniya Gounden*. (Person improperly convicted under Forest Act—Conviction has no legal effect—Prosecution under Penal Code not barred.)

('29) AIR 1929 Nag 161 (162): 30 Cri L Jour 763, *Manji Jairam v. Kalekhan*. (Conviction of some accused and acquittal of others—Appeal by former—Appellate Court holding whole trial void as without jurisdiction—Acquittal also void and does not operate as a bar to fresh trial, of persons acquitted.)

[See ('67) 7 Suth W R Cr 2 (2), *Queen v. Kali Charan*. (Verdict of jury reversed, proceedings of first trial annulled and fresh trial ordered to take place immediately.)

('68) 9 Suth WRCr 15 (16), *Goonath Mundle v. Troylocko Chuckerbutty*. (Magistrate, in warrant-case, acquitting accused without framing charge or putting him upon trial—Acquittal set aside—Fresh trial ordered to be proceeded with.)

('70) 13 Suth W R Cr 42 (42), *Queen v. Wahed Ali*. (Prisoner released by Court of Session on the ground of the proceedings being illegal and irregular—Subsequent trial and conviction for same offence not barred.)]

Note 11

1. ('17) AIR 1917 All 410 (412): 39 All 293: 18 Cri L Jour 546, *Husain Khan Emperor*.

('84) 8 Bom 307 (308), *Queen-Empress v. Hussein Gaibu*.

('81) 3 Mad 48 (51): 2 Weir 756, *In re Rami Reddi*.

subsequently charged.² See sub-section (4).

Section 403
Note 11

Where the sanction or complaint of a particular person or authority is necessary under the law for the trial of a person, the question arises whether in the absence of such sanction or complaint a Court which tries him is a Court of competent jurisdiction. On this question there is a conflict of decisions. The majority of the High Courts have held that the Court cannot be deemed to be a Court of competent jurisdiction in such cases.³ The Madras High Court in *Ganapathy Bhatta v.*

('84) 1884 Pun Re No. 38 Cr, p.73 (75), *Gulzar v. Empress*. (Accused convicted by girga in foreign territory under Frontier Regulation—Deputy Commissioner having no authority under the Regulation to convene girga — Conviction cannot be pleaded in bar of jurisdiction of criminal Courts over same offence in British territory.)

(1865) 2 Suth W R Cr 9 (10), *Queen v. Muthoorapershad Pandey*.

(1865) 4 Suth W R Cr L 2 (2), (Dismissal of charge by Magistrate in respect of offence over which he has no jurisdiction does not bar further proceedings.)

2. ('39) AIR 1939 Cal 65 (70) : 1 L R (1939) 1 Cal 1 : 40 Cri L Jour 199 (F B), *Purnananda Das Gupta v. Emperor*.

('38) AIR 1938 Lah 614 (615) : 39 Cri L Jour 870 : 1 L R (1938) Lah 127, *Bhag Singh v. Emperor*. (Accused tried by second class Magistrate under S. 323, Penal Code, and acquitted by him—Trial for offence under S. 324, Penal Code, is barred as the second class Magistrate was competent to try such offence.)

('37) AIR 1937 All 117 (118, 119) : 38 Cri L J 368, *Mahadco Prasad v. Emperor*. (Where the Court could have tried the offence subsequently charged, fresh trial is barred.)

('37) AIR 1937 Cal 99(113) : 38 Cri L Jour 818 (S B), *Jitendra Nath v. Emperor*. (Court not competent to try subsequent offence—Section 403 held no bar.)

('84) 7 Mad 557 (560) : 2 Weir 456, *Viran Kutti v. Chiyamu*.

('19) AIR 1919 Cal 464 (464, 465) : 19 Cri L Jour 388, *Abdul Hakim v. Emperor*. (Acquittal by Magistrate on charge under S. 465, Penal Code — Subsequent commitment to and trial by Court of Session for offence under S. 467, on same facts not barred.)

('18) AIR 1918 Cal 943 (945, 946) : 18 Cr.L.J. 834, *Abdul Hakim v. Buzruk Ali*.

('97-01) 1 Upp Bur Rul 91 (93), *Nga Po Han v. Nga Tha Le Ni*.

(1900-02) 1 Low Bur Rul 340 (343) (FB), *San Baw v. Crown*.

('98) 2 Weir 482 (483), *In re Kannachampet Parangodan*.

('28) AIR 1928 Bom 530 (531, 532) : 30 Cri L Jour 54 : 53 Bom 69, *In re Shankar Tulshiram*.

('28) AIR 1928 Pat 577 (579) : 29 Cr.L.J. 760, *Chhanu Prasad Singh v. Emperor*.

('25) AIR 1925 Mad 711 (711) : 26 Cri L Jour 1087, *Palani Goundan v. Emperor*.

('19) AIR 1919 Upp Bur 32 (33) : 3 Upp Bur Rul 135 : 20 Cri L Jour 533, *Mi Chit v. Mi Nyun*.

('87) 1887 Rat 337 (338), *Queen-Empress v. Ladkia*.

('75) 7 N W P H C R 371 (373, 374), *Queen v. Panna*.

('03) 5 Bom L R 125 (126), *Emperor v. Zuji Manu*.

('12) 13 Cri L Jour 742 (743, 744) : 1912 Pun Re No. 7 Cr : 17 I. C. 54, *Wadhawa Singh v. Emperor*.

('18) AIR 1918 Mad 481 (482) : 18 Cri L Jour 643, *In re Venkataranga Josier*.

('29) AIR 1929 Nag 161 (162) : 30 Cri L Jour 763, *Manji Jairam v. Kalekhan*.

('19) AIR 1919 Cal 511 (511) : 20 Cr. L. J. 112, *Krishnadhan Ghose v. Mahendra Nath Dutt*.

('28) AIR 1928 Lah 844 (844) : 29 Cri L Jour 701, *Mt. Allah Di v. Emperor*.

('34) AIR 1934 All 141 (142) : 56 All 529 : 35 Cr. L. J. 865, *Sukhala v. Emperor*.

('23) AIR 1923 Pat 228(229) : 2 Pat 333 : 25 Cr.L.J. 1385, *Gobind Swain v. Emperor*.

('21) AIR 1921 All 205 (205) : 22 Cri L Jour 750, *Mohan Lal v. Emperor*.

('15) AIR 1915 Bom 203 (204) : 40 Bom 97 : 16 Cri L Jour 761, *Jivram Dan-karji v. Emperor*.

3. ('38) AIR 1938 Lah 625 (626) : 39 Cri L Jour 960 : 1 L R (1939) Lah 373, *Emperor v. Ram Rakha*.

('29) AIR 1929 All 940 (940) : 30 Cr.L.J. 1153, *Abdul Rashid v. Harish Chandra*.

Section 403
Note 11

*Emperor*⁴ had taken a contrary view, holding that the words "competent jurisdiction" refer only to the character and status of a Court and not to conditions precedent for the prosecution or trial of a person. The question again arose for consideration before a Full Bench of the same High Court. After referring to the conflict of decisions on the point, King J., with whom the other Judges agreed, thought it unnecessary to come to any final conclusion on the meaning of the word "competent" and held that the trial without a proper complaint was void under S. 530 and, therefore, the judgment of acquittal was also void and so there was nothing which the accused could compel the Court to recognize in support of a plea of *autrefois acquit*.⁵ The Calcutta High

- (26) AIR 1926 All 231 (232) : 27 Cri L Jour 705, *Ram Nath v. Emperor*.
 (21) AIR 1921 All 205 (205) : 22 Cri L Jour 750, *Mohan Lal v. Emperor*.
 (17) AIR 1917 All 410(412) : 39 All 293 : 18 Cr.L.J. 546, *Husain Khan v. Emperor*.
 (15) AIR 1915 All 114(115) : 37 All 107 : 16 Cr L Jour 144, *Emperor v. Jiwan*.
 (15) AIR 1915 Bom 203 (204) : 40 Bom 97 : 16 Cr. L. J. 761, *Jivram Dankarji v. Emperor*.
 (15) AIR 1915 Bom 194 (195) : 16 Cri L Jour 662, *Tikaram v. Emperor*.
 (28) AIR 1928 Bom 143 (144) : 52 Bom 257 : 29 Cr.L.J. 545, *Emperor v. Ambaji*.
 (98) 22 Bom 711 (713), *In re Samsudin*.
 (28) AIR 1928 Bom 530 (531, 532) : 30 Cri L Jour 54 : 53 Bom 69, *In re Shanker Tulshiram*.
 (18) AIR 1918 Nag 126 (127, 128) : 19 Cri L Jour 796, *Nanakram v. Emperor*.
 (34) AIR 1934 Pat 411 (411) : 35 Cri L Jour 686, *Mohendra Nath v. Emperor*.
 (26) AIR 1926 Pat 302 (304) : 5 Pat 452 : 27 Cri L Jour 849, *Mohammad Yasin v. Emperor*.
 (1900-02) 1 Low Bur Rul 340 (343) (FB), *San Baw v. Crown*. (Want of sanction in cases where it is requisite goes to the root of the jurisdiction of the Court and affects its competency.)
 (27) AIR 1927 Sind 10 (12, 16) : 21 Sind L R 1 : 27 Cri L Jour 1105, *Fakir Mohammed v. Emperor*.
 (30) AIR 1930 Pat 26 (29) : 9 Pat 585 : 30 Cri L Jour 806, *Babulal Mahton v. Ram Saran Singh*. (Want of complaint or other material on which to take cognizance—No jurisdiction to try.)
 (05) 4 Cri L Jour 422 (423) : 2 Nag L R 149, *Emperor v. Mahabirpuri*. (Do.)
 [See (09) 9 Cri L Jour 526 (526) : 31 All 317 : 2 Ind Cas 219, *Umer-ud-din v. Emperor*. (Complaint for enticing away brother's wife — Magistrate finding that complainant had no authority from his brother to file complaint—Accused acquitted—Second complaint by husband himself not barred.)
 (30) AIR 1930 Lah 1055 (1055) : 32 Cri L Jour 253, *Chuhar v. Emperor*. (First trial under S. 291, I. P. C.—Subsequent proceedings under S. 188, I. P. C. not barred as they cannot be taken without a complaint under S. 195, Cr. P. C.)]
 [But see (22) AIR 1922 All 502 (502) : 45 All 11 : 23 Cri L Jour 496, *Kohna Ram v. Emperor*. (Offence coming under two sections—Sanction to prosecute under one refused—Prosecution under the other barred.)
 (21) AIR 1921 Sind 137 (139, 140, 142) : 16 Sind L R 1 : 23 Cri L Jour 305, *Emperor v. Menghraj Devidas*.]
 See also S. 195 Note 29.
 4. (13) 14 Cri L Jour 214 (217, 218) : 36 Mad 308 : 19 I. C. 310.
 [See also (30) AIR 1930 Mad 785 (785) : 32 Cr. L. J. 27 : *Kolandaswami Pillai v. Rajaratna Mudaliar*. (Though there was no question of sanction in this case, 36 Mad 308 was approved in obiter remark.)]
 [But see (02) 27 Mad 61 (62) : 2 Weir 236, *Bangaru Asari v. Emperor*. (Where a conviction was set aside on the ground that there being no complaint by the husband of an offence under S. 498, I. P. C., the Court had no jurisdiction to convict.)]
 5. (37) AIR 1937 Mad 301 (302, 303) : 38 Cr.L.J. 457 : 1 L R (1937) Mad 664 (FB), *In re Muthu Moopan*.

Court has held that a trial held in the absence of the necessary sanction or complaint is not a *trial* at all within the meaning of this section.⁶

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Notes 11-12

It has been held by the High Court of Bombay that a Court having no local jurisdiction to try a case is not a Court of competent jurisdiction and a conviction or acquittal by such Court will be no bar to a fresh trial of the accused on the same facts.⁷ But a Full Bench of the Madras High Court has dissented from the Bombay High Court and held that an accused person can plead *autrefois acquit* if the only defect in the jurisdiction of the Court which passed the order is want of territorial jurisdiction and that s. 531 applies to such cases.⁸ The Judicial Commissioner's Court of Sind⁹ has followed the Madras view in preference to that of the Bombay High Court. It is submitted that the Madras view is correct. See S. 531 Note 4.

Where the previous trial was by a Court of Session with the aid of assessors and the offence subsequently charged was triable by jury, it was held that it could not be said that the Court by which the accused was first tried was not competent to try the offence subsequently charged.¹⁰

A conviction or acquittal by a Court established under a local or special law is a conviction or acquittal by a Court of competent jurisdiction within the meaning of this section.¹¹

It has been held that a conviction by a Court in a Native State can be pleaded as a bar under this section.¹²

An illegal conviction is not the same thing as a conviction by a Court having no jurisdiction.¹³

12. Identity of accused necessary for application of section.

— This section will preclude a fresh trial only if the accused in the second case is the same as the accused in the previous case. The conviction or acquittal of an accused person is, therefore, no bar to the trial of *another* person *implicated* in the same offence.¹ But in

6. ('26) AIR 1926 Cal 691 (692) : 27 Cr. L. J. 751, *P. Banerjee v. Bepin Behary*.

7. ('28) AIR 1928 Bom 530 (531, 532) : 53 Bom 69 : 30 Cri L Jour 54, *In re Shanker Tulshiram*.

8. ('33) AIR 1933 Mad 765 (766) : 34 Cr.L.J. 1080 : 56 Mad 996 (F B), *Rathnavelu v. K. S. Iyer*.

9. ('37) AIR 1937 Sind 179 (180, 181) : 38 Cr. L. J. 959, *Dhingano Khoso v. Gulsher Kambir Khan*. (AIR 1933 Mad 765 (FB), Foll; AIR 1928 Bom 530, Dissent.)

10. ('01) 24 Mad 641 (644) : 2 Weir 458, *King-Emperor v. Krishna Ayyar*.

11. ('24) AIR 1924 Rang 23 (23) : 1 Rang 449 : 25 Cr.L.J. 233, *Nga Ev. Emperor*. (Conviction by village headman empowered by the Burma Village Act to try as a Court offences under S. 294, I. P. C., and other offences.)

('84) 1884 Pun Re No. 30 Cr, p. 52 (53, 54), *Sarwar v. Empress*. (Conviction by Council of Elders convened under Frontier Regulation No. IV of 1873.)

12. ('24) AIR 1924 Lah 238 (239) : 24 Cri L Jour 715, *Teja Singh v. Emperor*. See also S. 188 Note 2.

13. ('31) AIR 1931 Lah 199 (199, 200) : 32 Cr.L.J. 731, *Mt. Ram Piyari v. Emperor*.

Note 12

1. ('36) AIR 1936 Pesh 152 (153) : 37 Cri L Jour 889, *Awal Khan v. Emperor*.

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determining the question whether there is sufficient ground for proceeding against a person, the fact that another person accused of the same offence and on the same facts has been acquitted may be taken into consideration.²

13. Dismissal of complaint or discharge of accused. — The explanation to the section expressly provides that the dismissal of a complaint or the discharge of an accused is not an acquittal for the purposes of the section. The question has arisen whether notwithstanding this, the provision of a special remedy in such cases under S. 436 and S. 437 impliedly bars the institution of a fresh prosecution for the same offence where the order dismissing the complaint or discharging the accused has not been set aside by a competent authority. It is well settled now that a fresh prosecution is not barred in such cases.¹ The

- (14) AIR 1914 All 85 (86) : 36 All 168 : 15 Cri L Jour 200, *Emperor v. Ghure*.
 (14) AIR 1914 Cal 886 (887) : 41 Cal 754 : 15 Cr. L. J. 402, *Manindra Chandra Ghose v. Emperor*.
 (10) 11 Cr. L. J. 541 (541) : 37 Cal 680 : 7 Ind Cas 932, *Kokai Sardar v. Mchar Khan*.
 (05) 4 Cri L Jour 173 (174) : 10 C W N 1031, *Deputy Legal Remembrancer v. Hatim Mollah*. (Dismissal by a Court, of charge of riot against a person does not extend to other persons not then before the Court which ordered dismissal.)
 (66) 6 Suth W R Cr 51 (51), *Queen v. Morly Sheikh*.
 2. (26) AIR 1926 Cal 795 (798) : 53 Cal 606 : 27 Cr. L. J. 788, *Subal Chandra v. Ahadullah Sheikh*.
 (33) 1933 Mad W N 246 (247, 248), *Seshachalam v. Bapanayya*. (Second complaint against different accused on same facts — Plea of *autrefois acquit* though not available Courts will rightly exercise discretion in not proceeding with the second case where there was complete trial in the first.)
 (99) 4 Cal W N 346 (347), *Panchu Singh v. Umor Mohamed Sheikh*. (Order in previous trial purporting to terminate all proceedings.)
 [See however (36) AIR 1936 Pesh 152 (153) : 37 Cri L Jour 889, *Awal Khan v. Emperor*. (It is the duty of a Court to decide a case on the evidence before it without being influenced by the fact that another Court has on the same evidence on a previous occasion come to a certain conclusion.)]
 See also S. 204 Note 5.

Note 13

1. Dismissal of complaint — Fresh prosecution not barred:

- (39) AIR 1939 Sind 193 (195, 196) : 40 Cri L Jour 745 : ILR (1940) Kar 74 (FB), *Mt. Harbai v. Raya Premji*.
 (34) AIR 1934 Lah 435 (436) : 36 Cr. L. J. 62, *Mahomed Din v. Hussain*. (Complaint dismissed — Second complaint on same facts by different complainant is competent.)
 (95) 1895 All W N 86 (86), *Emperor v. Umedan*.
 (81) 1881 All W N 68 (68), *Empress v. Indar Dawan*.
 (13) 14 Cri L Jour 2 (2) : 35 All 78 : 18 Ind Cas 146, *Angan v. Ram Pirbhan*.
 (16) AIR 1916 Mad 887 (887) : 16 Cri L Jour 814, *Subbareddi v. Kamal Saib*.
 (05) 2 Cri L Jour 651 (652) : 1 Nag L R 18, *Makhatambi v. Hasan Ali*.
 (08) 7 Cr. L. J. 297 (299) : 1908 A W N 67 : 5 A L J 137, *Bhagwan Din v. Dibba*.
 (20) AIR 1920 All 8 (9) : 21 Cri L Jour 379, *Jai Kishan v. Kalla*.
 (14) AIR 1914 All 79 (80) : 36 All 129 : 15 Cri L Jour 158, *Rambharos v. Baban*.
 (35) AIR 1935 All 60 (63) : 35 Cri L Jour 1485, *Kunji Lal v. Emperor*.
 (86) 9 All 85 (88) : 1886 A W N 307, *Queen-Empress v. Puran*. (Magistrate dismissing original complaint — Order for further inquiry on receiving second complaint is not contrary to law.)

- (1900) 28 Cal 211 (215) : 5 C W N 169, *Queen-Empress v. Dolegorind Dass*.
 ('06) 29 All 7 (9, 10) : 3 A L J 562 : 1906 A W N 215 : 4 Cri L Jour 59, *Emperor v. Meharban Hussain*. (Second complaint by different complainant.)
 ('34) AIR 1934 All 87 (87) : 56 All 425 : 35 Cr. L. J. 1062, *Rama Nand v. Sheri*.
 ('14) AIR 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174, *Bulchand v. Ghandhoomal*.
 ('08) 8 Cri L Jour 249 (249) (Lah), *Beharilal v. Emperor*.
 ('04) 1 Cr. L. J. 167 (173, 179) : 2 Low Bur Rul 27 : 10 Bur L R 1 (F B), *King-Emperor v. Nga Pym Di*.
 ('34) AIR 1934 All 514 (515, 516) : 35 Cri L Jour 1059, *Lallain v. Emperor*.
 ('32) AIR 1932 Mad 369 (371) : 55 Mad 622 : 33 Cr. L. J. 451 (F B), *Ponnuswamy Gounden v. Emperor*.
 ('92) 16 Bom 414 (427), *Queen-Empress v. Vajiram*. (Court which has jurisdiction to try prisoner for an offence in respect of which complaint against him has been dismissed, can take cognizance of it in a proceeding for a connected offence *non-obstante* the order of dismissal.)
 [See ('27) AIR 1927 Mad 695 (696) : 28 Cr. L. J. 507, *Rama Naidu v. Venkataswami Naidu*. (Dismissal of complaint by village Magistrate does not bar fresh prosecution.)]
 [See however ('25) AIR 1925 Rang 114 (114, 115) : 26 Cr. L. J. 281, *U Shive Kyaw v. Ma Sein Bwin*. (On dismissal of complaint under S. 203, fresh complaint cannot be entertained unless new facts not available previously are adduced or manifest error or miscarriage has occurred in the previous proceedings.)]
Discharge of accused—Fresh prosecution not barred.
 ('08) 9 Cri L Jour 80 (82) : 31 Mad 513, *Emperor v. Maheswara Kondaya*.
 ('14) AIR 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174, *Bulchand v. Ghandhoomal*.
 ('14) AIR 1914 Oudh 406(407) : 17 Oudh Cas 273 : 15 Cr. L. J. 638, *Alauddin v. Emperor*.
 ('30) AIR 1930 Cal 369 (370) : 31 Cr. L. J. 1153, *Lori Chand v. Niroda Sundari*.
 ('29) AIR 1929 Bom 131 (131) : 30 Cri L Jour 591, *Emperor v. Amanat Kadar*.
 ('25) AIR 1925 Nag 432 (432) : 26 Cri L Jour 1010, *Asgar Ali v. Akbar Ali*.
 ('34) AIR 1934 Nag 215 (216) : 31 Nag L R 93 : 36 Cri L Jour 57, *Ram Prasad v. Ganpatrao*. (Discharge under S. 259—Fresh complaint not barred.)
 ('24) AIR 1924 Pat 797 (798) : 26 Cri L Jour 129, *Ramanand Lall v. Ali Hassan*. (Discharge under S. 491A — Fresh complaint not barred.)
 ('34) AIR 1934 All 87 (87) : 56 All 425 : 35 Cr. L. J. 1062, *Rama Nand v. Sheri*.
 ('30) AIR 1930 All 92 (95) : 30 Cri L Jour 1149, *Hukum Singh v. Emperor*.
 ('15) AIR 1915 All 417 (418) : 37 All 628 : 16 Cr. L. J. 669, *Bateshar v. Emperor*.
 ('16) AIR 1916 Pat 109 (110) : 18 Cr. L. J. 296 : 2 P. L. J. 34, *Bijoo Singh v. Emperor*.
 ('23) AIR 1923 All 332 (333) : 24 Cri L Jour 232, *Jasna v. Emperor*.
 ('19) AIR 1919 All 315 (316) : 20 Cr. L. J. 403, *Parmeshwari Das v. Jagan Nath*.
 ('14) AIR 1914 All 179 (179) : 36 All 53 : 15 Cr. L. J. 1, *William Cecil v. Emperor*.
 ('80) 1880 Rat 145 (145), *Queen-Empress v. Budhya*. (4 Cal 406, followed.)
 ('08) 8 Cri L Jour 208 (208) : 18 M L J 561 : 4 M L T 140, *In re Rudra Goud*.
 ('34) AIR 1934 Lah 169 (170) : 36 Cri L Jour 473, *Nasir v. Abdul Karim*. (Discharge on withdrawal by Public Prosecutor — Fresh complaint by private party not barred.)
 ('69) 4 Mad H C R App viii (ix). (Dismissal of complaint amounts to discharge of accused and does not bar fresh prosecution.)
 ('22) AIR 1922 Pat 372 (375) : 23 Cri L Jour 236, *Biso Ram v. Emperor*.
 ('11) 12 Cri L Jour 364 (368, 369) : 11 Ind Cas 132 : 1911 Pun Re No. 10 Cr (FB), *Emperor v. Kiru*.
 ('30) AIR 1930 Rang 156 (157) : 8 Rang 1 : 31 Cr. L. J. 824, *Dhana Reddy v. Emperor*.
 [See also ('05) 3 Cri L Jour 426 (428) : 1905 Upp Bur Rul Cr. P. C. 4th Qr, p. 41, *Nga Kun v. Emperor*. (Third Class Magistrate acting without jurisdiction in discharging accused—Sub-divisional Magistrate, held, could ignore the discharge order and proceed to try the accused.)]
Dismissal of complaint or discharge of accused—Same proceedings can be revived.
 ('72) 4 N W P H C R 23 (25), *Queen v. Hur Pershad*.
 ('72) 18 Suth W R Cr 39 (39) : 9 Beng L R 339, *Jint Sahoo v. Bheekon Roy*. (Magistrate after he has discharged accused has power to take up the case again and re-try it.)
 ('71) 15 Suth W R Cr 55 (55), *Queen v. Rajkishore Roy*. (Discharge of accused—Magistrate has jurisdiction to take up case *de novo*.)
 ('97) 1 C W N 49 (51), *Apoorba Kumar Sett v. Probod Kumari Dass*. (Presidency Magistrate can revive complaint even after discharge order.)

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- (‘87) 1887 Rat 350 (352), *Queen-Empress v. Bapuda*.
 (‘92) 1892 Rat 588 (590), *Queen-Empress v. Govind*.
 (‘75) 1 Bom 64 (66), *Reg. v. Devama*.
 (‘88) 13 Bom 384 (388): 1888 Rat 422, *Queen-Empress v. Shankar*. (Sanction under S. 195 given to private person — Complaint by such person dismissed — Proceedings under S. 478 not barred.)
 (‘07) 5 Cr. L. J. 255 (256) : 9 Bom L R 250, *Emperor v. Nabi Fakira*. (A Magistrate after he has discharged an accused is not prevented from inquiring again into the case against the accused.)
 (‘70) 14 Suth W R Cr 65 (66) : 6 Beng L R App 67, *In the matter of the petition of Ramjai Majumdar*. (Magistrate of district has power, whether there be a private prosecutor or not, to order arrest of and take up the case against a person who has been tried and discharged by a subordinate Magistrate.)
 (‘73) 20 Suth W R Cr 19 (19), *Queen v. Ramsodoy Chuckerbutty*. (In case triable by Court of Session, a Magistrate has power to commit the accused to sessions after he has once discharged the accused.)
 (‘73) 20 Suth W R Cr 47 (48), *Kistoram Mohara v. Anis*. (Accused discharged by joint Magistrate — Magistrate of the district on petition presented to him, remanding case and directing Magistrate to proceed with the case—Order held not illegal — Held, he could have received complaint and made it over to subordinate Magistrate, to be heard.)
 (‘01) 28 Cal 211 (216, 217) : 5 C W N 169, *Queen-Empress v. Dolegobind Dass*. (Discharge of accused — Re-arrest and commitment of accused without previous order of discharge being set aside—Commitment held good.)
 (‘01) 28 Cal 652 (658): 5 C W N 457 (FB), *Dwarka Nath v. Beni Madhab*. (Presidency Magistrate is competent to re-hear a warrant case in which he has discharged the accused.)
 (‘02) 29 Cal 726 (732, 735) : 6 C W N 633 (FB), *Mir Aliwad Hossein v. Mahomed Askari*. (28 Cal 652, applied.)
 (‘12) 13 Cr. L. J. 488 (488) : 40 Cal 71 : 15 Ind Cas 488, *Emperor v. Idoo*. (Magistrate has jurisdiction to adjudicate on any information laid before him against an accused person who is discharged by the High Court.)
 (‘18) AIR 1918 Cal 485 (486): 18 Cr. L. J. 886, *Umesh Chandra v. Satish Chandra*.
 (‘68) 1868 Pun Re No. 32 Cr, p. 90 (99, 100), *Sekunder Khan v. Crown*.
 (‘74) 7 Mad H C R App xl (xl) : 2 Weir 258. (Magistrate examining some witnesses and discharging accused—On learning that there is one more witness, cancelling order of discharge and after taking evidence, committing accused to sessions — Commitment held good.)
 (‘06) 3 Cr. L. J. 274 (280): 29 Mad 126, *In re Chinna Kaliappa Goundan*. (Magistrate can re-hear complaint previously dismissed by him under S. 203.)
 (‘93-1900) 1893-1900 Low Bur Rul 169 (172, 173), *Queen-Empress v. Nga O Bok*.
 [See (‘38) AIR 1938 Pat 99 (102): 16 Pat 650: 39 Cr. L. J. 353, *Kunjo Chowdhry v. Emperor*. (Application under S. 476 for filing complaint rejected — Order set aside on appeal and case sent back for enquiry — Trial Court is not precluded from filing complaint after inquiry.)]
 [But see (‘97) 3 C W N 760 (761), *Simbho Ram Lall v. Kari Hazari*. (Magistrate scoring out order of dismissal as having been passed through mistake and proceeding with the case—Held, Magistrate acted without authority.)
 (‘98) 4 C W N 26 (27), *Ram Kumar v. Ramji*. (Dismissal of complaint by Presidency Magistrate—Revival by him of the same complaint held barred.)
 (‘98) 4 C W N 46 (47), *Damini Dassi v. Hurry Mohan*. (Discharge of accused by Presidency Magistrate—Revival by him of same proceedings barred.)]
Fresh prosecution not barred though order dismissing complaint or discharging accused has been confirmed by superior Court.
 (‘30) AIR 1930 Lah 879 (880): 12 Lah 9: 31 Cr. L. J. 1180, *Allah Ditta v. Karam Baksh*.
 (‘09) 9 Cr. L. J. 563 (564) : 36 Cal 415 : 2 Ind Cas 293, *Jyotindra Nath Daw v. Hem Chandra Daw*. (Dismissal of complaint—Refusal by District Magistrate to order further inquiry does not prevent the revival of the original complaint by the Magistrate who dismissed it.)
But a contrary view was taken in the following case :
 (‘28) AIR 1928 Sind 49 (50) : 21 Sind L R 127 : 28 Cr. L. J. 57, *Shah Mahomed v. Emperor*. (Discharge or dismissal of complaint confirmed by superior Court—Fresh prosecution barred.)
 (‘10) 11 Cr. L. J. 347 (348): 5 I. C. 991 (Lah), *Mohammad Yakub v. Emperor*. (Do.)

contrary view taken in some of the earlier decisions² is, it is submitted, not good law.

Where a complaint is dismissed or an accused is discharged by one Magistrate, there is a conflict of decisions as to whether *another* Magistrate of co-ordinate or inferior jurisdiction can start a fresh prosecution against the accused for the same offence. It has been held by the High Courts of Bombay,³ Madras,⁴ Rangoon⁵ and the Chief Court of the Punjab,⁶ that a fresh prosecution can be started by such Magistrate. A contrary view is held by the High Courts of Allahabad⁷

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('05) 2 Cr. L. J. 752 (753) : 28 Mad 255: 2 Weir 247, *Mohamad Abdul Menon v. Panduranga Row*. (Complaint dismissed—District Magistrate refusing to interfere—Second complaint cannot be entertained.)

See also S. 119 Note 3.

2. ('96) 23 Cal 983 (988, 989) : 1 C W N 57, *Niratan Sen v. Jogesh Chundra*.

('01) 24 Cal 286 (288) : 1 C W N 185, *Komal Chandra v. Gour Chand*.

('94) 1894 Pun Re No. 33 Cr, p. 110 (111, 112), *Jowahir Singh v. Queen-Empress*.

('78) 2 Weir 247 (247). (Dismissal of complaint by one Magistrate—Another Magistrate cannot entertain the same complaint without an order under S. 437.)

('82) 6 Mad 25 (26), *Queen v. Venguvayyanganar*. (District Magistrate has no power to revive prosecution in a case in which the accused is improperly discharged by a Court competent to try it.)

[See ('05) 2 Cr. L. J. 758 (759) : 28 Mad 310, *Chinnathambi Mudali v. Sallaguruswamy Chetty*. (Discharge without taking evidence — Fresh prosecution not barred—Discharge after taking evidence—Fresh prosecution barred.)]

3. ('25) AIR 1925 Bom 258 (259) : 26 Cr. L. J. 991, *In re Mahadev Laxman*.

('92) 16 Bom 414 (427), *Queen-Empress v. Vajiram*. (Per Telang, J.)

('84) 1884 Rat 209 (209), *Queen-Empress v. Krishna*. (One Magistrate in warrant — case discharging accused— High Court suggesting complainant to file his complaint before another Magistrate.)

4. ('32) AIR 1932 Mad 369 (371) : 55 Mad 622 : 33 Cr. L. J. 454 (FB), *Ponnuswami Goundan v. Emperor*.

[See ('16) AIR 1916 Mad 887 (887) : 16 Cri L Jour 814, *Pampalli Subbareddi v. Chauduboyigari Kamal*. (Dismissal of complaint by one Magistrate does not bar presenting a second complaint on same facts before different Magistrate.)]

5. See ('34) AIR 1934 Rang 40 (41) : 35 Cr. L. J. 802, *U Sein Ywet v. U Maung Gyi*. (Dismissal of complaint by one Magistrate does not bar prosecuting a second complaint on same facts before different Magistrate.)

6. ('11) 12 Cr. L. J. 364 (369) : 11 Ind Cas 132: 1911 Pun Re No. 10 Cr, *Emperor v. Kiru*.

[See however ('26) AIR 1926 Lah 445 (445) : 27 Cri L Jour 719, *Dhari Mal v. Emperor*. (Fresh complaint should preferably be disposed of by Magistrate by whom complaint was dismissed or accused was discharged.)]

7. (1900) 22 All 106 (108) : 1899 A W N 211, *Queen-Empress v. Adam Khan*.

('34) AIR 1934 All 87 (87, 88) : 56 All 425: 35 Cr. L. J. 1062, *Rama Nand v. Sheri*.

('27) AIR 1927 All 815 (816) : 28 Cri L Jour 536, *Nanda v. Emperor*.

[See ('15) AIR 1915 All 50 (50) : 16 Cri L Jour 73, *Mohammed v. Ali Raza*. (Magistrate who dismissed complaint had jurisdiction in case merely by reason of transfer of the case to him — Subsequent complaint instituted in the Court which alone could take cognizance of the complaint, previous Magistrate having left the district—*Held* that the entertainment of complaint was legal.)

('35) AIR 1935 All 59 (60) : 36 Cri L Jour 128, *Phonsia v. Emperor*. (Discharge —Subsequent complaint on same facts — Application for transfer—Maintainability—Procedure.)

('81) 3 All 251 (253), *Empress of India v. Tika Singh*. (Discharge of accused does not bar revival of prosecution for the same offence but it can only be revived in the Court in which it could legally be instituted.)]

[See however ('35) AIR 1935 All 60 (63) : 56 All 990 : 35 Cri L Jour 1485, *Kunji Lal v. Emperor*. (Same Magistrate entertaining second complaint can transfer it to another Magistrate for disposal.)]

[But see ('26) AIR 1926 All 298 (298) : 27 Cri L Jour 383, *Puran v. Emperor*. (Complaint dismissed —Order of dismissal not set aside—Second complaint on same facts can be entertained by different Magistrate. 22 All 106, not followed.)]

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and Calcutta⁸ and by the Judicial Commissioner's Court of Sind⁹ on the ground that it would be contrary to sound principle to allow one Magistrate to practically displace the orders of another Magistrate of equal rank and powers. It is submitted that there is no warrant for limiting the effect of the words of the explanation in this way. It has also been held by a Full Bench of the Sind Judicial Commissioner's Court that where a complaint has been dismissed for *default*, there is no bar to the entertainment of a fresh complaint by the same Magistrate or by his successor in office or by some other Magistrate of co-ordinate jurisdiction.¹⁰

It is settled that the *successor* of the Magistrate by whom a complaint was dismissed or an accused was discharged can start proceedings against the accused afresh.¹¹ See also S. 559.

Whether it is the same Magistrate or a different Magistrate before whom proceedings against an accused are sought to be re-commenced, the Magistrate has a discretion in the matter;¹² he ought not to start a fresh prosecution in the absence of exceptional circumstances.¹³

8. ('97) 24 Cal 528 (531, 532) : 1 C W N 370, *Grish Chandra Roy v. Dwaraka Das Agarwallah*.

9. ('40) AIR 1940 Sind 15 (16) : 41 Cri L Jour 248, *Umar Ahmad v. Emperor*. ('39) AIR 1939 Sind 38 (39) : 40 Cr. L. J. 297 : 1 L R (1939) Kar 228, *Chellomal v. Keralmal Jeramdas*.

('22) AIR 1922 Sind 23 (24) : 15 S L R 131 : 23 Cr. L. J. 737, *Chandi Ram v. Emperor*. ('29) AIR 1929 Sind 61 (61) : 23 Sind L R 43 : 29 Cri L Jour 1097, *Mt. Tirathbai v. Mt. Sugribai*.

('29) AIR 1929 Sind 242 (243) : 31 Cr. L. J. 687, *Emperor v. Alias*.

10. ('39) AIR 1939 Sind 193 (195, 196) : 40 Cr L J 745 : ILR (1940) Kar 74 (FB), *Mt. Harbai v. Raja Premji*. (AIR 1929 Sind 61 overruled so far as cases of dismissal of complaint for default are concerned.)

11. ('25) AIR 1925 Nag 432 (433) : 26 Cri L Jour 1040, *Ashgar Ali v. Akbar Ali*. (First complaint before Magistrate A only because Magistrate D who had jurisdiction was on leave—Complaint dismissed—Second complaint before Magistrate D held maintainable.)

('14) AIR 1914 All 79 (80) : 36 All 129 : 15 Cri L Jour 158, *Rambharos v. Baban*. (Complaint forwarded to Magistrate dismissed—Another complaint on same facts to same Magistrate—Magistrate succeeded by another—Successor, held, not precluded from issuing process and entertaining complaint.)

('20) AIR 1920 Pat 523 (524) : 21 Cri L Jour 660, *Sheo Gobind Singh v. Emperor*.

('34) AIR 1934 All 514 (515) : 35 Cri L Jour 1059, *Lallain v. Emperor*.

('34) AIR 1934 All 87 (88) : 56 All 425 : 35 Cri L Jour 1062, *Rama Nand v. Sheri*. (Obiter.)

('20) AIR 1920 All 267 (267, 268) : 21 Cri L Jour 815, *Mohan Singh v. Emperor*.

12. See S. 190 Note 17.

13. ('36) AIR 1936 Lah 47 (48) : 37 Cri L Jour 427, *Chaman Lal v. Emperor*.

('30) AIR 1930 Lah 879 (880) : 12 Lah 9 : 31 Cri L Jour 1180, *Alla Ditta v. Karam Baksh*.

('18) AIR 1918 Mad 494 (495) : 18 Cri L Jour 329, *In re Koyassan Kutty*. (Unless strong grounds are made out, person once discharged should not be harassed again for the same charge.)

('22) AIR 1922 Pat 372 (375) : 23 Cri L Jour 236, *Bisoram v. Emperor*. (Fresh prosecution cannot be started unless there are new materials before the Magistrate which were not before him formerly.)

('25) AIR 1925 Rang 114 (115) : 26 Cri L Jour 284, *U Shwe Kyaw v. Mt. Shin Bwin*. (Fresh complaint cannot be entertained unless new facts, not available previously, are adduced or manifest error or miscarriage of justice has occurred in previous proceedings.)

('04) 1 Cri L Jour 867 (869) : 1904 Upp Bur Rul Cr Pro Code 19, *Mi The Kin v. Nga E Tha*. (Do.)

As to whether the *same* case can be re-opened, see notes under section 369.

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Notes 13-14

14. "Discharge" — Meaning of. — It has been seen in Note 13 that a discharge of an accused is not an acquittal for the purposes of this section.

Where on a complaint of a major offence the Magistrate frames a charge only for a minor offence, his action has been held to amount to a discharge of the accused in regard to the major offence.¹ Where an

- (‘05) 2 Cri L Jour 651 (653) : 1 Nag L R 18, *Maknatambi v. Hasanali*. (In entertaining second complaint proper discretion should be exercised so that injustice should not be done to the parties.)
- (‘06) 4 Cr. L. J. 59 (60) : 3 A L J 562 : 29 All 7, *Emperor v. Mcharban Hussain*. (Magistrate to whom second complaint is made may take into consideration the fact that a previous complaint was preferred and dismissed.)
- (‘08) 8 Cri L Jour 249 (249) (Lah), *Behari Lal v. Emperor*. (Magistrate on receiving second complaint should form an independent opinion whether *prima facie* case is established for investigation by the Court.)
- (‘11) 12 Cri L Jour 364 (369) : 11 I. C. 132 : 1911 Pun Re No. 10 Cr (FB), *Emperor v. Kiru*. (Where circumstances make the order of discharge equivalent to one of acquittal, no further proceedings should be taken against accused.)
- (‘87) 2 C P L R 82 (85, 86), *Empress v. Bhawagan Malce*. (Magistrate taking up case of accused, discharged by his predecessor and convicting him on evidence rejected by the predecessor would be acting wrongly.)
- (‘87) 1887 Rat 350 (352), *Queen-Empress v. Bapuda*. (Magistrate is bound to exercise due discretion and take the previous discharge into consideration and avoid oppressive proceedings.)
- (‘32) 33 Cri L Jour 493 (495) : 137 Ind Cas 520 (Lah), *Mohamad Din v. Mehatab Din*. (Second complaint can be entertained only where previous order was passed on incomplete record or it was manifestly perverse or foolish.)
- (‘29) 30 Cri L Jour 444 (444) : 115 Ind Cas 309 (Sind), *Parsram Bhagwan Das v. Emperor*. (Fresh complaint based on same facts and involving same evidence available at the previous trial should not be entertained.)
- (‘29) AIR 1929 Sind 242 (243) : 31 Cri L Jour 687, *Emperor v. Alias*. (Do.)
- (‘10) 11 Cri L Jour 582 (582) : 4 Sind L R 52 : 8 I. C. 202, *Mohammad Hassim v. Emperor*. (Sound judicial discretion should be exercised in proceeding with the second complaint.)
- (‘25) AIR 1925 Bom 258 (259) : 26 Cr. L. J. 991, *In re Mahadev Laxman*. (There is a compelling duty on the complainant while making his second complaint to inform the Magistrate that a previous similar complaint was dismissed so that Magistrate may exercise greater care in dealing with the case.)
- (‘14) AIR 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cr. L. J. 174, *Bulchand Tahilram v. Ghandhoomal*. (That previous complaint was dismissed under S. 259 is not sufficient ground for refusing to entertain second complaint though it may give an additional ground for refusing to proceed upon the complaint.)
- (‘25) AIR 1925 Cal 104 (104) : 25 Cr. L. J. 311, *In re Easatulla*. (Person discharged and examined as witness in case against accomplice — Trial again is unfair.)
- [See (‘29) AIR 1929 Bom 134 (134) : 30 Cr. L. J. 594, *Emperor v. Amanat Kader*. (Magistrate exercising due discretion in proceeding to inquire into merits of the second complaint.)
- (‘29) AIR 1929 Lah 544 (544), *Budh Singh v. Mt. Soman*. (Complainant failing to prove his alleged marriage with accused — Complaint dismissed—Another complaint cannot be entertained.)]

Note 14

- (‘01) 24 Mad 136 (139, 140, 146) : 2 Weir 544, *Krishna Reddy v. Subbamma*. (‘29) AIR 1929 All 940 (940) : 30 Cr. L. J. 1153, *Abdul Rashid v. Harish Chandra*. (Not framing charge under particular section amounts to discharge—Prosecution for offence under S. 353, Penal Code — Conviction for offence under S. 186.)
- (‘20) AIR 1920 Mad 94 (95) : 43 Mad 330:21 Cr. L. J. 91, *In re Gandi Apparazu*. (Police charging accused under Ss. 147, 325 and 323, Penal Code—Evidence pointing to an offence under S. 304—Accused acquitted of offence under S. 147—Sessions Judge directing commitment under S. 304, Penal Code — Commitment legal—Accused held must be deemed to have been impliedly discharged for offence under S. 304.)

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Notes 14-18

offence triable as a warrant-case is tried as a summons-case and the accused has been acquitted, it has been held that the order only amounts to a discharge.² See also the undermentioned cases.³

15. General Clauses Act, Section 26. — Sub-section (5) of this section provides *inter alia* that nothing in this section shall affect the provisions of S. 26 of the General Clauses Act. That section runs as follows :

“Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.”

The effect of this is not to authorise or prohibit a *second prosecution* of a person in any case. The section only means that at *one and the same trial* a person may be charged under the different enactments under which his act may be punishable provided that he is not punished twice for such act.¹ (Compare S. 235, sub-s.(2) of this Code and S. 71 of the Penal Code.)

(‘32) AIR 1932 Nag 85 (85) : 33 Cri L Jour 558, *Ramrao v. Emperor*. (Charge under S. 366, I. P. C. — Evidence disclosing offence under S. 376 — Application to amend charge rejected—Order amounts to discharge of offence under S. 376.)

(‘25) AIR 1925 Sind 190 (191) : 19 Sind L R 353 : 25 Cri L Jour 1368, *Khanu v. Emperor*. (Prosecution for offences under Ss. 424 and 506(2), Penal Code—Application by complainant to frame charge under S. 395 and commit accused—Magistrate declining to entertain applications—Implied discharge of offence under S. 395.) [See (‘26) 27 Cr. L. J. 615 (615, 616) : 94 I. C. 359 (All), *Yad Ram v. Emperor*. (Magistrate refraining from framing charge for offence under a particular section — Subsequent trial for same offence not barred.)]

[But see (‘03) 5 Bom L R 125 (126), *Emperor v. Zuji Manudibrit*. (Where a contrary view was assumed.)]

See also S. 209 Note 6; S. 253 Note 4 and S. 437 Note 8.

2. (‘88) 1888 All W N 96 (97) *Empress v. Lajja Ram*.

(‘86) 1886 All W N 260 (260), *Empress v. Jadu*.

[But see (‘80) 3 All 129 (131), *Empress of India v. Gurdū*. (Mere failure to frame charge does not invalidate acquittal and convert it into discharge.)]

See also S. 245 Note 5 and S. 251 Note 3.

3. (‘34) AIR 1934 All 944 (945) : 36 Cri L Jour 202, *Nazir Ahmad v. Emperor*. (For the purposes of this section there is no distinction between discharge after taking prosecution evidence and discharge before.)

(‘67) 8 Suth W R Cr 41 (41), *Queen v. Nectie*. (Magistrate used the words acquittal and release when he intended only to discharge a person accused of an offence not triable by him—Held Sessions Court could order commitment of such person.)

(‘75) 1 Bom 64 (65, 66), *Reg. v. Devama*. (Non-compoundable case dismissed on parties coming to amicable settlement—Order of dismissal amounts to discharge.)

(‘33) AIR 1933 Mad 98 (99) : 34 Cr. L. J. 12, *Musalayya v. Ranga Rao*. (Accused tried for offence triable as warrant-case on complaint by police — Before charge framed case withdrawn but order of acquittal passed — Order of acquittal was virtually one of discharge and did not bar subsequent trial for same offence.)

(‘19) AIR 1918 Mad 371 (373):41 Mad 727:19 Cr. L. J. 613, *Raghuvalu Naicker v. Singaram*. (Case under S. 352 (summons-case) and S. 504 (warrant-case) — Complainant absent—Accused discharged—Discharge does not operate as acquittal with reference to offence under S. 504.)

Note 15

1. (‘03) 6 Oudh Cas 153 (157), *Raghubar Dayal v. King-Emperor*.

It is submitted that the following decisions which have proceeded on the footing that the question of a subsequent trial being barred or not may come within the purview of S. 26, General Clauses Act, have not approached the question from the correct point of view :

(‘35) AIR 1935 Pesh 18 (19) : 36 Cri L Jour 813, *Arsala Khan v. Emperor*.

(‘33) AIR 1933 All 461 (463) : 34 Cri L Jour 1018, *Reoti v. Emperor*.

The effect of sub-s. (5) is to enact that the above provision which enables a person being proceeded against at the *same trial* under different enactments in regard to the same act is not affected by the prohibition of a *fresh trial* in respect of such act which this section contains.

15a. Section 188 of the Code. — Sub-section (5) of this section provides *inter alia* that nothing in this section shall affect the provisions of S.188 of the Code. The second proviso to that section provides that the trial of a person under the section in British India for an offence committed out of British India will preclude *extradition proceedings* being taken against him for the same offence. This section precludes only a *fresh trial* of a person on the same facts in the circumstances stated in the section. The object of this sub-section is to provide that the fact that only a *fresh trial* is barred under this section does not affect the bar of *extradition of proceedings* created by section 188.

16. Practice. — A plea of bar under this section can be raised at any stage of the case.¹ The plea can be raised even in revision,² though the proper time to take it is when the accused is called upon to plead.^{2a} The burden of proving the facts necessary to establish the plea is on the accused.³ When a plea of bar is raised under this section, it must be determined after hearing the evidence and ascertaining what the facts are in the two cases.⁴ It cannot be constructively decided.⁵

(‘16) AIR 1916 Pat 86 (86) : 1 Pat L Jour 373 : 18 Cr. L. J. 321, *Rahamatullah v. Emperor*. (When one act constitutes two offences separate punishments can be inflicted only if both offences are against same law—S. 26 makes the point more clear.)

(‘32) AIR 1932 Mad 537 (537) : 33 Cri L Jour 629, *President, Panchayat Board, Velgode v. Chinna Venkata*. (S. 26 has no application if offences are distinct.)

Note 16

1. (‘36) AIR 1936 Mad 353 (357, 363) : 37 Cr.L.J. 637 (FB), *Emperor v. John McIver*.
(‘14) AIR 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cr. L. J. 460, *Emperor v. Nirmal Kanta Roy*. (Before verdict in any form is given.)

(‘28) AIR 1928 Pat 577 (579) : 29 Cr.L.J. 760, *Chhanu Prasad Singh v. Emperor*.

2. (‘34) AIR 1934 All 877 (878) : 35 Cri L Jour 1177, *Ali Bux v. Emperor*.

(‘21) AIR 1921 Sind 137 (138) : 16 Sind L R 1 : 23 Cri L Jour 305, *Emperor v. Menghraj Devidas*. (Objection to trial can be taken notice of by High Court in revision of its own motion.)

(‘35) AIR 1935 Nag 23 (25), *Jagannatha Rao v. Emperor*. (Do.)

2a. (‘36) AIR 1936 Mad 353 (357, 363) : 37 Cr. L. J. 637 (F B), *Emperor v. John McIver*.

3. (‘28) AIR 1928 Pat 577 (579) : 29 Cri L Jour 760, *Chhanu Prasad v. Emperor*.

(‘15) AIR 1915 Mad 315 (315) : 15 Cri L Jour 672, *Appalaswami v. Emperor*.

4. (‘19) AIR 1919 Cal 57 (57) : 20 Cr.L.J. 572, *M. N. Mukherjee v. Matangi Charan*.

(‘20) AIR 1920 Cal 972 (973) : 22 Cri L Jour 67, *Radha Kishen v. Fateh Chand*.

5. (‘36) AIR 1936 Mad 353 (364) : 37 Cr.L.J. 637 (FB), *Emperor v. John McIver*.
(Per Mockett, J.)

PART VII.

OF APPEAL, REFERENCE AND REVISION.

CHAPTER XXXI.

OF APPEALS.

Section 404

404.* No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Unless otherwise provided, no appeal to lie.

Synopsis

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|--------------------------------------|--|
| 1. Right of appeal. | 5. Appeal and revision. See S. 439. |
| 1a. Forum of appeal. | 6. Withdrawal of appeal. See S. 423. |
| 2. Appeal to Privy Council. | 7. Death of appellant—Abatement of appeal. See S. 431. |
| 2a. Appeal to Federal Court. | 8. Transfer of territory and appeal, forum. See S. 1. |
| 3. Limitation. See Note 9 to S. 419. | |
| 4. "By any other law." | |

Other Topics (miscellaneous)

- | | |
|---|---|
| Appeal — Continuation of trial. See Note 1. | Right of appeal — Expressly to be given by statute and not by implication. See Notes 1 and 4. |
| Appellate Court's powers same as original. See Note 1. | Right of appeal subject to conditions. See Note 1. |
| Interlocutory order non-appealable. See Note 1. | Right of appeal under rule-making power. See Note 4. |
| Judgment, order, conviction and sentence—Meaning. See Note 1. | Section 428 not applicable to S. 250. See Note 1. |
| Letters Patent — Leave to appeal. See Note 2. | Sections 250, 486, 515, 524 and 562. See Note 1. |
| Power of superior Court to cancel or vary—No right of appeal. See Note 1. | Sections 476, 486, 195 and procedure. See Note 1. |
| Procedure for appeals under special or local law. See Note 4. | "Sentences final" — No appeal. See Note 4. |
| Procedure in appeals. See Note 1. | Transfer—Appeal not lost. See Note 1. |

1. Right of appeal. — A right of appeal is not a natural or inherent right. It must be expressly given by statute.¹ It cannot arise

* 1882 : S. 404 ; 1872 : S. 282, para. 2 and S. 286, illustrations ;
1861 : S. 414.

Section 404 — Note 1

1. ('39) AIR 1939 F C 43 (45) : 40 Cr.L.J. 468 : I L R (1939) Kar (FC) 132 : 1939 F C R 159 : I L R (1940) Lah 400 (F C), *Hori Ram Singh v. Emperor*.
('37) AIR 1937 Cal 413 (413) : I L R (1937) 1 Cal 123 : 38 Cr. L. J. 876, *Kali Kumar Mitter v. Emperor*.
('13) 40 Cal 21 (27) : 6 Low Bur Rul 150 : 16 I. C. 188 : 39 I A 197 (PC), *Rangoon Botatoung Co., Ltd. v. Collector of Rangoon*.
('87) 11 Mad 26 (34) : 14 Ind App 160 : 5 Sar 54 (P C), *Minakshi Naidu v. Subramanya Sastri*.
('15) AIR 1915 Mad 831 (832) : 39 Mad 539 : 16 Cr. L. J. 303, *Adur v. Emperor*.
('25) AIR 1925 All 380 (382) : 47 All 513 (FB), *Abdul Rahman v. Abdul Rahman*.
('05) 2 Cri L Jour 329 (330, 331) : 1905 A W N 135 : 2 A L J 716, *In the matter of the petition of Chet Ram*. (Before S. 406 was amended in 1923, there was no right of appeal from an order under S. 118 requiring security to keep the peace.)
('92) 15 All 61 (62) : 1892 A W N 242, *Mehdi Hasan v. Tota Ram*. (The word 'appeal' in Ss. 195 and 439, Criminal P. C., does not grant an appeal—It is only intended to designate the Court in question.)
('73) 19 Suth W R Cr 53 (54), *Belilios v. Queen*.

by implication.² Thus, the existence of a power in a superior Court to cancel or vary an order of a subordinate Court, as for instance, under S. 125,³ or under S. 195, sub-s.(6), as it stood before 1923,⁴ or under S. 123, sub-s.(2),⁵ cannot be construed as giving a right of appeal in such cases.

Where a right of appeal is given by statute subject to certain conditions and limitations, the right cannot be enlarged so as to nullify such conditions or limitations.⁶ A right of appeal duly conferred on a

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- ('98) 25 Cal 630 (636) : 2 C W N 225, *Ram Chandra Mistry v. Nobin Mirdha*. (No appeal from an order under S. 522, Criminal P. C.)
- ('91) 1891 All W N 48 (51) : 13 All 171 (FB), *Queen-Empress v. Pohpi*.
- ('99) 21 All 181 (182) : 1899 A W N 15, *In the matter of the petition of Madho Ram*. (No appeal from order under S. 36, Legal Practitioners Act.)
- ('86) 10 Bom 258 (263, 264), *Queen-Empress v. Mangal Tekchand*. (By the Aden Act, II of 1864, S. 29, no appeal lies from an order or sentence of the resident at Aden in any criminal case — The High Court of Bombay, being doubtful if this provision applied to the island of Perim, admitted appeal from death sentence of the Resident who was a Sessions Court subject to the High Court of Bombay.) [See ('81) 2 Weir 308 (309), *In re Narayanaswami*. (No appeal is allowed against an order of dismissal of complaint.)
- ('05) 2 Cri L Jour 24 (26) : 1905 A W N 19 : 2 A L J 64 : 27 All 415, *Mauki v. Bhagwanti*. (No appeal from an order under S. 522, Criminal P. C.)
- ('12) 13 Cr. L. J. 782 (782) : 17 I. C. 414 (All), *Syed Itaf Husain v. Emperor*. (Order of transfer by Sub-divisional Magistrate under S. 528 — Appeal to District Magistrate not maintainable.)
- ('11) 12 Cri L Jour 322 (322) : 38 Cal 547 : 10 Ind Cas 618, *Rudolf Stallman v. Emperor*. (A Magistrate acting under the Extradition Act is not subject to any appellate or revisional jurisdiction.)
- ('09) 9 Cr. L. J. 306 (307) : 1 I. C. 506 : 1909 Pun Re No. 1 Cr, *Hale v. Emperor*. (Appeal is not competent from the judgment of a Single Judge on original side.)
- ('09) 9 Cri L Jour 59 (60) : 1 Ind Cas 143 : 31 All 59, *In re Kedar Nath*. (No appeal from order under S. 36, Legal Practitioners Act.)
- [See however ('78) 2 All 53 (54), *Empress of India v. Nadua*. (The High Court in this case, though doubtful whether the law allows an appeal entertained an appeal, relying on the practice of the Court.)]
2. ('32) AIR 1932 Sind 88 (89) : 26 S. L. R. 200 : 33 Cr. L. J. 898, *Emperor v. Nim*. (1891 A C 211, followed.)
- ('15) AIR 1915 Mad 831 (832) : 39 Mad 539 : 16 Cr. L. J. 303, *Abdur v. Emperor*.
3. ('14) AIR 1914 Mad 613 (619) : 14 Cr. L. J. 546 (552, 554) : 37 Mad 125 (FB), *Mare Gowd v. Emperor*. (Power under S. 125 is larger than appellate or revisional.)
- ('13) 35 All 103 (104) : 18 I. C. 351 : 14 Cr. L. J. 63, *Banarsi Das v. Pratab Singh*.
- ('17) AIR 1917 All 428 (428) : 39 All 466 : 18 Cr. L. J. 630, *Sita Ram v. Emperor*. [But see ('78) 3 Cal 379 (381) : 1 C L R 339, *In re Captain Michell*. (Power to alter or annul under S. 520 held to imply right of appeal.)]
4. ('12) 13 Cr. L. J. 296 (296) : 14 I. C. 760 : 40 Cal 37, *Hari Mandal v. Keshav Chandra*. (Not being an appeal District Judge cannot transfer the proceeding to a Subordinate Judge under the Civil Courts Act.)
- ('12) 13 Cr. L. J. 599 (601) : 40 Cal 239 : 16 I. C. 167, *Pochay Mitay v. Emperor*. [But see ('04) 1 Cr. L. J. 7 (9) : 1904 A W N 10 : 26 All 244, *Hardeo Singh v. Hanuman Dal*. (An application under the old sub-s. (6) to S. 195 is in the nature of an appeal. N. B. — S. 476-B introduced by the Amending Act of 1923 now makes specific provision for appeal in such cases.)]
5. ('32) AIR 1932 Sind 88 (89) : 26 Sind L R 200 : 33 Cri L Jour 898, *Emperor v. Nim*. (Not being an appeal no re-trial can be ordered as if on appeal.)
6. ('37) AIR 1937 Bom 336 (336) : 38 Cr. L. J. 985, *Moti Ram v. Emperor*. (Sentence of whipping passed by Presidency Magistrate—No appeal lies to High Court.)
- ('37) AIR 1937 Cal 413 (414) : 1 L R (1937) 1 Cal 123 : 38 Cri L Jour 876, *Kalikummar Mitter v. Emperor*. (Sentence of six months' rigorous imprisonment passed by Presidency Magistrate—Co-accused bound over under S. 562—Appeal does not lie.)
- ('81) 7 Cal 447 (451), *In re Poona Churn Pal*. (Right of appeal under S. 417 is not available to a private complainant.)
- ('84) 7 Mad 218 (214) : 2 Weir 477, *Rangaswami v. Narasimulu*. (No appeal to a District Magistrate from an acquittal by a second class Magistrate—See S. 417.)

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person cannot be taken away by transfer.⁷

A right of appeal has been given not only by Ss. 405 to 418 of this chapter but also by other sections of the Code. See Ss. 250, 486, 515 and 524. The procedure to be adopted in all such appeals under the Code is that prescribed by this chapter (Ss. 419 to 431)⁸ unless any of the provisions thereof specifically restrict the application of such provisions to appeals under this chapter. Thus, S. 428 applies only to appeals under this chapter; it consequently does not apply to appeals under section 476B.⁹

The section refers to *criminal* Courts. It does not, however, follow from this that the Code deals only with the appeals from criminal Courts. Sections 476B and 486 deal with orders passed by any civil or revenue Courts. Appeals in respect of orders from such Courts are specially provided for in those sections. As to the procedure applicable to such appeals, see Ss. 195 and 476 and the undermentioned cases.¹⁰

The words judgment, order, conviction and sentence are not used in a consistent sense in this chapter, with the result that a clear and consistent scheme as to appeals cannot be evolved from the chapter.¹¹

The term "order" in this section means a final order. An *interlocutory* order is thus not open to appeal.¹² See also Note 7 to S. 417.

(196) 20 Bom 145 (145), *Queen-Empress v. Hari Savba*. (Appeal under S. 411 lies only in cases of sentences specified in it and not otherwise.)

(189) 16 Cal 799 (801), *Schein v. Queen-Empress*. (Do.)

7. (179) 4 Cal 667 (669), *Empress v. Tsit Oode*. (Judicial Commissioner of his own motion transferring a case from Sessions Court to his own Court.)

8. (21) AIR 1921 Mad 281 (282): 22 Cri L Jour 583, *Krishna Kone v. Narayana Dass*. (But Sections 407, 419, 421, 422 and 423 of Ch. XXXI apply.)

9. (28) AIR 1928 Mad 391 (392): 51 Mad 603: 29 Cr. L. J. 445, *Vannia Nainar v. Periaswami Naidu*.

[See (110) 33 Mad 90 (91): 5 I C 881: 11 Cri L Jour 280, *In re Krishna Reddy*.

10. (31) AIR 1931 Cal 3 (4): 58 Cal 402: 32 Cri L Jour 325, *Mahomed Boyetulla v. Emperor*. (Ch. 31 applies.)

(107) 5 Cri L Jour 288 (289): 30 Mad 311: 17 M L J 123: 2 M L T 84, *Rama Iyer v. Venkatachala Padayachi*. (An application for sanction to prosecute coming before District Judge on appeal from Munsif—The former cannot direct the latter to take fresh evidence.)

(31) AIR 1931 Cal 604 (605, 606): 59 Cal 68: 33 Cri L Jour 38, *Surendra Nath v. Susil Kumar*. (Civil Procedure Code applies.)

(29) AIR 1929 Cal 428 (429): 31 Cr. L. J. 750, *Mahendra Nath v. Emperor*. (Do.)

(27) AIR 1927 Cal 98 (100): 53 Cal 827: 28 Cri L Jour 92, *Nasaruddin Khan v. Emperor*. (Do.)

(27) AIR 1927 Cal 284 (284, 285): 54 Cal 355, *Hamid Ali v. Madhusudhan Das*. (Per Chotzner, J., Ch. XXXI applies; Per Duval, J., Civil Procedure Code applies.)

(13) 14 Cr.L.J. 197 (204): 19 I C 197: 40 Cal 477 (FB), *Har Prasad v. Emperor*. (When an order under S. 476, Criminal P. C., is made by a Civil Court it cannot be revised by the High Court under S. 439 but it may be revised under S. 115 of C. P. C.; but if the order is made by criminal Court, S. 439, Cr. P. C. applies.)

(28) AIR 1928 Mad 391 (392): 51 Mad 603: 29 Cri L Jour 445, *Vannia Nainar v. Periaswamy Naidu*.

11. (104) 1 Cri L Jour 543 (545): 10 Bur L R 321: 1904 Upp Bur Rul Cr. P. C. 7, *Mi Shwe v. King-Emperor*. (For example see the bearing of S. 408 on Ss. 380, 562 and 563.)

(25) AIR 1925 Cal 329 (330): 52 Cal 463: 26 Cr.L.J. 455, *Bahadur Molla v. Ismail*.

12. (26) AIR 1926 Oudh 280 (280, 281): 1 Luck 48: 27 Cri L Jour 191, *Kashi Ram v. R. L. Dikshit*.

An appeal is only a continuation of the trial¹³ and consequently the appellate Court, unless otherwise provided, has powers to do only what the lower Court could do and should have done and not to pass any order under any circumstances.¹⁴

The general tendency of the Amending Act of 1923 is to enlarge rather than curtail the right of appeal.¹⁵

Section 404
Notes 1-1a

1a. Forum of appeal. — Under ss. 407, 408, 410 and 411, the forum of an appeal is dependent on the status of the Judge by whom the trial is held. Suppose there is a change in the status of the Judge after the hearing of a case and before judgment is given: Is the forum of appeal to be determined by the Judge's status at the time of the hearing or at the time of the judgment? On this question there is a conflict of decisions. According to the Allahabad High Court,¹ the judgment does not form part of a trial under the Code and hence the Judge's status at the time of the hearing and not at the time of the judgment determines the forum of appeal. The Calcutta High Court also holds the same view.² But the Sind Judicial Commissioner's Court has held that the status of the Judge at the time of the judgment determines the forum of appeal.³ The decision proceeds on the ground that as under this section an appeal lies from a judgment or order and not from a trial, it is the Judge's status at the time of the judgment that determines the forum of the appeal. But with regard to this point, the Allahabad High Court thinks that this section only indicates that an appeal is to lie from a judgment or order and has nothing to do with the forum of an appeal.⁴

13. ('14) AIR 1914Mad258(259) : 37Mad119 : 15Cr.L.J.180, *Bali Reddy v. Emperor*. ('96) 23 Cal 975 (977), *Queen-Empress v. Jabanulla*.

('32) AIR 1932 Nag 121 (123) : 23 Nag LR 233 : 33 Cr. L. J. 849 (FB), *Mohammadi Gul Rohilla v. Emperor*. (Appeal by the convict and appeal by the Government is continuation of the original trial.)

See also S. 403 Note 7.

14. ('11) 12 Cri L Jour 444 (445, 446) : 11 I. C. 788 : 7 Nag L R 109, *Sita Ram v. Emperor*. (Appellate Court cannot inflict a greater punishment than the lower Court.)

('06) 29 Mad 190 (191) : 3 Cr. L. J. 461, *Muthia Chetty v. Emperor*. (Case under the Code of 1882 under which appellate Court had no power to require security; but under the present Code that Court has such power.)

('08) 7 Cr. L. J. 224 (226) : 12 C W N 438, *Bansi Lal v. Emperor*. (S. 191 applies in case of appeals also.)

('89) 12 Mad 451 (453) : 1 Weir 113, *Queen-Empress v. Subbappa*. (Accused cannot be examined as a witness in criminal appeal.)

15. ('25) AIR 1925 Cal 329 (331) : 52 Cal 463 : 26 Cr. L. J. 455, *Bahadur Molla v. Ismail*. (e. g. Ss. 406, 406A, 415A, 418 (2) and 563 (4).)

Note 1a

1. ('38) AIR 1938 All 102 (106) : ILR (1938) All 157 : 39 Cr. L. J. 345, *Bakshi Ram v. Emperor*. (Trial by Assistant Sessions Judge — Judge made Additional Sessions Judge before judgment — Appeal lies to Sessions Judge under S. 408 and not to High Court.)

2. ('32) AIR 1932 Cal 460 (461) : 33 Cr. L. J. 516, *Baramaddi v. Magorali*. (Trial while Magistrate holding second class powers — First class powers given before judgment — Appeal lies to District Magistrate under S. 407.)

3. ('37) AIR 1937 Sind 22 (22, 23) : 38 Cri-L Jour 350 : 30 S. L. R. 456, *Jalal v. Emperor*. (Trial by Assistant Sessions Judge — Judgment in capacity of Additional Sessions Judge — Appeal lies to High Court.)

4. ('38) AIR 1938 All 102 (105, 106) : ILR (1938) All 157 : 39 Cri L Jour 345, *Bakshi Ram v. Emperor*.

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Note 2

2. Appeal to Privy Council. — The Criminal Procedure Code does not provide for any appeal to the Privy Council.¹ In fact, the Privy Council is not a Court of criminal appeal for India.² But under the relevant clauses of the Letters Patent granted to the various Chartered High Courts, such Courts can grant leave to appeal to the Privy Council in certain cases.³ Under those clauses of the Letters

Note 2

1. See ('33) AIR 1933 Nag 216 (216) : 29 Nag L R 340 : 34 Cri L Jour 934, *Zaprya Kondba v. Emperor*.
2. ('39) AIR 1939 Cal 682 (685) : ILR (1939) 1 Cal 187 : 41 Cri L Jour 59, *C. B. Plucknett v. Emperor*.
- ('38) AIR 1938 P C 130 (135) : 39 Cri L Jour 452 : 65 I A 153 : 32 S. L. R. 476 : ILR (1938) 2 Cal 295 (PC), *Babulal Chowkhani v. Emperor*.
- ('37) AIR 1937 P C 179 (180) : 38 Cri L Jour 573 : 64 I A 134 : ILR (1937) Lah 371 : 31 S. L. R. 300 (PC), *Mangal Singh v. Emperor*.
- ('36) AIR 1936 P C 169 (170) : 37 Cri L Jour 628 (PC), *Attygalle v. The King*. (Case from Ceylon.)
- ('36) AIR 1936 P C 199 (200) : 37 Cri L Jour 833 : 17 Lah 488 (PC), *Inayat Khan v. Emperor*.
- ('36) AIR 1936 PC 253 (253) : 38 Cri L Jour 415 (PC), *Nazir Ahmed v. Emperor*.
- ('35) AIR 1935 Rang 214 (215) : 13 Rang 141 : 36 Cri L Jour 1232, *H. W. Scott v. Emperor*.
- ('31) AIR 1931 P C 111 (111) : 58 I A 169 : 12 Lah 280 : 32 Cri L Jour 727 (PC), *Bhagat Singh v. Emperor*.
- ('30) AIR 1930 P C 57 (58) : 11 Lah 192 : 31 Cri L Jour 378 : 57 I A 71 (PC), *Atta Mohammad v. Emperor*.
- ('25) AIR 1925 PC 59 (60) : 48 Bom 515 : 26 Cri L Jour 391 (PC), *Rustom v. Emperor*.
- ('25) AIR 1925 P C 130 (131) : 6 Lah 226 : 52 I A 191 : 26 Cri L Jour 1059 (PC), *Begu v. Emperor*.
- ('22) AIR 1922 P C 162 (162) : 23 Cri L Jour 743 (PC), *Muruga Goundan v. Emperor*.
- ('21) AIR 1921 P C 29 (30) : 2 Lah 34 : 48 I. A. 96 : 22 Cri L Jour 129 (PC), *Kali Nath v. Emperor*.
- ('19) AIR 1919 P C 31 (38) : 43 Mad 146 : 46 I. A. 176 : 20 Cri L Jour 593 (P C), *Annie Besant v. Advocate-General of Madras*.
- ('19) AIR 1919 P C 108 (108) : 20 Cri L Jour 799 (PC), *Bugga v. Emperor*.
- ('17) AIR 1917 P C 25 (26) : 44 Cal 876 : 44 I. A. 137 : 13 Nag L R 100 : 18 Cr. L. J. 471 (PC), *Dal Singh v. Emperor*.
- ('15) AIR 1915 P C 29 (30) : 42 Ind App 133 : 16 Cr. L. J. 494 : 42 Cal 739 (PC), *Bal Mukund v. Emperor*.
- ('13) 15 Cri L Jour 144 (144) : 22 I C 496 : 41 Cal 568 : 40 I. A. 241 (PC), *Clifford v. Emperor*.
- (1864) 1 Suth W R P C 13 (13) : 9 M I A 168 : 1 Moo P C (N S) 272 : 1 Sar 860 : 1 Suther 481 (P C), *In re Joy Kissen Mookerjee*.
- (1846) 3 M. I. A. 468 (484, 485) : 5 Moo P C 276 : 1 Sar 305 (PC), *Queen v. Eduljee Byramjee*.
- ('35) AIR 1935 Mad 793 (793) : 37 Cr. L. J. 64 (SB), *Ramanuja Iyengar v. Emperor*. [See ('30) AIR 1930 P C 201 (202) : 31 Cr. L. J. 701 (PC), *Benjamin v. Emperor*. (Case from Ashanti, Eastern Provinces.)]
3. See Letters Patent : All., Cl. 32; Bom., Mad. and Cal., Cl. 41; Lah., Cl. 31; Nag; Cl. 31; Pat., Cl. 33 and Rang., Cl. 39.
- ('39) AIR 1939 Cal 682 (684) : ILR (1939) 1 Cal 187 : 41 Cr. L. J. 59, *C. B. Plucknett v. Emperor*. (High Court will grant application for leave in very special and exceptional circumstances—Misdirection to jury is not itself sufficient.)
- ('35) AIR 1935 Mad 793 (793) : 37 Cri L Jour 64 (SB), *Ramanuja Ayyangar v. Emperor*. (Petition for leave to appeal to Privy Council—Important point of law reserved for decision of High Court—Petition is competent.)
- ('35) AIR 1935 Rang 214 (214) : 13 Rang 141 : 36 Cri L Jour 1232, *H. W. Scott v. Emperor*. (Accused convicted by High Court on unanimous verdict of jury—Application under Cl. 39, Letters Patent for leave to appeal lies — Tests in determining whether case falls within Cl. 39 mentioned.)

Patent, the High Courts have to declare that a case is a fit one for appeal to the Privy Council. They have, therefore, to satisfy themselves whether the case falls within the limits prescribed by the Privy Council for the entertainment of appeals in criminal matters.⁴ The Privy Council may also grant special leave in special cases.⁵ In any case, the Privy Council will not interfere with the course of criminal proceedings in British India unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.⁶

('33) AIR 1933 Nag 216 (216):29 Nag L R 340:34 Cr.L.J. 934, *Zhaprya Kondba v. Emperor*. (A non-chartered High Court cannot grant leave. In such cases, special leave of Privy Council to be applied for. Note : Now the Nagpur High Court has got power under its Letters Patent, Cl. 31 to grant leave.)

('73) 10 Bom H C R Cr 75 (92), *Reg v. Pestonji Dinsha*. (Consideration that guide the Court in granting leave to appeal stated.)

('35) AIR 1935 Pat 66 (67) : 14 Pat 318 : 36 Cri L Jour 815, *Rahman v. Emperor*. (Limitation on the powers of Patna High Court in granting leave in Appellate Criminal Jurisdiction stated.)

('84) Oudh Sel Cas 551 (559, 560), *Reg v. Alu Paru*.

[See (1857) 7 M. I. A. 72 (92, 93) : 4 Suth WR PC 109 : 1 Suther 285 (PC), *Nga Hoong v. Queen*.]

[But see ('72) 18 Suth W R 407 (407), *In re Gooroo Das Roy*. (Leave to appeal cannot be granted by the High Court on its criminal appellate side under Cl. 39, Letters Patent, Calcutta.)

('72) 18 Suth W R 407n (407n), *In re Amcer Khan*. (Do.)]

4. ('35) AIR 1935 Mad 793 (793) : 37 Cri L Jour 64 (SB), *Ramanuja Ayyangar v. Emperor*.

5. ('39) AIR 1939 F C 43 (45) : 40 Cr. L. J. 468 : I L R (1939) Kar (FC) 132 : 1939 F. C. R. 159 : I L R (1940) Lah 400 (FC), *Hori Ram Singh v. Emperor*. (Privy Council may not grant special leave to appeal unless it be shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.)

('39) AIR 1939 Cal 682 (685) : I L R (1939) 1 Cal 187 : 41 Cri L Jour 59, *C. B. Plucknett v. Emperor*.

('36) AIR 1936 P C 160 (165) : 37 Cri L Jour 679 (PC), *D. R. Ranouf v. Attorney-General for Jersey*. (There is no Order in Council, Charter or other instrument of authority from which it can be inferred that the King's prerogative to allow an appeal, if so advised, has been taken away in criminal matters.)

('36) AIR 1936 P C 169 (170):37 Cri L Jour 628 (PC), *Attygalle v. Emperor*. (Mere fact that there has been some mistake of law does not afford sufficient ground in itself for granting special leave to appeal.)

('36) AIR 1936 P C 253 (253) : 38 Cri L Jour 415 (PC), *Nazir Ahmad v. Emperor*. (Difference between High Courts with reference to a section of this Code — Difference, of vital importance to accused—Special leave granted.)

('25) AIR 1925 P C 180 (180) : 49 Bom 455 : 26 Cri L Jour 1419 (P C), *Hanmant Rao v. Emperor*.

(1864) 1 Suth W R P C 13 (13) : 1 Moo P C (NS) 272 : 1 Sar 860 : 1 Suther 481 : 9 M. I. A. 168 (PC), *In re Joy Kissen Moolkerjee*.

('33) AIR 1933 P C 124 (125) : 34 Cri L Jour 322 : 32 Sind L R 716 (P C), *Dwarkanath Varma v. Emperor*. (If the High Court refuses, special leave may be obtained from Privy Council.)

('22) AIR 1922 P C 351 (351) : 49 Cal 845 : 49 I. A. 319 : 18 Nag L R 176 (P C), *Sankar Ganesh v. Secretary of State*. (The Board is not bound to give reasons, if it refuses leave to appeal.)

('07) 14 Bur L R 148 (PC), *Loku Nona v. The King*. (Case from Supreme Court of Ceylon.)

[See ('30) AIR 1930 P C 291 (296) (PC), *Chung Chuck v. Rex*. (It is difficult to induce the Board to advise the granting of special leave to appeal in a criminal case—Case from British Columbia.)]

6. ('17) AIR 1917 P C 25 (26) : 39 I C 311 (316) : 44 Cal 876 : 44 Ind App 137 : 13 Nag L R 100 : 18 Cr. L. J. 471 (P C), *Dal Singh v. Emperor*.

Section 404
Note 2

- (139) AIR 1939 Cal 682 (684, 685): I L R (1939) 1 Cal 187 : 41 Cri L Jour 59, *C. B. Plucknett v. Emperor*.
- (138) AIR 1938 P C 130 (130, 135) : 39 Cri L Jour 452 : 65 Ind App 158 : 32 Sind L R 476 : I L R (1938) 2 Cal 295 (P C), *Babulal Chowkhani v. Emperor*. (Merely because special leave is granted it cannot be said that the ordinary rules limiting the exercise of jurisdiction by the Privy Council in criminal matters cease to apply.)
- (137) AIR 1937 P C 108 (113): 38 Cri L Jour 503 (PC), *Alexander Kennedy v. The King*. (The proposition that in every case in which there was material for a successful challenge to the empanelling of a juror and it was not made for excusable reasons, an adverse verdict should be set aside, is ill-founded and is contrary to the well settled principles laid down by the Privy Council with regard to its intervention in criminal matters.)
- (137) AIR 1937 P C 119 (121) : 38 Cri L Jour 498 : 64 I. A. 148 : ILR (1937) Bom 711 (PC), *Fakira v. Emperor*.
- (137) AIR 1937 P C 179 (180) : 38 Cri L Jour 573 : 64 I.A. 134 : ILR (1937) Lah 371 : 31 Sind L R 300 (PC), *Mangal Singh v. Emperor*.
- (136) AIR 1936 P C 160 (168) : 37 Cri L Jour 679 (PC), *D. R. Ranouf v. Attorney-General for Jersey*. (The Board has always treated applications for leave to appeal and the hearing of criminal appeals so admitted as being on the same footing—No interference on ground of misdirection or irregularity.)
- (136) AIR 1936 P C 199 (200) : 37 Cri L Jour 833 : 17 Lah 488 (PC), *Inayat Khan v. Emperor*.
- (136) AIR 1936 P C 242 (246) : 37 Cri L Jour 914, *Mahadeo v. The King*. (Privy Council will interfere where fundamental rules of practice necessary for safe administration of justice and protection of prisoners have been neglected.)
- (136) AIR 1936 P C 289 (301): 37 Cri L Jour 963 (PC), *Stephen Seneviratne v. The King*. (Trial by jury—Irregular procedure—Judge and jury along with accused and counsel visiting scene of occurrence—Judge alone questioning some witnesses present there—Experiments performed by doctor not called as witness and not sworn—Jury divided and not sitting together at time of experiments—Proceedings held to be irregular so as to call for interference.)
- (136) 44 Mad L W 694 (695) : 1936 M W N 1248 (PC), *Sodeman v. Rex*. (Whether language used in summing up case to jury was enough clearly to bring matter home to jury is not a question of legal importance and is no ground for interference.)
- (135) AIR 1935 Rang 214 (214, 218) : 13 Rang 141 : 36 Cri L Jour 1232, *H. W. Scott v. Emperor*.
- (127) AIR 1927 P C 44 (49) : 5 Rang 53 : 54 I. A. 96 : 28 Cr.L.J. 259 (PC), *Abdul Rahman v. Emperor*.
- (132) AIR 1932 P C 234 (234, 235) : 59 I. A. 233 : 13 Lah 479 : 34 Cri L Jour 18 (PC), *Mohindar Singh v. Emperor*.
- (131) AIR 1931 P C 112 (114): 53 All 183 : 53 Ind App 152 (P C), *A Pleader v. Judges of the High Court of Judicature, Allahabad*. (No miscarriage of justice—Leave refused.)
- (131) AIR 1931 P C 111 (111) : 12 Lah 280 : 58 I. A. 169 : 32 Cr. L. J. 727 (P C), *Bhagat Singh v. Emperor*. (Leave not granted when there is no case on merits.)
- (121) AIR 1921 P C 24 (25) : 22 Cr. L. J. 174 : 44 Mad 297 : 48 Ind App 35 (P C), *Chinnayya Dhora v. Emperor*. (High Court in revision enhancing the sentence to transportation for fourteen years—Sentence unauthorized by law—Substantial injustice.)
- (111) 12 Cr. L. J. 100 (100) : 9 Ind Cas 581 (P C), *Birch v. Emperor*.
- (113) 14 Cri L Jour 577 (579) : 21 I C 369 : 36 Mad 501 : 40 Ind App 193 (P C), *Vaithinatha Pillai v. Emperor*. (Reception of inadmissible evidence and its use causing great prejudice to accused and absence of reliable evidence—Substantial injustice done.)
- (124) AIR 1924 Cal 545 (549) : 26 Cr. L. J. 52, *Barendra Kumar v. Emperor*.
- (125) AIR 1925 P C 305 (306) : 27 Cr. L. J. 228 (P C), *Shafi Ahmad v. Emperor*. (Privy Council will not interfere on the ground of misdirection to jury.)
- (114) AIR 1914 P C 116 (125, 126) : 1914 A. C. 644 : 41 Cal 1023 : 8 Low Bur Rul 16 : 41 Ind App 149 : 15 Cr. L. J. 309 (P C), *Channing Arnold v. Emperor*. (Do.)
- (113) 15 Cr. L. J. 144 (144) : 22 I C 496 : 41 Cal 568 : 40 Ind App 241 : 83 LJP C 152 (P C), *Clifford v. Emperor*. (Do.)
- (125) AIR 1925 P C 52 (53) : 6 Lah 45 : 52 Ind App 121 : 26 Cr. L. J. 1020 (P C), *Umra v. Emperor*. (Wrong interpretation of sections of Acts does not justify interference by Privy Council.)

2a. Appeal to Federal Court.—The word "judgment" in S. 205 of the Government of India Act, 1935, is comprehensive enough to include a judgment in a criminal case.¹ Hence, the Federal Court has jurisdiction in criminal as well as in civil cases.² An appeal will, therefore, lie to the Federal Court from the decision of a High Court in a criminal case.

**Section 404
Notes 2a-4.**

3. Limitation.—See Note 9 to Section 419.

4. "By any other law."—As is seen in Note 1 above, a right of appeal must be conferred expressly by a statute. If the right is created by a rule of the Government, such a rule must not be *ultra vires* of the statute conferring the rule-making power.¹ An order may be that of a criminal Court; yet there will be no appeal unless one is provided for by the statute.² There is no right of appeal when a special or

('02) 25 Mad 61 (98) : 28 Ind App 257 : 11 M L J 233 : 2 Weir 271 : 8 Sar 160 : 3 Bom L R 540 : 5 C W N 866 (P C), *Subramania Iyer v. Emperor*.

[See ('14) AIR 1914 P C 155 (162, 163) : 15 Cri L Jour 326 (P C), *Ibrahim v. Emperor*. (Practice of the Privy Council stated—Case from Hong-Kong.)

('13) 15 Cri L Jour 305 (309) : 1914 A C 221 : 23 Ind Cas 657 (P C), *Louis-Edward Lanier v. The King*. (Crown was directed to pay costs of successful appellant—Case from Seychelles.)

(1887) 12 App Cas 459 (467) : 16 Cox C C 241 : 56 L T 615 : 36 W R 81, *In re Dillet*. (Case from British Honduras.)

('04) 8 Cal W N xliii, *Painda Khan v. Emperor*.

('98) 22 Bom 528 (532) : 25 Ind App 1 : 7 Sar 270 (P C), *Bal Gangadhar Tilak v. Queen-Empress*.]

See also S. 297 Note 13 and Letters Patent Calcutta, Cl. 41 Note 3.

Note 2a

1. ('39) AIR 1939 F C 43 (54) : 40 Cr. L. J. 468 : I L R (1939) Kar (F C) 132 : 1939 F C R 159 : I L R (1940) Lah 400 (F C), *Hori Ram Singh v. Emperor*.

2. ('39) AIR 1939 F C 43 (44, 45) : 40 Cr. L. J. 468 : I L R (1939) Kar (F C) 132 : 1939 F C R 159 : I L R (1940) Lah 400 (F C), *Hori Ram Singh v. Emperor*. (Sulaiman J. dubious.)

Note 4

1. ('91) 15 Bom 505 (509, 511), *Queen-Empress v. Sarya*. (Bombay Government R. 44 framed under S. 3 of Act XI of 1846—Creating right of appeal to High Court from Political Agent—Held rule *ultra vires* of Act and no appeal lay—But see AIR 1916 Bom 313 where it is held that the said rule created a right of appeal—In this case 15 Bom 505 was not referred to.)

2. ('14) AIR 1914 Sind 79 (80) : 15 Cr. L. J. 372 (373) : 7 Sind L R 80, *Thairio v. Emperor*. (Order under the first part of S. 2 (1), Workman's Breach of Contract Act, to re-pay sum of money received as advance and on failure to comply with that order sentencing under the second part of S. 2 (1) of the Act to a term of imprisonment—No appeal.)

('72) 17 Suth W R Cr 11 (11), *Queen v. Boydanath Mookerjee*. (No appeal to the High Court under Act, 37 of 1855 from a conviction by the Deputy Commissioner of the Sonthal Parganas.)

('72) 17 Suth W R Cr 11 (12), *In re Mukta Bibee*. (Conviction under Contagious Diseases Act 14 of 1868, S. 11—There is no appeal from such conviction.)

('72) 1872 Pun Re No. 16 Cr, p. 21 (21), *Hayat Alakhan v. Jahana*. (A Commissioner's order refusing to impose a fine under S. 42, Act IV of 1872, not appealable.)

('95) 1 Weir 835 (835), *In re Ramanna*. (No appeal lies against an order of confiscation passed under S. 11, Opium Act, 1 of 1878.)

('70) 14 Suth W R Cr 71 (72), *Queen v. Mudhoo Dutt*. (Order of Magistrate fining defaulter under S. 25, Income-tax Act, 9 of 1869—No appeal to Sessions Court.)

Section 404
Notes 4-8

local Act lays down that sentences passed thereunder in criminal cases are *final*.³

Where a special or local law provides a special procedure in regard to appeals, such procedure will prevail over that of the Code.⁴ Otherwise the Code will be applicable.⁵ See section 5.

5. Appeal and revision. — See Section 439.

6. Withdrawal of appeals. — See Section 423.

7. Death of appellant — Abatement of appeal. — See Section 431.

8. Transfer of territory and appeal, forum. — See Section 1.

[See ('10) 11 Cr. L. J. 390 (391) : 6 I. C. 640 : 1910 Pun Re No. 14 Cr, *Bishan Das v. Emperor*. (Order of District Magistrate in trials by him as Superintendent of Hill States under orders of Local Government outside British India — No appeal to Chief Court.)]

[But see ('25) AIR 1925 Rang 12 (13) : 2 Rang 321 : 26 Cr. L. J. 289, *Mg Po Lon v. Emperor*. (Conviction under S. 6, Upper Burma Ruby Regulations — No appeal provided in the Regulation—*Held* that right of appeal and revision under Criminal Procedure Code not thereby taken away.)]

3. ('86) 12 Cal 536 (538), *Dular Dat Rai v. Nijabat Hosein*. (S. 4, Cl. (1) of Act XXXVII of 1855, Sonthal Parganas — High Court cannot exercise power of revision.)

('84) 1884 Pun Re No. 40 Cr, p. 77 (84), *Charde v. Empress*. (S. 28, Cantonments Act, III of 1880, bars an appeal in any case tried under that section.)

[See ('10) 11 Cr. L. J. 426 (427) : 6 I. C. 959 : 1910 Pun Re No. 19 Cr, *King-Emperor v. Mt. Alam Khatun*. (Sentence and order of Magistrate under S. 59, Frontier Crimes Regulation 3 of 1901 open to appeal under Criminal Procedure Code in the ordinary course—S. 60 of the Regulation prohibits appeals in certain cases.)]

[See however ('93) 1893 Rat 672 (673), *Queen-Empress v. Louis Francis*. (Under S. 35, Public Conveyances Act, no conviction under the Act shall be open to appeal—*Held* that if a person not punishable under the Act is punished, High Court can interfere in revision.)]

4. Special procedure prevails over Criminal Procedure Code — See S. 1 (2).

('28) AIR 1928 Pat 370 (372) : 7 Pat 421 : 29 Cri L Jour 420, *Krishna Prasad v. Emperor*. (Orders under S. 63, of the Chota Nagpur Tenancy Act are appealable to the officers mentioned in S. 215 of the Act and not under the Criminal Procedure Code.)

('33) AIR 1933 Bom 1 (3, 4) : 57 Bom 93 : 34 Cri L Jour 199 (SB), *Balkrishna Hari v. Emperor*. (Emergency Powers Ordinance, 1932.)

('84) 1884 Pun Re No. 40 Cr, p. 77 (84), *Charde v. Empress*, (Cantonment Act.)

('32) AIR 1932 Cal 867 (868) : 59 Cal 1248 : 34 Cri L Jour 107, *Sukumar Majumdar v. Emperor*. (Bengal Emergency Powers Ordinance (11 of 1931), S. 33—Sentence of four years—Appeal not to High Court but to a special tribunal or to Sessions Court where there is no such tribunal.)

5. ('16) AIR 1916 Lah 207 (208) : 1916 Pun Re No. 10 Cr : 17 Cri L Jour 225, *Sher Singh v. Emperor*. (Foreigners Ordinance (3 of 1914)—Offence under—Conviction by District Magistrate—Appeal lies to Sessions Court under S. 408, Cr. P. C.)

('69) 6 Bom H C R Cr 45 (46), *Reg v. Malhari Lauji*. (Appeal lies to Sessions Court from decision of Zillah Magistrate under S. 16 of the Bombay Ferries Act.)

('72) 9 Bom H C R Cr 166 (166), *Reg. v. Sadu Dadabhai*. (Case under S. 7 of Regulations XXI of 1827.)

('66) 5 Suth W R Cr 22 (23), *In re Thakoor Das*. (Conviction for an offence under Police Act, V of 1861—Appeal lies under S. 408, Cr. P. C.)

405.* Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Section 405

Appeal from order rejecting application for restoration of attached property.

1. "Ordinarily lie." — The Court to which appeals ordinarily lie is the Court to which appeals are normally and in the majority of cases provided for by the statute.¹ A subordinate Court getting only delegated jurisdiction, as for example, under S. 407, sub-s. (2) of the Code, to hear appeals is not such a Court.²

Appeal from order requiring security for keeping the peace or for good behaviour.

406.† Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—
(a) if made by a Presidency Magistrate, to the High Court;
(b) if made by any other Magistrate, to the Court of Session :

Section 406

Provided that the *Provincial Government*^a may, by notification in the *Official Gazette*,^b direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the

* 1882 : S. 405; 1872 and 1861—Nil.

† Code of 1898, original S. 406.

Appeal from order requiring security for good behaviour.

406. Any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour under S. 118 may appeal to the District Magistrate.

1882 : S. 406; 1872 : S. 267; 1861 : S. 409.

Section 405 — Note 1

1. ('87) 11 Bom 438 (440), *In re Anant Ramchandra Lotlikar*.
('95) 22 Cal 487 (489, 490), *Maduray Pillai v. H. T. Elderton*.
('19) AIR 1919 Lah 57 (59) : 1919 Pun Re No. 32 Cr: 21 Cri L Jour 210, *Emperor v. Multan Singh*. (e. g. order by District Magistrate rejecting restoration of property attached under S. 89—Appeal lies to the Sessions Court.)
[See ('16) AIR 1916 Mad 1105 (1106) : 16 Cri L Jour 439, *Ramayya v. Surayya*. (By Government Notification Appeals directed to Subordinate Judges—Held, that such Court is a Court to which appeals ordinarily lie.)]
2. ('03) 26 Mad 656 (658, 659) : 2 Weir 202 (F B), *Eroma Variar v. Emperor*. (Benson, J., dissenting.)
('04) 1 Cri L Jour 422 (424) : 27 Mad 124 (126) : 2 Weir 461, *In re Subbamma*.
('02) 30 Cal 394 (395, 396) : 7 C W N 114, *Sadhu Lall v. Ram Churn Pasi*.
[See ('12) 13 Cri L Jour 191 (192) : 39 Cal 774 (777, 778, 780) : 13 I C 1007, *Ramcharan Chandra v. Taribulla Sheikh*.]
[See however ('16) AIR 1916 Mad 1105 (1106) : 16 Cri L Jour 439, *Ramayya v. Surayya*. (If by Government Notification appeals are presentable to the subordinate Court directly such Court is one to which appeals ordinarily lie.)]

Section 406
Note 1

District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session :

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.

a. Substituted by A. O. for "Local Government."

b. Substituted by A. O. for "Local Official Gazette."

Synopsis

- | | |
|--------------------------|---------------------------------|
| 1. Legislative changes. | 3. Hearing of security appeals. |
| 2. Scope of the section. | 4. Second proviso. |

Other Topics (miscellaneous)

Appeals from Additional District Magistrate. See Note 2.	Order of Sessions Judge on reference under section 123 — Non-appealable. See Note 4.
Appeal from order of security compared with other appeals. See Note 3.	Orders under S. 106 not appealable. See Note 2.
Applicability to order for security under special or local law. See Note 2.	Re-trials in appeals under the section—S. 423—Applicability of. See Note 3.

1. Legislative changes. — The Code of Criminal Procedure (Amendment) Act, XVIII of 1923, by which this section was substituted for the old S. 406 has introduced the following changes in the law :

- (1) Under the old section there was no right of appeal in cases of orders under S. 118 read with S. 107, *i. e.* orders for security for keeping the peace.¹ The present section has conferred this right.
- (2) Even in respect of orders in good behaviour cases, there was no right of appeal from the orders of the District Magistrate or the Presidency Magistrate.² Under the present section appeals are provided from such orders to the Court of Session and the High Court.

Section 406 — Note 1

1. ('18) AIR 1918 Pat 183 (184): 19 Cri L Jour 246, *Khetrabasi Sahu v. Emperor*.
 ('16) AIR 1916 All 338 (338): 17 Cri L Jour 165, *Har Dutt v. Emperor*.
 ('17) AIR 1917 All 428 (428): 39 All 466: 18 Cr. L. J. 630, *Sita Ram v. Sita Ram*.
 ('05) 2 Cri L Jour 329 (330): 1905 A W N 135: 2 A L J 716, *In re Chet Ram*.
 ('13) 14 Cri L Jour 63 (63): 35 All 103: 18 I C 351, *Banarsi Das v. Parlab Singh*.
 ('09) 10 Cr. L. J. 375 (377,378): 3 Ind Cas 774 (Bom), *Suleman Adam v. Emperor*.
 ('05) 2 Cri L Jour 550 (551): 32 Cal 948: 9 C W N 860, *Barpachandra Dey v. Janmejy Dutt*.
 ('15) AIR 1915 Nag 113 (113): 11 Nag L R 98: 16 Cr. L. J. 555, *Emperor v. Dalli*.
 (Reason for old law stated.)
 ('20) AIR 1920 Nag 138 (138): 21 Cri L Jour 591, *Khushal v. Emperor*. (In the case of an order to keep the peace the District Magistrate's powers were limited to the cancellation of the bonds under S. 125.)
 ('24) AIR 1924 Nag 60 (61): 19 Nag L R 160: 25 Cr. L. J. 67, *Shamrao v. Emperor*.
 ('02) 1902 Pun Re No. 15 Cr, p. 41 (44): 1902 Pun L R No. 104 (FB), *Khuda Baksh v. Emperor*.
 ('66) 3 Bom H C R Cr 1 (2, 3), *Reg. v. Bhaskar K. Kharkar*.
 [See ('83) 9 Cal 878 (879), *Chand Khan v. Empress*.]
 2. ('83) 9 Cal 878 (879), *Chand Khan v. Empress*.
 ('74) 22 Suth W R Cr 68 (68), *Queen v. Nujuah*. (No appeal lies to High Court.).
 ('98) 1898 All W N 127 (128), *Empress v. Phullu*.

Section 406
Notes 1-2

- (3) Whereas under the old section appeals lay only to the District Magistrate, the present section provides appeals to Courts of Session and the High Court except where there is a Government Notification under the first proviso to the section. See Note 2 below.
- (4) The law has been made clear as to appeals in cases where proceedings are laid before a Sessions Judge under S. 123 of the Code. See Note 4 below.

2. Scope of the section. — The present section, while extending the right of appeal to orders for security for keeping the peace, confines the right only to such orders as fall under S. 118. In other words, an order under S. 106 as it is not covered by the terms of S. 118 read with S. 112 still remains non-appealable.¹ See S. 106, Note 23.

The jurisdiction to hear appeals in security cases which was vested only in the District Magistrate is now vested in the Sessions Judge and the High Court ordinarily. But power has been given to the Provincial Government by the first proviso to the section to direct that in any particular district notified in the official Gazette, appeals from subordinate Magistrates shall lie to the District Magistrate.² Before the amendment of the section, appeals from the orders of an Additional District Magistrate also lay to the District Magistrate as the former was held not to be a District Magistrate under S. 406.³ The same would appear to be the law under the present section in cases covered by the first proviso thereof.⁴

When a special or local Act empowers a Magistrate to proceed under the security sections of chapter VIII of the Code in respect of persons specified in the Act, an order by the Magistrate for furnishing security is one under S. 118 of the Code, and S. 406 applies to such an order.⁵

Note 2

1. ('35) AIR 1935 Rang 363 (363):13 Rang 287:36 Cr. L. J. 1510, *Emperor v. Nga Tun Lu*. (Order under S. 106 should not be passed with non-appealable sentence.)
- ('89) 2 Weir 460 (460), *Rowtha Goundan v. Muthuswami Goundan*. (Order to furnish security under S. 106 being no part of a sentence is not appealable.)
2. See ('32) AIR 1932 Lah 463 (463) : 13 Lah 254 : 32 Cr. L. J. 849, *Emperor v. Jahangir Chand*.
3. ('21) AIR 1921 Cal 347 (348) : 48 Cal 874 : 23 Cri L Jour 229, *Mahendra Bhumji v. Emperor*.
4. ('32) AIR 1932 Lah 463 (463) : 13 Lah 254 : 32 Cri L Jour 849, *Emperor v. Jahangir Chand*.
5. ('05) 2 Cri L Jour 317 (319) : 3 Low Bur Rul 21 : 11 Bur L R 120, *Nga Tet Pya v. Emperor*. (S. 17, Burmah Gambling Act, empowers a competent Magistrate, who receives information that any person in his jurisdiction earns his livelihood wholly or in part, by unlawful gaming to deal with that person, as nearly as may be as if the information were of the description mentioned in S. 110 and the Magistrate is authorised to make an order in respect of him under S. 118; therefore, there is an appeal against the order.)
- ('19) AIR 1919 Upp Bur 27 (27) : 3 Upp Bur Rul 117 : 20 Cri L Jour 321, *Law Kaw v. Emperor*. (A Magistrate under S. 3 of the Burmah Opium Law Amendment Act, may proceed in accordance with the sections of the Code and, demand security under S. 118. Against such an order an appeal lies under S. 406 of the Code.)
- ('97-01) 1 Upp Bur Rul 227 (227), *Queen-Empress v. Nga Kyauk Maw*. (With reference to S. 17, Gambling Act.)

Section 406
Notes 2-4

The Code does not confer a right of appeal from an order of imprisonment in default of furnishing security passed under S. 123.⁶

3. Hearing of security appeals. — An appeal from an order requiring a person to furnish security to be of good behaviour or to keep the peace is distinguishable from an appeal against a conviction in respect of an offence specifically charged, where the only matter for consideration may be the credibility or otherwise of certain direct and positive evidence.¹ In appeals of the former class, it is not unreasonable to insist that the appeal should not be disposed of in a summary manner but by a judgment showing on the face of it that the Judge has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant.^{1a}

As to whether an appellate Court hearing appeals under S. 406 has the power to order retrial, see S. 423, Note 34. An appellate Court can modify or alter the bond in appeal under clause (c) to S. 423.² It has, however, been held by the Oudh Chief Court that the appellate Court cannot enhance the amount of security demanded by the trial Court.³ But it has been held by the Judicial Commissioner's Court of Sind that an appellate Court has power to extend the period during which security is required to be furnished and thereby extend the period of imprisonment to be suffered in default although power should be exercised only in exceptional circumstances.⁴

4. Second proviso. — Under sub-s. (2) to S. 123 of the Code, where a person has been ordered to give security for a period exceeding one year and does not give such security, the Magistrate (other than a Presidency Magistrate) is bound to lay the proceedings before the

6. ('35) AIR 1935 Rang 363 (363) : 13 Rang 287 : 36 Cri L Jour 1510, *Emperor v. Nga Tun Lu*.

Note 3

1. ('16) AIR 1916 All 197 (197) : 38 All 393 : 17 Cr.L.J. 309, *Lal Behari v. Emperor*.
1a. ('16) AIR 1916 All 197 (197) : 38 All 393 : 17 Cr.L.J. 309, *Lal Behari v. Emperor*.
(12) 13 Cri L Jour 9 (9) : 13 Ind Cas 102 (All), *Babu Prasad v. Emperor*.
(16) AIR 1916 All 180 (181) : 17 Cri L Jour 167, *Sarwan v. Emperor*.
(26) AIR 1926 All 614 (614, 615) : 27 Cr.L.J. 370, *Ram Charan v. Emperor*. (The preparedness of accused to furnish security does not relieve the Court of this duty.)
(09) 9 Cri L Jour 528 (529) : 2 Ind Cas 225 (All), *Shiam Lal v. Emperor*.
(13) 14 Cri L Jour 419 (420) : 40 Cal 376 : 20 I C 403, *Fidoi Hossein v. Emperor*. (Appellate Court should consider the defence evidence of the accused, although the defence counsel did not make any reference to it.)
(29) AIR 1929 Nag 328 (330, 331) : 31 Cri L Jour 20, *Kashiram v. Asaram*.
[See ('21) 23 Cri L Jour 378 (378) : 67 Ind Cas 202 (All), *Sunchri v. Emperor*. (Making only some general observations on the volume of evidence—Appeal disposed of.—Judgment is perfunctory and not in accordance with law.)]
2. ('38) AIR 1938 Nag 303 (305) : 39 Cr. L. J. 747 : 1 L R (1938) Nag 595, *Hafiz Ahesanali v. Emperor*. (Appellate Court thinking that facts set out in body of order under S. 112 bring matter within cl. (a) instead of cl. (b) of S. 109—It has jurisdiction to make this alteration.)
(22) AIR 1922 Nag 180 (180) : 23 Cri L Jour 394, *Baines v. Emperor*.
[See ('20) AIR 1920 Nag 67 (67) : 21 Cr.L.J. 352, *Azizul Jabar Khan v. Emperor*.]
See also S. 125 Note 9.
3. ('23) AIR 1923 Oudh 44 (45) : 22 Cr.L.J. 766 : 24 O C 286, *Rameshwar Baksh Singh v. Emperor*. (Decision proceeds on the ground that tenor of S. 423 is against increasing the severity of the penalty imposed by the trial Court.)
4. ('36) AIR 1936 Sind 125 (125) : 37 Cr. L. J. 1003 : 29 S L R 353, *Emperor v. Kadu*. (A I R 1924 Sind 120, Relied on.)

Section 406
Note 4

Sessions Judge for orders. Notwithstanding such reference to the Sessions Judge an appeal from the order of the Magistrate as such lay as a matter of right to the District Magistrate under the terms of S. 406 as it stood before the amendment of 1923. Two different Courts were thus likely to be in *seisin* of the same matter at the same time and this state of the law gave rise to conflict of procedure. Under the circumstances the High Courts tried to lay down complex rules of procedure to mitigate the anomalies. It was held that the Sessions Judge should proceed to decide the case under reference before him only on satisfying himself that no appeal had been preferred and in case an appeal had been filed should stay his hand till the disposal of the appeal and that the right of appeal under S. 406 was lost as soon as the Sessions Judge passed orders under S. 123.¹ It was sometimes held that an appeal under S. 406 was meant only for cases in which there was no necessity to lay the proceedings before the Sessions Judge.² The present section, by enacting the second proviso, has removed the right of appeal in such cases and simplified the law.³ The right of appeal is, however, revived, if pending disposal of the reference, security is offered and accepted, inasmuch as the acceptance of the security has the effect of automatically terminating the reference.⁴ But it may be noted that the said proviso affects only cases of reference by the Magistrate to the Sessions Judge and has no application to cases laid before the High Court by a Presidency Magistrate under S. 123.

An order passed by a Sessions Judge on reference under S. 123 is not an order of the Magistrate and therefore continues to be non-appealable under section 406.⁵

See also the undermentioned case.⁶

Note 4

1. ('24) AIR 1924 Sind 120 (120) : 26 Cri L Jour 179 : 17 S L R 160, *Allahabad v. Emperor*.
(11) 12 Cri L Jour 257 (258) : 35 Bom 271 : 10 I. C. 802, *Emperor v. Amir Bala*.
(1900) 1900 Pun Re No. 15 Cr, p. 35 (36) : 1900 Pun L R No. 59 Cr, *Crown v. Ida*.
(93-1900) 1893-1900 Low Bur Rul 381 (382), *Queen-Empress v. Shwe Gyaw Aung*.
(96) 1896 Pun Re No. 23 Cr, p. 55 (56), *Kanhaya v. Empress*.
(93) 1893 All W N 183 (184), *Empress v. Chottia*.
(10) 11 Cri L Jour 725 (726) : 8 I. C. 879 : 13 Oudh Cas 354, *Pattu v. Emperor*.
(99) 2 Oudh Cas 307 (310), *Subba v. Crown*.
2. ('22) AIR 1922 Lah 475 (476) : 23 Cri L Jour 454, *Qamar Din v. Emperor*.
3. ('35) AIR 1935 Pesh 55 (55) : 36 Cr. L. J. 936, *Fazal Mahmud v. Emperor*.
4. ('28) AIR 1928 Lah 64 (65) : 29 Cri L Jour 236, *Emperor v. Mahomed Akbar*.
5. ('11) 12 Cri L Jour 257 (258) : 35 Bom 271 : 10 I. C. 802, *Emperor v. Amir Bala*. (Decided under the old section.)
(1900) 1900 Pun Re No. 15 Cr, p. 34 (35) : 1900 P L R p. 59 Cr, *Crown v. Ida*.
(Do.)
(83) 9 Cal 878 (879), *Chand Khan v. Empress*. (Under the Code of 1882.)
(86) 1886 Pun Re No. 23 Cr, p. 55 (55), *Kanhaya v. Empress*. (Do.)
(93-1900) 1893-1900 Low Bur Rul 381 (382), *Queen-Empress v. Shwe Gyaw Aung*.
(Do.)
(91) 1891 All W N 219 (219), *In re Haridas*. (Do.)
(93) 1893 All W N 183 (184), *Empress v. Chottia*. (Do.)
(75) 24 Suth W R Cr 12 (12), *Queen v. Roghoo*. (Under Code of 1872.)
See also S. 123 Note 20 and S. 410 Note 1.
6. ('30) AIR 1930 Pat 274 (276) : 9 Pat 131 : 31 Cri L Jour 958, *Charan Mahto v. Emperor*. (Where the bond required is for one year the order requires no confirmation but is, subject to appeal under S. 406, final.)

Section 406A

406A. Any person aggrieved by an order refusing to accept or rejecting a surety. Appeal from order refusing to accept or rejecting a surety. surety under section 122 may appeal against such order, —

- (a) if made by a Presidency Magistrate, to the High Court;
- (b) if made by the District Magistrate, to the Court of Session; or
- (c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.

This section was newly inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

1. Scope. — An appeal lies to the Sessions Judge from an order of a District Magistrate rejecting sureties.¹

Section 407

407.* (1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 380^a by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the *Provincial Government*^b to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

a. The words "or in respect . . . S. 380" were inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

b. Substituted by A. O. for "Local Government."

* 1882 : S. 407; 1872 : Ss. 266, 47; 1861 : S. 412.

Section 406A — Note 1

1. ('34) AIR 1934 Cal 482 (487) : 61 Cal 588 : 35 Cr. L. J. 952, *Parbati Charan v. Emperor*.

Synopsis

Section 407
Note 1

1. "Convicted on a trial."
2. Trial held by a second class Magistrate.
3. Appeals from the Bench of Magistrates of the second class.
4. Transfer of appeals by the District Magistrate—Sub-section (2).

Other Topics (Miscellaneous)

- | | |
|--|---|
| Absence of a sentence no bar. See Note 1. | trate not thereby ordinary Court of |
| Appeal against sentence alone. See Note 1. | appeal—District Magistrate continues as such. See Note 4. |
| Appeals not transferable by District Magistrate. See Note 4. | Trial partly as first class and partly as second class. See Note 2. |
| Offence under Cattle Trespass Act, 1871. See Note 1. | What are not convictions on a trial. See Note 1. |
| Transfer of appeal—First class Magis- | Withdrawal of part-heard appeals. See Note 4. |

1. "Convicted on a trial."—Section 4 of the Code of 1872 defined "trial" as the proceedings taken in Court after a charge has been drawn up and as including the punishment of an offence. Subsequent Codes have not defined the term 'trial' as such; but in S. 4 of the present Code the term is distinguished as being different from an "inquiry" under the Code. A "trial" under the Code would imply the proceedings in which a person stands before a Court empowered to convict him of some 'offences' alleged against him.¹ The essentials of a trial are thus the charge of an "offence" and the power in the Court to "convict" the offender for the offence. The term "conviction" denotes the finding of guilty as distinguished from an *acquittal* or *discharge* on a finding of not guilty. On a conviction a sentence will follow in the usual course except as otherwise provided by the Code, as for example, in S. 562. The expression "convicted on a trial" has thus sole reference to cases in which an accused has been held *guilty* of an *offence*.² See the language of Ss. 243, 258, 262 (2), 306 (2), 307 (2) and (3) and 367.

It follows that a decision in which an offence is not involved is not a conviction on a trial. Before the change introduced in 1893 in S. 4 (1) (o), an illegal seizure of cattle did not amount to an 'offence' and an order under the Cattle Trespass Act, 1871, for compensation for illegal seizure was held not to amount to a conviction on trial and not appealable.³ Such an order now amounts to a "conviction on a trial"

Section 407 — Note 1

1. ('20) AIR 1920 Mad 337 (341) : 21 Cri L Jour 402 : 43 Mad 511 (FB), *Venkata-chennayya v. Emperor*.
- ('78) 2 Mad 169 (170), *Ananthachari v. Ananthachari*.
2. ('68) 4 Mad H C R Cr 146 (148), *In re Chappu*. (Proceeding under S. 480, a case of conviction on trial.)
[See ('65) 2 Mad H C R Cr 473 (473) : 2 Weir 461, *Re Evans*. (The offence may be under special or local law, *e. g.*, Merchant Seamen's Act, 1 of 1859.)
('25) AIR 1925 Rang 12 (13) : 2 Rang 321 : 26 Cri L Jour 289, *Maung Po Lon v. Emperor*. (Do—*e. g.*, Upper Burma Ruby Regulation, 1887.)]
3. ('96) 23 Cal 442 (445), *Raghu Singh v. Abdul Wahab*.
- ('88) 15 Cal 712 (712), *Dhiku v. Deno*.
- ('86) 10 Bom 230 (231), *Queen-Empress v. Raja Lakhma*.
- ('96) 19 Mad 238 (239) : 2 Weir 461, *Queen-Empress v. Lakshmi Nayakan*.
- ('89) 11 Mad 359 (360) : 1 Weir 712, *In re Khadar Khan*.
- ('90) 1890 Rat 520 (521), *Queen-Empress v. Sadashiv*.
- ('71) 3 N W P H C R 200 (201), *In re Gunesk Pershad*.
- ('86) 1886 Pun Re No. 22 Cr, p. 54 (55), *Empress v. Baksh*.

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Notes 1-2

and is appealable.⁴ An order under S. 488 of this Code directing payment of a monthly allowance in default of maintenance is not a "conviction on a trial."⁵ So also, an order under the Workman's Breach of Contract Act for refund of the amount of advance⁶ or an order imposing a penalty and inflicting a sentence of imprisonment⁷ or to perform a contract under the said Act,⁸ or forfeiting the security furnished under chapter VIII,⁹ is not an order of "conviction on a trial."

The appeal being from a conviction, the absence of a sentence, as in cases falling under S. 562, is no bar to an appeal¹⁰ nor will an appeal lie against the sentence alone except in cases provided for in S. 412 of the Code.¹¹

2. Trial held by a second class Magistrate.—According to the wording of S. 407, it is not the conviction by a second class Magistrate but the holding of a trial by such Magistrate that determines the forum of the appeal.¹ Where a second class Magistrate in the course of the proceedings in the same case is invested with first class powers, the question arises whether the appeal lies to the District Magistrate under the section or to the Court of Session. Where the trial was

(179) 1 Weir 711 (712),

[See (196) 23 Cal 300 (301, 302), *Shama v. Lechhu Sheikh*.

(1900) 27 Cal 992 (992) : 5 C W N 32, *Bhagirathi Naik v. Gangadhar Mahanty*.]

4. (122) AIR 1922 Bom 191 (191, 192) : 46 Bom 58 : 22 Cri L Jour 624, *Barthol Duming Rodrik's v. Papa Dada*.

(107) 5 Cri L Jour 86 (86, 87) : 29 Mad 517, *In re Ponnusamy*.

(107) 6 Cri L Jour 121 (121, 122) : 4 Low Bur Rul 10, *Emperor v. Mi Hari Ma*.

5. (167) 7 Suth W R Cr 10 (11), *Queen v. Gulam Hossein*. (The person ordered against is not a person convicted of an offence—Per Peacock, C. J.)

(168) 5 Bom H C R Cr 81 (82), *Reg. v. Thaku*.

6. [See (119) AIR 1919 Bom 158 (159) : 43 Bom 607 : 20 Cri L Jour 316, *Emperor v. Devappa*. (But an order on disobedience of the order for refund may involve an offence—*Obiter*.)]

[But see (1879) 1 Weir 694 (694), *In re Higgins*.]

7. (114) AIR 1914 Sind 79 (80) : 7 Sind L R 80 : 15 Cri L Jour 372, *Thairio v. Emperor*. (Such an order is the result of a special penal proceeding.)

8. (114) AIR 1914 Cal 909 (909) : 15 Cri L Jour 697, *Anukul v. Kamarali*.

9. (178) 2 Mad 169 (170), *Ananthachari v. Ananthachari*.

10. (125) AIR 1925 Cal 329 (330, 331) : 52 Cal 463 : 26 Cri L Jour 455, *Bahadur Molla v. Ismail*. (Marginal note to the section ignores distinction between order and sentence.)

(104) 1 Cri L Jour 543 (545) : 10 Bur L R 321 : 1904 Upp Bur Rul 7, *Mi Shwe v. Emperor*.

(104) 1 Cri L Jour 1098 (1099) : 1904 Pun Re No. 24 Cr, *Emperor v. Manohar Das*.

(110) 11 Cr.L.J.152(153):5 Low Bur Rul 129:4 I.C. 1027, *Ma Chit Su v. Emperor*.

(117) AIR 1917 Lah 413 (413) : 1917 Pun Re No. 20 Cr : 18 Cr. L. J. 401, *Hyata v. Emperor*. (Subject to limitation, appeal may be filed even after expiry of the bond ordered under S. 562.)

[See also (169) 1869 Rat 18 (18). (Accused previously convicted and sentenced—Conviction subsequently for another offence and sentence to run concurrently with former—Though sentence inoperative, appeal lies against later conviction.)]

See also S. 562 Note 19.

11. (131) AIR 1931 Pat 351 (351) : 32 Cr. L. J. 1017, *Sheikh Rijhu v. Emperor*. (Appeal must be heard as a whole.)

[See (122) AIR 1922 Nag 71 (72) : 23 Cr. L. J. 73, *Dhekliia Kunbi v. Emperor*. (Suspension of license under S. 18 (2), Motor Vehicles Act, is part of the sentence on conviction and appeal lies.)]

See also S. 412 Note 1, S. 421 Note 1 and S. 423 Note 7.

Note 2

1. (125) AIR 1925 Pat 472 (472) : 26 Cr.L.J. 914, *Sheobhanjan Singh v. Emperor*.
(32) AIR 1932 Cal 460 (461) : 33 Cr. L. J. 516, *Baramaddi v. Magorali*.

completely held by the Magistrate as a second class Magistrate but the higher powers were conferred only at the time of the judgment, there is no doubt that the appeal lies to the District Magistrate.² Similarly, where most part of the trial is held by the Magistrate as a first class Magistrate, as for example, when, after examining eight prosecution witnesses as second class Magistrate, two more prosecution witnesses are examined and charge framed and the case concluded as a first class Magistrate, the appeal lies to the Court of Session.³ Also, in cases where only a small part of the trial is held by the Magistrate as a first class Magistrate,⁴ the appeal has been held to lie to the Court of Session, apparently on the ground that if any part of the trial is held by the Magistrate as a Magistrate of the first class and the case has been concluded by him, it must be considered to be a trial held by a Magistrate of the first class. The Madras High Court in *Venkatareddi v. Ramayya*,⁵ seems to be of the opinion that a conviction by a first class Magistrate and not the trial is the determining factor. It is submitted this is against the current of authority in India. See also S. 39 Note 2 and S. 410 Note 2.

Where a second class Magistrate submits a case under S. 349 to a first class Magistrate, an appeal from the sentence of the first class Magistrate falls under S. 403 and not under this section, although the first class Magistrate passes his sentence without taking further evidence and so the trial should be considered to have been held by the second class Magistrate.⁶

3. Appeals from the Bench of Magistrates of the second class. — Where a trial Bench is composed of Magistrates of the second class but is invested, as a Bench with first class powers, appeals from the decisions of the Bench lie to the Sessions Judge and not to the District Magistrate.¹

See also S. 414 Note 3.

4. Transfer of appeals by the District Magistrate—Sub-section (2).—The District Magistrate may, under the powers conferred by the sub-section, transfer only appeals¹ and, again, only such appeals

2. ('32) AIR 1932 Cal 460 (461) : 33 Cr. L. J. 516, *Baramaddi v. Magorali*.

('08) 8 Cr. L. J. 48 (49) : 4 Low Bur Rul 239, *Emperor v. Nga Paw*.

3. ('27) AIR 1927 Lah 138 (139) : 28 Cr. L. J. 50, *Durgadas v. Emperor*.

('27) AIR 1927 Bom 366 (366) : 28 Cr. L. J. 474, *Emperor v. Moganlal Jhavarchand*. (Higher powers were conferred after charge and before conclusion of trial.)

4. ('25) AIR 1925 Pat 472 (472) : 26 Cr. L. J. 914, *Sheobhanjan Singh v. Emperor*. (The Magistrate was vested with first class powers some time before the hearing of the arguments.)

('27) AIR 1927 Lah 398 (399) : 8 Lah 203 : 28 Cr. L. J. 781, *Babu Ram v. Emperor*. (Higher powers conferred when the Magistrate concluded the trial.)

5. ('28) AIR 1928 Mad 55 (55) : 51 Mad 257 : 29 Cr. L. J. 71, (Trial continued as first class Magistrate—Case renumbered after higher powers — Conviction as first class Magistrate.)

6. ('37) AIR 1937 Cal 394 (396) : 38 Cr. L. J. 990 : I L R (1937) 2 Cal 469, *Kishori Singh v. Emperor*.

Note 3

1. ('34) AIR 1934 Bom 176 (177) : 36 Cr. L. J. 592, *Emperor v. Bhimabai Sitaram*.

Note 4

1. (1900) 2 Bom L R 536 (539), *Bai Harku v. Sitaram Kalian*. (But not any revisional work.)

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Note 4

as lie to him "under this section," that is to say, appeals from *convictions*. He cannot transfer any other class of appeals from his Court under this sub-section.^{1a} Nor will the power to hear appeals on transfer render the Court of the first class Magistrate, the Court to which appeals "ordinarily lie" within the meaning of S.195 (3). The Court of the District Magistrate will continue to be such Court notwithstanding that appeals under S.407 may be *presented* to a subordinate Magistrate's Court under the sub-section.²

The power of withdrawal of appeals vested in the District Magistrate can be exercised at any time even though an appeal may be part-heard before the subordinate Magistrate.³ Once an appeal is withdrawn the District Magistrate becomes solely responsible for the disposal of the appeal and he is not bound by any opinion formed or recorded by the subordinate Magistrate prior to the withdrawal as to the necessity of examining further evidence in the case.⁴

Section 408

408.* Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 380^a by a Magistrate of the first class, may appeal to the Court of Session:

Provided as follows:

(a) (*Omitted by Criminal Law Amendment Act, XII of 1923.*)

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation,

* 1882 : Ss. 408, 31; 1872 : Ss. 79, 269, 270, 18; 1861 : Ss. 409, 22.

1a. ('12) 13 Cri L Jour 273 (274): 34 All 244: 14 I C 657, *Lal Singh v. Emperor*. (For example an appeal from an order for prosecution under S. 195.)

2. ('03) 26 Mad 656 (659); 2 Weir 202 (F B), *Eroma Variar v. Emperor*. (For the purposes of S. 195 (3).)

('20) AIR 1920 Lah 479 (479), *Mt. Jiwani v. Emperor*. (Do.)

('07) 5 Cri L Jour 432 (433): 3 Nag L R 50, *Ram Dayal v. Ram Prasad*. (Do.)

('24) AIR 1924 Oudh 239 (239): 26 Oudh Cas 358: 26 Cr.L.J. 423, *Ahmed Hussein v. Mt. Rahiman*. (Do.)

('03) 30 Cal 394 (396): 7 C W N 114, *Sadulal v. Ramchurn*. (For purposes of S. 195 (5).)

('04) 1 Cri L Jour 422 (424): 27 Mad 124, *In re Subbamma*. (Do.)

('29) AIR 1929 Cal 172 (173): 56 Cal 824: 30 Cr.L.J. 658, *Mohim Chandra v. Emperor*.

[But see ('95) 18 Mad 487 (490): 2 Weir 165, *Queen-Empress v. Subbaraya Pillai*. (This ruling was influenced by the words "shall be presented" used in the section in the Code of 1882—Distinguished in 26 Mad 656.)]

3. ('08) 7 Cri L Jour 329 (330): 31 Mad 277: 18 M L J 89, *In re Alagu Ambalam*.

4. ('08) 7 Cri L Jour 329 (330): 31 Mad 277: 18 M L J 89, *In re Alagu Ambalam*.

See also S. 428 Note 10.

the appeal of all or any of the accused convicted at such trial^b shall lie to the High Court;

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(c) when any person is convicted by a Magistrate of an offence under section 124A of the Indian Penal Code, the appeal shall lie to the High Court.

a. The words "or in respect of S. 380" were inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

b. The words "of all or at such trial" were inserted by Act, XVIII of 1923.

Synopsis

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|--------------------------------|------------------------------------|
| 1. Scope. | 5. Order or sentence under S. 380. |
| 2. "Convicted on a trial." | 6. Court of Session. |
| 3. "Trial held by." | 7. Proviso (b). |
| | 8. Concurrent sentences. |
| 4. Sentence under section 349. | 9. Proviso (c). |

Other Topics (miscellaneous)

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| Agency tracts. See Note 6. | Sections 30, 32 and 33. See Note 4. |
| Assistant Sessions Judge becoming Sessions Judge—Appeal. See Note 7. | Sentence exceeding four years, contrary to Ss. 32 and 33—Appeal. See Note 4. |
| British Baluchistan. See Note 6. | Sentence is substantive sentence. See Note 7. |
| District Magistrate as special officer in Native States. See Note 7. | Trial for more than one offence. See Notes 8 and 9. |
| Legislative changes. See Note 5. | Trial partly as first class and partly as second class. See Note 3. |
| Merchant Seamen's Act (1 of 1859). See Note 6. | Two Sessions Divisions. See Note 6. |
| No appeal by accused sentenced to more than four years—Effect. See Note 7. | |

1. **Scope.** — Section 408 is a general provision conferring a right of appeal in the cases mentioned therein. The section, however, must be read subject to the exceptions and modifications embodied in subsequent sections, viz., sections 412, 413 and 414.¹ See also the undermentioned case.²

2. **"Convicted on a trial."** — The section confers a right of appeal on a person convicted on a trial and hence, the absence of a sentence as in cases where he is dealt with under S. 562 does not affect his right of appeal.¹ See also S. 407 Note 1.

Section 408 — Note 1

1. ('37) AIR 1937 Cal 394 (395, 396): 38 Cri L Jour 990 : I L R (1937) 2 Cal 469, *Kishori Singh v. Emperor*. (S. 408 does not limit in any way operation of S. 413 —S. 413 applies even when sentence is passed under S. 380 or S. 349—First Class Magistrate in case submitted to him under S. 349 sentencing accused under S. 323, Penal Code, to fine below Rs. 50—Appeal from such conviction is barred under S. 413 notwithstanding S. 408.)
- ('11) 12 Cri L Jour 389 (389) : 11 I C 253 : 33 All 510, *Alam v. Emperor*. (S. 413 is an exception to the general rule laid down in S. 408.)
- ('31) AIR 1931 Cal 642 (643):59 Cal 19:33 Cr.L.J. 90, *Akbar Ali v. Emperor*. (Do.)
- ('19) AIR 1919 Pat 556 (557, 559) : 20 Cri L Jour 545 : 4 Pat L Jour 435, *Phelkujha v. Emperor*. (Do.)
- ('13) 14 Cr.L.J. 170 (171): 19 I C 170: 15 Oudh Cas 386, *Sheopal v. Emperor*. (Do.)
- ('10) 11 Cri L Jour 152 (152) : 4 I C 1027 : 5 Low Bur Rul 129, *Ma Chit Su v. Emperor*. (Ss. 412, 413 and 414 are exceptions to S. 408.)
2. ('10) 11 Cri L Jour 426 (427) : 6 I C 959 : 1910 Pun Re No. 19 Cr, *Emperor v. Alam Khatun*. (Trial of offence under Frontier Crimes Regulation—Trial by first class Magistrate—Appeal lies to Sessions Judge.)

Note 2

1. ('40) AIR 1940 Rang 223 (224): 1940 R L R 381, *Shankar Sukul v. The King*.

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Notes 3-6

3. "Trial held by." — As to whether trial includes judgment, see S. 410 Note 2 and S. 404 Note 1a.

As to an appeal from a conviction where a second class Magistrate is invested with higher powers in the course of the case, see Note 2 to S. 407 and Notes to S. 39. See also S. 404 Note 1a.

4. Sentence under section 349. — In a case submitted by an inferior Magistrate under S. 349 for severer punishment, the District Magistrate or the sub-divisional Magistrate to whom it is submitted, cannot pass a higher sentence than he is empowered to inflict under ss. 32 and 33.¹ See proviso to sub-s.(2) of S. 349. Again, S. 30 authorizes the Provincial Government to empower the District Magistrate or any Magistrate of the first class to try, as a Magistrate, all offences not punishable with death. Now, suppose the Magistrate to whom proceedings are submitted under S. 349 is a Magistrate empowered under S. 30, can he pass a sentence more severe than he is empowered to inflict under ss. 32 and 33? It has been held that he cannot do so, that in such a case the said proviso to S. 349 will prevail and that even should the Magistrate sentence him to imprisonment for a term exceeding four years, the appeal will lie not to the High Court under proviso (b) to S. 408, but only to the Court of Session.²

5. Order or sentence under section 380.—The amendment of 1923 making an order or sentence under S. 380 appealable to the Court of Session has given legislative sanction to the view expressed to that effect in the undermentioned case.¹

6. Court of Session. — Where, in a district there are two sessions divisions, an appeal from a conviction by a Magistrate having jurisdiction over the whole district lies to the Sessions Judge of the division within which the headquarters of the Magistrate are situate, irrespective of the place of offence.¹

In Agency Tracts to which the Code of Criminal Procedure is extended, an appeal from the Agency Magistrate of the first class lies to the Sessions Judge of the Agency Tracts and not to the non-agency Sessions Judge.²

(1926) AIR 1926 Bom 382 (383) : 27 Cri L Jour 873, *Madhav v. Emperor*.

(1914) AIR 1914 All 543 (544) : 37 All 31 : 16 Cri L Jour 43, *Emperor v. Ghasite*.

(1935) AIR 1935 Mad 157 (158) : 58 Mad 517 : 36 Cr. L. J. 589, *Mayandi Nadar v. Pala Kuduban*.

(1924) AIR 1924 All 765 (766) : 46 All 828 : 25 Cr. L. J. 1244, *Hira Lal v. Emperor*.

Note 4

1. (1973) 1873 Pun Re No. 2 Cr, p. 3 (3), *Crown v. Rahim*.

2. (1907) 6 Cri L Jour 289 (290) : 4 Low Bur Rul 53, *Nga Pya v. Emperor*.

See also Note 7, S. 34 Note 3 and S. 349 Note 19.

Note 5

1. (1915) AIR 1915 Bom 263 (264) : 16 Cr. L. J. 738, *Emperor v. Bhimappa*. (Case submitted to first class Magistrate under S. 562 — Conviction by the Magistrate under S. 380 is that of a first class Magistrate—Appeal lies to Court of Session.)

Note 6

1. (1906) 4 Cri L Jour 443 (444) : 16 M L J 444 : 1 M L T 402, *Ambu Podaval v. Emperor*.

2. (1912) 13 Cri L Jour 850 (852) : 17 I. C. 786 (Mad), *Public Prosecutor v. Sadananda Patnaik*.

[See also (1937) AIR 1937 Mad 17 (19) : 38 Cr. L. J. 81, *Alla Satyam v. Emperor*. (Sub-divisional Magistrate also exercising powers as Assistant Agent in Agency

The Code being extended to British Baluchistan, a Court of Session in the said territory has all the powers in respect of appeals as are conferred by the Code.³ A sentence of the Justice of the Peace under the Merchant Seamen's Act (I of 1859) is appealable to a Court of Session.⁴

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Notes 6-7

7. Proviso (b). — This proviso says "*all or any of the accused convicted at such trial.*" An appeal, therefore, by an accused person sentenced for a term not exceeding four years will lie to the High Court¹ even though no appeal has been preferred by another accused who has been sentenced in the same case for a term exceeding four years.²

The 'sentence' in proviso (b) has reference only to the *substantive* sentence of imprisonment apart from any sentence of whipping or fine or imprisonment in default of fine.³

When a Magistrate empowered under S. 30 of the Code passes a sentence referred to in this proviso, the appeal lies only to the High Court.⁴ Where, however, the Magistrate is not so empowered⁵ or has not acted in exercise of such powers,⁶ the appeal will lie only to the Court of Session.

Tract — District Magistrate also acting as Government Agent — District Magistrate transferring cases (offence in one of them in agency) for trial to Sub-divisional Magistrate — Both cases decided by him in capacity of Sub-divisional Magistrate—Appeal lies to Sessions Judge and not to Government Agent.]]

3. ('29) AIR 1929 Lah 187 (189) : 30 Cri L Jour 918, *Barnsfield v. Emperor*.

4. (1865) 2 Mad H C R 473 (473) : 2 Weir 461, *In re W. M. Evans*.

Note 7

1. ('15) AIR 1915 All 20 (20) : 16 Cri L Jour 353, *Richha v. Emperor*.

('31) 1931 Mad W N 1068 (1068), *Perumal v. Emperor*.

('07) 5 Cri L Jour 496 (496) : 17 Mad L J 248, *Palani Koravan v. Emperor*.

('11) 12 Cri L Jour 236 (238) : 10 Ind Cas 278 (Lah), *Hardit Singh v. Emperor*.

[See ('93-1900) 1893-1900 Low Bur Rul 516 (518), *Nga Po Saing v. Empress*.

('97-01) 1 Upp Bur Rul 94 (95), *Queen-Empress v. Nga Tun Baw*.

(1900) 1900 Pun Re No. 12 Cr, p. 28 (29) : 1900 Pun L R p. 56, *Queen-Empress v. Jai Singh*.

('80) 1880 Pun Re No. 36 Cr, p. 89 (90), *Jeytu Mal v. Empress*. (Several charges at one trial against an accused—For the sentence of some charges appeal lying to High Court—Appeal from lesser sentences on other charges also lies to High Court.)]

2. ('26) AIR 1926 All 160 (160) : 27 Cri L Jour 175, *Debi Din v. Emperor*.

('15) AIR 1915 All 356 (357) : 37 All 471 : 16 Cr. L. J. 606, *Hardayal v. Emperor*.

('16) AIR 1916 Lah 441 (441) : 1916 Pun Re No. 5 Cr : 17 Cr. L. J. 299, *Ahmad Khan v. Emperor*.

3. ('34) AIR 1934 Oudh 433 (433) : 35 Cri L Jour 1288, *Khajjan v. Emperor*.

('18) AIR 1918 Lah 384 (384) : 1918 Pun Re No. 19 Cr : 19 Cr. L. J. 742, *Khuda Bakhs v. Emperor*.

(1900.02) 1 Low Bur Rul 57 (58), *Nga Tun Tha v. Empress*.

[See ('27) AIR 1927 Nag 255 (256) : 23 Cr. L. J. 672, *Jagadish Chandra Ray v. Emperor*.]

4. ('25) AIR 1925 Rang 39 (39) : 2 Rang 386 : 26 Cri L Jour 293, *In re Abdulla*.

[See ('25) AIR 1925 Lah 318 (318) : 26 Cri L Jour 757, *Dalip Singh v. Emperor*.

('20) AIR 1920 Cal 87 (88) : 47 Cal 154 : 21 Cr.L.J. 386, *Kaseem Ali v. Emperor*.]

[See also ('98) 1898 Pun Re No. 3 Cr, p. 6 (7), *Queen-Empress v. Batera*.

('93) 1893 Rat 655 (655), *Queen-Empress v. Alibax*. (Code of 1882.)

('83) 9 Cal 513 (516) : 12 C L R 500, *Rongai v. Empress*. (Where the sentence is less than mentioned in the section appeal lies to sessions.)]

5. ('07) 6 Cri L Jour 239 (290) : 4 Low Bur Rul 53, *Nga Pya v. Emperor*.

See also Note 4, S. 34 Note 3 and S. 349 Note 19.

6. ('75) 1875 Pun Re No. 10 Cr, p. 14 (14), *Nathu v. Crown*.

('70) 14 Suth W R Cr 33 (34) (FB), *Queen v. Dhonah Bhooyah*.

Section 408
Notes 7-9

Where an Assistant Sessions Judge convicts and sentences an accused for a term less than four years, an appeal lies only to the Court of Session and the fact that at the time of the appeal the Assistant Sessions Judge himself became the Sessions Judge will not give a right of appeal to the High Court.⁷

Where a District Magistrate, appointed as a special officer to try a criminal case in a Native State, convicts and sentences the accused for the term mentioned in proviso (b), no appeal will lie to the High Court as he did not act as a Magistrate of the first class under the Code.⁸

An order of detention in Borstal School is not a sentence of imprisonment within the meaning of this proviso.⁹

For "concurrent sentences," see Note 8 below.

8. Concurrent sentences. — In a trial for more offences than one the aggregate of sentences if they are *consecutive* must be deemed as one sentence for purposes of an appeal.¹ See also S. 35 Note 16.

9. Proviso (c). — Under this proviso, when a person is convicted by a Magistrate of an offence under S. 124A, Penal Code, the appeal lies to the High Court and not to the Sessions Court. The Sessions Judge entertaining such an appeal acts without jurisdiction.¹

Where in a single trial an accused person is convicted under S. 124A of the Penal Code, and also under S. 153A of that Code, the aggregate of sentences must be deemed as one sentence for purposes of appeal under S. 35, sub-s.(3) of the Code; the *forum* for appeal is the High Court.²

(77) 1877 Pun Re No. 8 Cr, p. 19 (21) (FB), *Bahadar v. Crown*. (If it appears, from the sentence awarded, that the Magistrate has acted in the exercise of enhanced powers, appeal lies to High Court—Case under S. 270 of the Code of 1882.)

(79) 1879 Pun Re No. 33 Cr, p. 94 (95), *Mahamed Newaz v. Empress*. (Do.)

(81) 1881 Pun Re No. 23 Cr, p. 51 (52, 53), *Tulsi Ram v. Empress*. (Do.)

7. ('18) AIR 1918 Pat 240 (240) : 3 Pat L Jour 192 : 19 Cr.L.J. 442, *Garib Lall v. Emperor*. (In such a case, it is open to the Officiating Sessions Judge, on receipt of the appeal, to either send the case to the High Court for disposal or to admit the appeal and postpone it till the return of the Sessions Judge.)

8. ('10) 11 Cri L Jour 390 (391) : 6 I. C. 640 : 1910 Pun Re No. 14 Cr, *Bishen Das v. Crown*.

9. ('36) AIR 1936 Rang 229 (229, 230) : 37 Cr. L. J. 793 : 14 Rang 143, *Nga Tha E v. Emperor*. (The only circumstances in which the appeal against such an order will lie to the High Court is when a co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding four years—In such a case the appeal will lie to the High Court under this proviso.)

Note 8

1. ('30) 32 Cri L Jour 469 (469) : 129 Ind Cas 731 (All), *Hamid v. Emperor*.

('13) 14 Cr. L. J. 119 (119) : 18 I. C. 679 : 35 All 154, *Tulsi Ram v. Emperor*.

('33) AIR 1933 Pesh 90 (94) : 35 Cri L Jour 399, *Akbar v. Emperor*.

[See ('11) 12 Cr. L. J. 348 (351) : 10 I. C. 948 : 38 Cal 214, *Joy Chandra Sarkar v. Emperor*.]

Note 9

1. ('37) AIR 1937 All 466 (467) : 38 Cr. L. J. 972, *Krishna Chandra v. Emperor*. (Sessions Judge allowing appeal and reducing sentence — Order is without jurisdiction.)

2. ('11) 12 Cri L Jour 348 (351) : 38 Cal 214 : 10 Ind Cas 948, *Joy Chandra Sarkar v. Emperor*. (Obiter.)

409.* An appeal to the Court of Session or Section 409
Appeals to Court of Session how heard. Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

^aProvided that an Additional Sessions Judge shall hear only such appeals as the *Provincial Government*^b may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

a. The proviso to the section was inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

b. Substituted by A. O. for "Local Government."

1. Proviso. — It is only the Sessions Judge or an Additional Sessions Judge that has jurisdiction to hear an appeal preferred to the Court of Session. The Sessions Judge cannot, therefore, make over an appeal under the proviso to an *Assistant* Sessions Judge for hearing. Nor can he do so under sub-s. (2) of S. 193 of the Code, as an appeal is not a 'case' within the meaning of that section.¹

The power of the Sessions Judge to make over an appeal to an Additional Sessions Judge is not confined to appeals arising within his territorial jurisdiction but extends also to appeals which might have been transferred to the Sessions Judge by the High Court.²

410.† Any person convicted on a trial held Section 410
Appeal from sentence of Court of Session. by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

1. Appeal from sentence of Court of Session. — A conviction by a Sessions Judge for intentional insult to him in Court is equally a conviction on a trial held by the Sessions Judge and an appeal lies to the High Court.¹ But an order of the Sessions Judge in a security case referred to him under S. 123 of the Code, is not a conviction on a trial held by him and no appeal lies to the High Court.² Where a

* 1882 : S. 409; 1872 and 1861 — Nil.

† 1882 : S. 410; 1872 : Ss. 80, 270, 271; 1861 : S. 408.

Section 409 — Note 1

1. ('15) AIR 1915 All 101(102):37 All 286; 16 Cr.L.J. 316, *Emperor v. Abdul Razyak*. See also S. 193 Note 6.

2. ('34) AIR 1934 Pat 114 (115, 116) : 35 Cri L Jour 1167, *Kedarnath Sahay v. Emperor*. (Unless the contrary is directly expressed.)

Section 410 — Note 1

1. ('68-69) : 4 Mad H CR Cr 146 (147, 148), *In re Chappu Menon*.

2. ('83) 9 Cal 878 (879), *Chand Khan v. Empress*.

See also S. 123 Note 20 and S. 406 Note 4.

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Notes 1-2

Sessions Judge, acting under S. 428, causes additional evidence to be taken in an appeal and then convicts the accused, the latter is not *convicted on a trial held* by a Sessions Judge and no appeal lies to the High Court.³

A Judge of the Court of the Judicial Commissioner of Sind sitting in a Sessions trial is a Sessions Judge for the purposes of this section.⁴ The High Court of Bombay has power to hear appeals from a conviction by the Agent of Mewar, under the special jurisdiction conferred on the said High Court by Rule 44 of the Bombay Act, II of 1846.⁵ The High Court of Calcutta has no jurisdiction to hear appeals from Chittagong Hill Tracts, as those tracts have been removed from the operation of the existing civil and criminal jurisdiction.⁶

For the meaning of 'High Court' in regard to appeals by European British subjects, see section 4 (1) (j) of the Code.⁷

Where a case has been submitted to the High Court under S. 374 for confirmation and the High Court has pronounced a decision thereon, no appeal is open to the accused subsequently from the order of the Sessions Judge.⁸

As to the matters on which an appeal is admissible, see S. 418 and Notes thereunder.

2. Trial held by Assistant Sessions Judge — Judgment pronounced by Additional Sessions Judge — Forum of appeal. — See Section 404 Note 1a.

Section 411

411.* Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

* 1882 : S. 411; 1872 and 1861 — Nil.

3. (1900) 27 Cal 372 (375, 376) : 4 C W N 497, *Queen-Empress v. Ishak*.

(1971) 15 Suth W R Cr 33 (34) : 6 Beng L R 483, *In re Dhunobur Ghose*.

[But see (1865) 2 Suth W R Cr 13 (14, 19, 24), *Queen v. Mohesh Chunder*. (Case under S. 422 of 1861 Code — No longer law — See 27 Cal 372.)]

See also S. 428 Note 10.

4. ('39) AIR 1939 Sind 209 (211) : 41 Cri L Jour 28 : ILR (1940) Kar 249, *Shewaram Jethanand v. Emperor*. (An appeal lies to the Judicial Commissioner's Court against convictions and sentences passed by a Judge of the Judicial Commissioner's Court, sitting in its Sessions Court jurisdiction with a jury only on a point of law.)

(1925) AIR 1925 Sind 249 (250, 251, 253) : 19 Sind L R 309 : 26 Cr. L. J. 562 (FB), *Haji Khudabux v. Emperor*. (The definition in S. 266, Criminal P. C., does not apply to chapter 31.)

5. ('17) AIR 1917 Bom 224 (226) : 41 Bom 657 : 18 Cri L Jour 817 (FB), *Nazar Mahomed v. Emperor*.

6. (1900) 27 Cal 654 (654), *Empress v. Sonai Mugh*.

7. ('10) 11 Cri L Jour 723 (724) : 8 Ind Cas 873 : 13 Oudh Cas 335, *Thomas v. Emperor*. (Before the amendment of S. 4 (1) (j) in 1923 the Court of the Judicial Commissioner of Oudh was not a High Court for the purposes of an appeal by a European British subject from a conviction by a Sessions Judge.)

8. ('67) 1867 Pun Re No. 33 Cr, p. 55 (55), *Crown v. Soojan Singh*.

See also S. 375 Note 4.

1. Appeal from Presidency Magistrate. — The imprisonment for a term exceeding six months in this section has reference only to the *substantive* term of imprisonment, and does not include the imprisonment which may be contingent on default of payment of fine.¹ A substantive sentence of imprisonment for a term of six months cannot, therefore, be combined with any term of imprisonment imposed in default of payment of fine for claiming a right of appeal.² Where the sentence does not contain any one of the punishments specified in the section, no appeal lies.³ Concurrent sentences against the accused in the same trial cannot be aggregated to bring the case under the section.⁴

In a case where a Presidency Magistrate proceeds under S. 562 and passes an order for release of the accused on furnishing security for good behaviour thereunder, the question arises whether an appeal lies from such an order. It has been seen in Note 1 to S. 407 that the absence of a *sentence* is no bar to an appeal from a conviction which underlies an order under S. 562. But under the strict terms of S. 411 no appeal can lie from a conviction by a Presidency Magistrate unless it is accompanied by one or the other of the sentences specified in the section. The answer, therefore, in the case under consideration is that no appeal lies.⁵

Where the sentence, one of imprisonment, is within the appealable limit, an appeal lies although the offender is ordered to be confined in a juvenile jail.⁶

Section 411 — Note 1

1. ('06) 33 Cal 1036 (1038, 1039) : 4 Cri L Jour 368 : 4 C L J 408, *Shaik Babu v. Emperor*. (Sentence of eight months in default of giving security — No appeal.)
2. ('78) 2 Mad 30 (31, 32) : 1 Weir 525, *In re Jotharam Davay*.
3. ('96) 20 Bom 145 (145), *Emprress v. Hari Savba*.
4. ('78) 2 Mad 30 (31, 32) : 1 Weir 525, *In re Jotharam Davay*.
5. ('89) 16 Cal 799 (801), *Schein v. Emprress*.
6. ('37) AIR 1937 Bom 336 (336) : 38 Cr.L.J. 985, *Motiram Bhikoba v. Emperor*. (Sentence of whipping — No appeal — It cannot be assumed that sentence of whipping was passed in lieu of an appealable sentence.)
7. ('37) AIR 1937 Cal 413 (413) : 38 Cri L Jour 876 : 1 L R (1937) 1 Cal 123, *Kali Kumar Mitter v. Emperor*. (Sentence of six months' imprisonment—No appeal.)
8. ('09) 10 Cri L Jour 255 (256) : 3 Ind Cas 285 (Bom), *Datta Ram v. Emperor*. (One day's simple imprisonment and a fine of Rs. 150 — No appeal.)
9. ('15) AIR 1915 Bom 61 (61) : 39 Bom 558 : 16 Cr. L. J. 585, *Emperor v. Goodhew*. (Simple imprisonment for a day and forfeiture of pay of two days — No appeal.)
10. ('05) 2 Cal L Jour 45n, *Max Minck v. Emperor*. (Imprisonment for one day and Rs. 200 fine.)
11. ('12) 13 Cri L Jour 787 (788) : 17 Ind Cas 531 (Cal), *Suknandan Singh v. Emperor*. (Two concurrent sentences of six months each — It is only a single sentence of six months.)
12. See also S. 35 Note 16.
13. ('37) AIR 1937 Cal 413 (414) : 38 Cri L Jour 876 : 1 L R (1937) 1 Cal 123, *Kali Kumar Mitter v. Emperor*. (Presidency Magistrate sentencing accused to six months' rigorous imprisonment — Co-accused bound over under S. 562—Appeal does not lie under S. 411 — Appeal also does not lie under S. 415A as order under S. 562 is not itself appealable.)
14. ('32) AIR 1932 Cal 488 (488) : 33 Cri L Jour 639, *H. Birks v. Emperor*. See also S. 562 Note 19.
15. ('25) AIR 1925 Bom 147 (147) : 26 Cr.L.J. 454, *Mahomed Roshan v. Emperor*.

Section 412

412.* Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

1. Scope of bar under the section.—The principle underlying the provision is that a plea of guilty by the accused person operates as a *waiver* of his right to question the legality of the conviction based on such a plea.¹ But, before the bar of this section can be applied against a convicted person, the plea of guilty must be really such a plea. For instance, a plea which only amounts to an admission of *facts* alleged and not of the offence,² or a plea of guilty based on a misconception of the law of criminal liability,³ or on a misconception of one's right in property,⁴ or in answer to a charge defectively framed and not properly explained to the accused,^{4a} is really a plea of not guilty. Again, it is only in cases where the Court has accepted the plea of guilty and has *convicted* the accused person *on such plea* that the right of an appeal from the conviction is taken away.⁵ But once the Court has in its discretion accepted the plea, such discretion cannot afterwards be attacked as improperly exercised so as to affect the provisions of this section.^{5a}

A plea of guilty with regard to previous convictions equally precludes the appellate Court from re-opening the question of the previous convictions in appeal.⁶

As a rule, an appeal cannot be admitted on the question of sentence only. But this section creates an exception to the rule in cases where the conviction has taken place on an admission of guilt by

* 1882 : S. 412; 1872 : S. 273; 1861—Nil.

Section 412 — Note 1

1. ('20) AIR 1920 Cal 522 (522) : 21 Cr. L. J. 547, *Emperor v. Akub Ali*. (Plea of guilty must be taken in connection with written statement.)
- ('80) 5 Bom 85 (87), *Empress v. Jafar M. Talab*.
- ('28) AIR 1928 Rang 49 (49) : 5 Rang 710 : 29 Cr.L.J. 115, *Emperor v. Nga Lu Gale*. [See ('66) 5 Suth W R Cr 52 (52), *Queen v. Kurmoo Kurmee*.]
2. ('19) AIR 1919 Bom 160 (160) : 43 Bom 842 : 20 Cr.L.J. 684, *Murarji Raghunath v. Emperor*. (Whether on admitted facts the accused is liable is a question of law.)
3. ('20) AIR 1920 Cal 522 (523) : 21 Cr. L. J. 547, *Emperor v. Akub Ali*. ('69) 11 Suth W R Cr 53 (53), *Queen v. Mittun Chowdhry*. (Followed in AIR 1920 Cal 522.)
4. ('31) AIR 1931 All 265 (266) : 53 All 437 : 32 Cr. L. J. 576, *Emperor v. Sat Narain*. (Case under S. 380, I. P. C.)
- 4a. ('93-1900) 1893-1900 Low Bur Rul 328 (328), *Nga Nge v. Queen-Empress*.
5. ('09) 10 Cri L Jour 325 (340) : 3 Ind Cas 625 (Cal), *Khudiram v. Emperor*. (Evidence taken and conviction on evidence.)
- ('31) AIR 1931 Bom 195 (196, 198) : 32 Cr.L.J. 719 (F B), *Emperor v. Janardhan Kashinath*. (Do.)
- 5a. ('34) AIR 1934 Pat 330 (334) : 35 Cr.L.J. 1322: *Shyama Charan v. Emperor*.
6. ('08) 9 Cr. L. J. 56 (59) : 4 Nag L R 163, *Emperor v. Kissan Yessu*.

the accused person.⁷ In the latter case, the accused is entitled to question in appeal the sentence of the lower Court and the sentence only, either on the ground that the *extent* of the sentence is beyond what the circumstances of the case required or that the sentence is *illegal* as not authorized by law.⁸ Where on the plea of guilty of the accused the Court, proceeding under S. 562 of the Code, releases him on recognizance and passes *no sentence* at all, the right of appeal is absolutely barred.⁹

The principle of this section would seem to apply to criminal revision also.¹⁰

For a special case of the right to appeal against the *conviction* notwithstanding a plea of guilty, see section 499, sub-section (6), and the undermentioned case.¹¹

Section 412 Note 1

413.* Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only, or in which a Court of Session or District Magistrate or other Magistrate

Section 413

* 1882 : S. 413; 1872 : S. 273; 1861 : S. 411.

7. ('31) AIR 1931 Pat 351 (351) : 32 Cr. L. J. 1017, *Rijhu v. Emperor*. (A restriction order for admission of a criminal appeal on the ground of sentence only is *ultra vires*.)

('14) AIR 1914 Cal 276 (277) : 41 Cal 406 : 14 Cri L Jour 485, *Nafar Sheikh v. Emperor*. (Do.)

('95) 1895 Rat 826 (827), *Empress v. Dagdu Gangaram*. (Do.)

('98) 22 Bom 759 (760), *Queen-Empress v. Kalu*. (Corresponding section of the Code of 1882 did not include a conviction by a Magistrate of the first class.)

('98) 1898 Rat 954 (954), *Empress v. Govind Raghu*. (Do.)

See also S. 407 Note 1, S. 421 Note 1 and S. 423 Note 7.

8. ('80) 5 Bom 85 (87), *Empress v. Jafar M. Talab*. (Case under Presidency Magistrates' Act, 4 of 1877.)

('98) 22 Bom 759 (760), *Queen-Empress v. Kalu*.

9. ('17) AIR 1917 Lah 413 (413) : 1917 Pun Re No. 20 Cr : 18 Cri L Jour 401, *Hayata v. Emperor*.

('31) AIR 1931 Sind 151 (151, 152) : 25 Sind L R 337 : 32 Cr. L. J. 1142, *Tejumul Jagumal v. Emperor*. (Although other accused in the case have been convicted and given appealable sentences—See S. 415A.)

10. ('20) AIR 1920 Cal 522 (522) : 21 Cr. L. J. 547, *Emperor v. Akub Ali*.

('07) 6 Cr. L. J. 153 (154) : 1907 A W N 204, *Emperor v. Puttan Lal*.

('27) AIR 1927 Bom 67 (67) : 27 Cr. L. J. 1148, *Emperor v. Chunilal Hargovan*.

[See also ('96) 19 Mad 209 (210) : 1 Weir 850, *Queen-Empress v. Bhashyam Chetty*. (Prisoner in revision denied factum of plea of guilty—*Held* his own affidavit to that effect not enough—But that vakil must file affidavit.)]

[See however ('30) AIR 1930 Rang 349 (350) : 32 Cri L Jour 206, *Ali Hossein v. Emperor*. (The High Court in revision is not bound by S. 412, Criminal P. C., but may examine the record for the purpose of seeing whether the plea was based on proper conception of the facts.)]

11. ('35) AIR 1935 Rang 49 (50) : 36 Cr. L. J. 336 (337) : 12 Rang 616, *Nga Ywa v. Emperor*. (Accused convicted on his plea of guilty—Notice to show cause why sentence should not be enhanced—Accused held entitled to appeal both against his conviction and sentence.)

Section 413
Notes 1-2

of the first class passes a sentence of fine not exceeding fifty rupees only.

Explanation. — There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope of sections 413 to 415A. 3. Order under section 562. 4. "Passes a sentence." 5. "Sentence of fine." | <ol style="list-style-type: none"> 6. Combination of sentences for purposes of an appeal. See Note 1 under S. 415. 7. "By a convicted person." 8. "Explanation" to the section. |
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Other Topics (miscellaneous)

- | | |
|---|---|
| <p>Co-accused — Non-appealable sentence. See Note 7.</p> <p>Compensation under Section 22, Cattle Trespass Act — Not final. See Note 5.</p> <p>First non-appealable sentence — Subse-</p> | <p>quent addition to make it appealable. See Note 4.</p> <p>Order under Section 31, Court-fees Act — Not fine. See Note 5.</p> <p>Strict construction of the section. See Note 3.</p> |
|---|---|

1. Legislative changes.

Amendments made in 1923 —

- (1) The words "or the District Magistrate or other Magistrate of the first class" appearing after the words "Court of Session" in the first paragraph of the section and the words "or of whipping only" at the end of the paragraph were repealed by the Criminal Law Amendment Act, XII of 1923.
- (2) The words "in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence" were inserted between the words "only, or" and "of fine" in the first paragraph of the section by the said Act XII of 1923.

2. Scope of sections 413 to 415A. — Sections 413 to 415A have to be read together. Sections 413 and 414 enact certain exceptions to the right of appeal given by ss. 403 and 410. Section 413 takes away the right of appeal in certain petty cases and S. 414 in certain convictions in summary trials. Sections 415 and 415A are added by way of proviso. Explanations to ss. 413 and 415 are intended to remove possible doubts in the construction of those sections.¹

In order that S. 413 may apply it is necessary to see whether the sentence is one not exceeding the limit prescribed by the section and whether it is passed by a Court of the class mentioned in the section. If these two conditions are satisfied the section would apply, although the sentence is passed under S. 349 or S. 390 of the Code.²

Section 413 — Note 2

1. ('11) 12 Cri L Jour 389 (389, 390) : 33 All 510 : 11 I. C. 253, *Alam v. Emperor*. (This case is confined to S. 415 and was before S. 415A was enacted.)
2. ('37) AIR 1937 Cal 394 (396) : 38 Cr. L. J 990 : I L R (1937) 2 Cal 469, *Kishore Singh v. Emperor*. (Sentence of fine below fifty rupees passed by First Class Magistrate in a case submitted to him under S. 349—No appeal.)

The restrictions on appeal laid down in S. 413 have now been made applicable to European British subjects by the repeal of S. 416.

Section 413
Notes 2-5

3. Order under section 562. — It has been already noticed in S. 407 Note 1 that an appeal lies from an order under S. 562, notwithstanding the absence of any sentence against the accused. In view of the fact that S. 413 bars an appeal in cases of slight sentences, can it be maintained that an appeal lies where there is no sentence at all? The answer is that an appeal does lie and that the restrictive provisions of S. 413 are not applicable to the case.¹ Any restrictive provision on the right of appeal must be strictly construed and in favour of the subject.² On a strict construction of S. 413, an appeal is barred only in the specific cases mentioned therein. The section cannot bar the right of appeal existing in respect of cases not falling within its specific terms.³

4. "Passes a sentence." — Once a sentence exceeding the limits prescribed by the section is passed, an appeal will lie, as of right, whether the sentence was legal or not. Where, for example, a Magistrate passes a non-appealable sentence at first and subsequently adds to it so as to make it appealable, an appeal lies from such a sentence and the appellate Court cannot strike out the added sentence and decline to go into the merits of the whole appeal on the ground that the original sentence was not appealable.¹

Where a trial is commenced before a second class Magistrate and after the conclusion of evidence he is invested with first class powers, a sentence of fine not exceeding fifty rupees passed by such Magistrate is one 'passed' by a first class Magistrate and is not appealable under this section.²

5. "Sentence of fine." — An award of compensation under S. 22 of the Cattle Trespass Act, I of 1871, is not a sentence of *fine* within the meaning of this section.¹ Similarly, an order under S. 546A of the

Note 3

1. ('26) AIR 1926 Bom 382 (383) : 27 Cr.L.J.873, *Madhav Raghuvendra v. Emperor*. ('04) 1 Cri L Jour 1098 (1099) : 1901 Pun Re No. 24 Cr, *Emperor v. Manohar Das*.
2. ('31) AIR 1931 Cal 612 (643) : 59 Cal 19 : 33 Cr. L. J. 90, *Akabbar Ali v. Emperor*. (Separate sentences each of rupees forty in the same trial—Appeal lies.)
3. [See ('24) AIR 1924 All 765 (765) : 46 All 828 : 25 Cri L Jour 1244, *Hiralal v. Emperor*. (S. 413 only says in what cases appeal does not lie—It does not say in what cases appeal lies—It does not bar an appeal under S. 408 from an order under S. 562.)]

Note 4

1. ('11) 12 Cri L Jour 431 (431) : 11 Ind Cas 615 (Bom), *Emperor v. Keshavlal*. (Additional sentence imposed at the request of the accused.)
- ('11) 12 Cri L Jour 402 (402) : 35 Bom 418 : 11 I. C. 586, *Emperor v. Keshavlal*. (Additional sentence imposed without jurisdiction.)
- [See ('93) 20 Cal 483 (486), *Jatra Sheikh v. Reazat Sheikh*. (Imposition of non-appealable sentences instead of appealable sentences in proper cases deprecated.)]
- See also S. 423 Note 3.
2. ('40) AIR 1940 Cal 540 (542) : ILR (1940) 1 Cal 519 : 44 C W N 677 (679), *Bejoy Kumar Kundu v. Sita Nath Kundu*.

Note 5

1. ('22) AIR 1922 Bom 191 (191) : 46 Bom 58 : 22 Cri L Jour 624, *Barthol Duming Rodriks v. Papa Dada*. (And S. 413 has no application.)
- [See (1900) 27 Cal 992 (992) : 5 C W N 32, *Bhagirathi Naik v. Gangadar Mahanty*.]

Section 413
Notes 5-8

Code, directing payment to the complainant of the court-fee paid by him on his complaint was held not to be a sentence of *fine*.² In such cases, the fact that the amounts are to be collected as if they were fines, is immaterial.

6. Combination of sentences for purposes of an appeal.—See Note 1 under Section 415.

7. "By a convicted person." — For the law as to the right of appeal by a co-accused who has been awarded only a non-appealable sentence in the same trial, see Notes under S. 415A.

8. "Explanation" to the section. — Under the Code of 1861 there was an appeal when the sentence fixed a term of imprisonment exceeding one month in default of payment of fine of less than fifty rupees.¹ This is altered now.

Section 414

414.* Notwithstanding anything herein-
No appeal from certain before contained, there shall be
summary convictions. no appeal by a convicted person
in any case tried summarily in which a Magistrate
empowered to act under section 260 passes a sentence
of fine not exceeding two hundred rupees only.

Synopsis

1. Legislative changes.
2. European British subjects.
3. "Magistrate empowered to act under section 260."
4. "Passes a sentence of fine."
5. Combination of sentences. See S. 415 Note 1.

Other Topics (miscellaneous)

Addition of other penalties to fine. See Note 4.	Illegality in trying a case as summary. See Note 3.
Conviction by Bench of second or third class Magistrates — Not within the section. See Note 3.	Repeal of Section 416 — Effect. See Note 2.

1. Legislative changes. — The words "of imprisonment not exceeding three months only or" after the words "pass a sentence" and the words "or of whipping only" at the end of the section were omitted by the Criminal Law Amendment Act, XII of 1923. By these amendments, cases in which a sentence of imprisonment or whipping has been passed, have been made appealable.¹

* 1882 : S. 414; 1872 : S. 274, para. 1; 1861 — Nil.

2. ('37) 42 C W N 760 (760), *Atul Chandra Modak v. Emperor*. (Sentence of fine of Rs. 50 and direction to pay costs of Court-fee on complaint—No appeal.)

The following cases are decided with reference to S. 31 of the Court-fees Act which was repealed by Act 18 of 1923 and incorporated as S. 546A, Cr P. C.

('93) 20 Cal 687 (689), *Madan Mandul v. Haran Ghose*.

('09) 9 Cri L Jour 83 (83) : 31 Mad 547, *Emperor v. Maddipatla Subbarayudu*.

('94) 1 Weir 724 (724), *In re Para Muniyan*.

See also S. 33 Note 4 and S. 546A Note 3.

Note 8

1. ('72) 1872 Pun Re No. 3 Cr, p. 3 (3), *Fattah v. Mahomed Din*.

[See ('66) 3 Bom H C R Cr 15 (15), *Reg. v. Shankar Venkaji*.]

Section 414 — Note 1

1. See ('29) AIR 1929 Pat 716 (716) : 30 Cr.L.J. 869, *Jagadish Prasad v. Emperor*.

2. **European British subjects.** — Under S. 416 of the Code, now repealed, it was laid down that the provisions of S. 414 did not apply to European British subjects.¹

Section 414
Notes 2-4

3. **"Magistrate empowered to act under section 260."** — This section embodies another exception to the right of appeal. It takes away the right of appeal in cases tried summarily under S. 260 of the Code where the sentence is one of fine not exceeding Rs. 200 only. The restriction in this section applies only to convictions by a Magistrate or a Bench of Magistrates of the first class to whom alone S. 260 has reference.¹ Any conviction, therefore, by a Bench of Magistrates of the second or third class is appealable under S. 407 and is not affected by this section.²

The jurisdiction to try a case summarily must be validly exercised. A Magistrate cannot deprive an accused person of his right of appeal by trying a case summarily without having the power to do so.³

As to the constitution and powers of a Bench of Magistrates, see section 15.

4. **"Passes a sentence of fine."** — The bar under this section operates only when the specific non-appealable sentence mentioned in the section is awarded. Where, therefore, no sentence is passed at all, as for example, an order under S. 562 is passed,¹ this section has no application and an appeal lies from the conviction. See also Notes under S. 407. So also, when the sentence is any other than of a "fine not exceeding Rs. 200 only," the right of appeal is not taken away. A sentence of fine of Rs. 60 *coupled with suspension of license* under the Motor Vehicles Act is not a sentence of fine only within the meaning of this section and an appeal is not barred.² Similarly, to a case where, in addition to a non-appealable sentence, a further order to furnish

Note 2

1. ('06) 3 Cri L Jour 433 (437) : 12 Bur L R 59, *Narayanswamy v. A. Blake*.

Note 3

1. ('86) 9 Mad 36 (37) : 2 Weir 460, *Queen-Empress v. Narayansami*.
[See ('83) 9 Cal 96 (97) : 11 C L R 423, *Havaladar Roy v. Jagu Mean*. (A Bench of Magistrates consisting of an Assistant Magistrate with second class powers and two or more Honorary Magistrates is a Bench with first class powers as per Government order in Calcutta.)]
2. ('86) 9 Mad 36 (37) : 2 Weir 460, *Queen-Empress v. Narayansamy*.
3. ('79) 4 Cal 18 (19) : 3 C L R 44, *Empress v. Golam Mahommad*. (Magistrate is not entitled to split up an offence for giving himself summary jurisdiction.)
(('32) AIR 1932 Lah 188 (189) : 33 Cr. L. J. 108, *Robert John Bradley v. Emperor*. (Summary trial by Magistrate not empowered.)

Note 4

1. ('40) AIR 1940 Rang 223 (223, 224) : 1940 R L R 381, *Shankar Sukul v. The King*. (Person convicted need not wait for passing of sentence.)
(('24) AIR 1924 All 765 (766) : 46 All 828 : 25 Cr.L.J. 1244, *Hira Lal v. Emperor*.
(('09) 11 Cr.L.J. 152 (153) : 4 I. C. 1027 (1028) : 5 L.B.R. 129, *Ma Chit Su v. Emperor*.
(('04) 1 Cr.L.J. 543 (545) : 1904 Upp Bur Rul Cr. P. C. 7 : 10 Bur L R 321, *Mi Shwe Nyun v. Emperor*.
See also S. 562 Note 19.
2. ('33) AIR 1933 Rang 329 (330) : 35 Cr. L. J. 116, *Garanand Singh v. Emperor*. (The order of suspension is part of sentence.)

Section 414
Notes 4-5

security for good behaviour is passed, this section has no application.³ But an order of confiscation under the Excise Act in addition to a non-appealable sentence has been held not to make the case appealable.⁴

5. Combination of sentences. — See Section 415 Note 1.

Section 415

415.* An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Explanation. — A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

Synopsis

1. Combination of sentences.

2. Order for security to keep the peace.

Other Topics (miscellaneous)

Amendment in 1923 of Sections 413 and 414 and not of Section 415 also—Effect. See Note 1.

Combination of two sentences of fine. See Note 1.

Concurrent sentences — Aggregation. See Note 1.

Security for good behaviour under section 31A of Rangoon Police Act. See Note 2.

Sentences in same trial and not separate cases. See Note 1.

1. Combination of sentences. — It has already been seen in Note 2 to S. 413 that S. 415 is intended by the Legislature as a proviso or an explanation to Ss. 413 and 414. S. 415 has not been altered by the Amending Act of 1923 and remains as it stood before. Ss. 413 and 414 were amended in 1923. In understanding the meaning of S. 415 it will, therefore, be necessary to notice how the law stood under Ss. 413 and 414 before their amendment. The old S. 413 laid down that no appeal lay in cases in which a sentence of imprisonment not exceeding one month only or of fine not exceeding Rs. 50 only or of whipping only was passed. The old S. 414 also contained the same three kinds of

* 1882 : S. 415; 1872 : S. 274; 1861 — Nil.

3. ('09) 9 Cr.L.J. 368 (370) : 4 Low Bur Rul 359, *Kathan v. Emperor*. (Security for good behaviour on conviction for an offence is not provided for in Criminal Procedure Code—Such an order in this case was passed under S. 31A of Rangoon Police Act.)

4. (1900-02) 1 Low Bur Rul 3 (4), *Queen-Empress v. Tagarajan*. (Such an order is not part of sentence.)

[See ('77) 3 Cal 366 (369) : 1 C L R 442, *Empress v. Baidanath Das*. (Confiscation under S. 49, Act 21 of 1856 (Country spirits)—Not part of sentence.)]

[See also ('66) 3 Bom H C R Cr 12 (14), *Reg. v. Jivan Usman*—(*Quære*. Confiscation of cotton under Bombay Cotton Frauds Act, 9 of 1863, whether part of sentence.)]

alternative punishments. It followed that if each of the two sections barred an appeal only in case there was a sentence, either of a petty imprisonment only or of a petty fine only or of whipping only, the right of appeal was not taken away when any two or more of the alternative punishments were jointly awarded, though each of the said joint punishments, taken by itself, was of the extent not appealable under the said sections.¹ This position was only made clear in S. 415. The words "any two or more of the punishments therein mentioned" in that section were clearly referable to any two or more of the punishments of imprisonment, fine and whipping mentioned in Ss. 413 and 414 as they stood before the amendment in 1923.

Section 415
Note 1

Now by virtue of the amendment in 1923, the punishment of whipping is taken out of S. 413 and whipping as well as imprisonment are taken out of S. 414. But the words "any two or more of the punishments therein mentioned" have been retained in S. 415. In view of the fact that now S. 414 mentions only *one* punishment, what is the meaning of the words "any two or more of the punishments therein mentioned" in this section? It can very well be urged that those words, while *meaning* punishments of the two kinds mentioned in S. 413, also *include* several punishments of the *same kind* mentioned in Ss. 413 and 414. This view derives support from the fact that Ss. 413 and 414 say that no appeal lies from *a* sentence of fine, etc., thus implying that if there are two or more sentences of fine, etc., the bar will not apply. When there are two or more such sentences, it does not matter if the aggregate of those sentences does not exceed the limits of duration or amount fixed by Ss. 413 and 414. It has, thus, been held by the Chief Court of Oudh² that a person convicted under S. 447 of the Penal Code, and S. 24 of the Cattle Trespass Act, and fined Rs. 50 and Rs. 20 respectively by a Magistrate in the exercise of summary powers, was not deprived of the right of appeal by the terms of S. 414, on the ground that two punishments of the nature mentioned in S. 414 have been combined. In a Calcutta case,³ the High Court accepted the

Section 415 — Note 1

1. ('11) 12 Cri L Jour 389 (389, 390) : 33 All 510 : 11 I C 253, *Alam v. Emperor*. (Imprisonment for one day and Rs. 50 fine—Held appeal lay—It is not necessary that the accused must have actually suffered imprisonment to claim right of appeal.) ('79) 3 Cal L Rep 511 (512), *Empress v. Haradhan Tamuli*. (Rs. 20 on one charge and imprisonment for one month on another—Appeal lay as to whole.) ('69) 1 N W P H C R 302 (303). (Imprisonment for one month and Rs. 40 fine.) ('78) 2 Cal L Rep 511 (512), *In re Sher Mahomed*. [See ('02) 1902 Pan L R No. 45 Cr, p. 170 (171), *Crown v. Rura*. (Imprisonment for one month and whipping under old section.) ('78) 3 Cal L R 405n (405n), *Mohesh Mundul v. Bholanath*. (An order against accused persons jointly and severally for payment of money to the complainant is not a "fine" imposed against the accused. Such order added to an imprisonment of one month will not make the case appealable.)]
2. ('37) AIR 1937 Oudh 524 (527, 528) : 38 Cri L Jour 1062 : 13 Luck 618, *Makrand Singh v. Ganga*. (Punishment includes punishment of the same kind also.) ('32) AIR 1932 Oudh 27 (28) : 7 Luck 501 : 33 Cr. L. J. 278, *Kandhai v. Emperor*.
3. ('31) AIR 1931 Cal 642 (643) : 59 Cal 19 : 33 Cri L Jour 90, *Akabbur Ali v. Emperor*. (It is to be noted, however, that the aggregate of the two fines in this case was more than Rs. 50 although this aspect does not appear to have influenced the decision.)

Section 415
Notes 1-2

contention that S. 413 mentions only *a* sentence of fine, etc., and does not, therefore, affect a case of two or more sentences of fine. In the later Calcutta cases⁴ however, the above contention was rejected and it was held, that two sentences of fine must, in the aggregate, be above Rs. 50 in order to avoid the bar of S. 413. This view has also been held by the Bombay,⁵ Madras⁶ and Nagpur⁷ High Courts and by the Sind Judicial Commissioner's Court.⁸ It is submitted that the latter view, though it might be unexceptionable under the old ss. 413 and 414, fails to take into consideration the inevitable effect of construing S. 415 read with ss. 413 and 414 as they stand at present.

A combination of sentences will give a right of appeal only if the sentences are in the *same trial* and not in *separate cases*.⁹

On the question whether concurrent sentences of imprisonment can be aggregated under S. 415 for escaping the bar of S. 413 and S. 414 (as it stood before the amendment) there was a difference of opinion. In some cases it was held¹⁰ that such sentences could not be aggregated and in others that they could.¹¹ The amendment in 1923 of S. 35 of the Code has now settled the point by upholding the former view.

2. Order for security to keep the peace. — The section says that the fact of a convicted person being ordered to furnish security to keep the peace will not alter the non-appealable nature of the sentences mentioned in ss. 413 and 414.¹ In a case decided by the Rangoon High Court,² where in a summary trial an accused person was convicted and sentenced to three months imprisonment and was also ordered to give security for *good behaviour* under S. 31A of the Rangoon Police Act, it was held that an appeal lay under S. 408 and that the right thereto was not taken away by S. 414 (as it stood before the amendment) on the

4. ('39) AIR 1939 Cal 274 (274, 275) : 40 Cri L Jour 652 : I L R (1939) 1 Cal 325, *Kali Charan Sardar v. Adhar Mandal*.

('32) AIR 1932 Cal 551 (552) : 59 Cal 1131 : 33 Cri L Jour 704, *Nawab Ali Haji v. Joinab Bibi*. (Two sentences of fine of Rs. 20 and Rs. 15 against an accused and of Rs. 20 and Rs. 30 against another—*Held* appeal barred.)

5. ('26) AIR 1926 Bom 416 (416) : 27 Cri L Jour 926, *Shidlingappa Gurulingappa v. Emperor*. (Two sentences of fine of Rs. 50 and Rs. 30—It was held that there was one sentence of fine exceeding Rs. 50.)

6. ('40) AIR 1940 Mad 111 (112) : 41 Cri L Jour 403 : I L R (1939) Mad 1035, *In re Venkataramayya*.

7. ('40) AIR 1940 Nag 264 (265) : 41 Cri L Jour 544, *Provincial Government v. Bhivram Nanhya*. (Case under S. 414.)

8. ('36) AIR 1936 Sind 40 (40) : 37 Cr. L. J. 455, *Emperor v. Hemandas Devansingh*. (Case under S. 414.)

9. ('66) 6 Suth W R Cr 51 (51, 52), *Queen v. Morley Sheikh*.

('68) 10 Suth W R Cr 3 (4) : 1 Beng L R A G Cr 3, *Queen v. Nagardi Paramanik*.

10. ('13) 14 Cri L Jour 254 (254) : 40 Cal 631 : 19 IC 510, *Aziz Sheikh v. Emperor*.

('21) AIR 1921 Cal 152 (152) : 23 Cri L Jour 225, *Abdul Jabbar v. Emperor*. (Magistrate of first class—Concurrent sentences of one month for each offence—S. 413 held to apply.)

11. ('12) 13 Cri L Jour 877 (877) : 17 Ind Cas 813 (Cal), *Abdul Khalek v. Emperor*.

('11) 12 Cri L Jour 391 (392) : 11 Ind Cas 255 (Cal), *Bepin Behary Dey v. Emperor*.

Note 2

1. ('04) 1 Cri L Jour 1054 (1055) : 7 Oudh Cas 338, *Meghu v. Emperor*.

('35) AIR 1935 Rang 363 (363) : 36 Cri L Jour 1510 : 13 Rang 287, *Emperor v. Nga Tun Lu*.

See also S. 106 Note 23 and S. 123 Note 2.

2. ('08) 9 Cri L Jour 368 (369, 370) : 4 Low Bur Rul 359, *Kathan v. Emperor*.

ground that the said security was also ordered. It was observed that an appeal lay under S. 408 and that reading Ss. 414 and 415 together an appeal was barred under S. 415 only in cases where there was an order for security to *keep the peace* and not where, under a special Act, there is an order for security for *good behaviour*.

Section 415
Note 2

415A. Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any such persons, all or any of the persons convicted at such trial shall have a right of appeal.

Section 415A

Special right of
appeal in certain
cases.

Synopsis

- | | |
|----------------------------|---------------------------|
| 1. Scope and object. | 2. Sections 415A and 412. |
| 1a. Sections 415A and 411. | 3. Sections 415A and 449. |

1. Scope and object. — This section was newly introduced by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923. It was intended to remove doubts that previously existed with regard to the right of appeal in cases where in the same trial appealable and non-appealable sentences were passed against different accused. In some cases, the Courts were of opinion that the accused against whom a non-appealable sentence was passed was also entitled to appeal,¹ and in other cases it was held that such accused had no right of appeal.² The controversy is now set at rest by the enactment of S. 415A which recognizes the right of appeal on behalf of an accused person against whom a non-appealable sentence is passed in a trial in

Section 415A — Note 1

1. ('16) AIR 1916 All 236 (237) : 38 All 395 : 17 Cr.L.J. 513, *Lal Singh v. Emperor*.
(16) AIR 1916 Lah 193 (194) : 1915 Pun Re No. 30 Cr : 17 Cr.L.J. 27, *Emperor v. Naurati*.
(16) AIR 1916 Lah 302 (303) : 1916 Pun Re No. 16 Cr : 17 Cr.L.J. 173, *Emperor v. Jaisukh*.
(19) AIR 1919 Pat 556 (557, 560) : 20 Cr. L. J. 545 : 4 Pat L Jour 435, *Phaku Jha v. Emperor*. (Per Atkinson, J., *contra*.)
(20) AIR 1920 Pat 802 (803) : 22 Cri L Jour 297, *Biswanath Singh v. Emperor*. (Even though the accused had applied to Appellate Court only to refer his case to High Court for revision.)
(13) 14 Cr. L. J. 170 (171) : 15 Oudh Cas 386 : 19 I. C. 170, *Sheopal v. Emperor*.
(08) 9 Cri L Jour 356 (358) : 4 Low Bur Rul 354 (FB), *Ba Thaw v. Emperor*.
(08) 9 Cri L Jour 368 (370) : 4 Low Bur Rul 359, *Kathan v. Emperor*.
2. ('17) AIR 1917 All 372 (373) : 39 All 549 : 18 Cr. L. J. 684, *Bhola v. Emperor*.
(17) AIR 1917 All 410 (411) : 39 All 293 : 18 Cr.L.J. 546, *Husain Khan v. Emperor*.
(23) AIR 1923 All 609 (609) : 24 Cri L Jour 679, *Jhagru v. Emperor*.
(14) AIR 1914 Mad 433 (434) : 15 Cri L Jour 371, *In re Uruma Mudali*.
(18) AIR 1918 Mad 918 (918) : 40 Mad 591 : 18 Cr.L.J. 454, *In re Venkatakrishnayya*.
(19) AIR 1919 Mad 1163 (1163) : 19 Cri L Jour 623, *In re Annasami Madavan*.
(17) AIR 1917 Sind 34 (35) : 10 Sind L R 156 : 18 Cri L Jour 72, *Unar Gools v. Emperor*.
(70) 7 Bom H C R Cr 35 (37), *Reg. v. Kalubhai*.
(11) 12 Cr. L. J. 63 (63) : 9 Ind Cas 340 (Mad), *In re Chode Balavi Ramaswami*.
(23) AIR 1923 Mad 95 (96) : 24 Cri L Jour 89, *In re Mittoor Moideen Hajee*.

Section 415A
Notes 1-3

which an appealable judgment is passed against any of the accused persons.³

The Sind Judicial Commissioner's Court has held that the words "appealable judgment" and "right of appeal" in the section should be read together and that the *extent* of the right of appeal is the same in the case of all the co-accused. So, where an appealable judgment is passed against A and there is no appealable judgment against B, and A is entitled only to appeal as regards his sentence and not as regards his conviction, B can also only appeal as regards the sentence, if any, passed against him and cannot appeal as regards his conviction.⁴ But the Rangoon High Court has held that the section confers a general right of appeal and that although the co-accused (by virtue of whose right of appeal the other accused gets his right of appeal) can only appeal as to his conviction and not as to his sentence, the other accused can appeal as to both.⁵

1a. Sections 415A and 411. — A and B are jointly tried and convicted by a Presidency Magistrate. A is sentenced to six months' imprisonment and B is dealt with under S. 562 without any sentence being passed against him. A is not entitled to appeal under this section because under the terms of S. 411, there being no sentence against B, there is no appealable judgment against B. (A himself cannot appeal because the sentence against him is not of the appealable level.)¹

2. Sections 415A and 412. — A and B are jointly tried and both are convicted on their plea of guilty. But no sentence is passed on A and he is dealt with under S. 562. But an appealable sentence is passed against B. Can A appeal? No; the reason is that B himself can only appeal as to the extent or legality of the sentence passed against him, and A's right of appeal cannot be more extensive than that of B and as no sentence at all has been passed against A, he cannot appeal.¹

3. Sections 415A and 449. — Where leave to appeal is granted under S. 449 of the Code to one of two accused persons jointly tried by the High Court sessions, leave to appeal should be granted to the other accused also by reason of the provisions of this section.¹

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3. ('31) AIR 1931 Cal 642 (643) : 59 Cal 19 : 33 Cr. L. J. 90, *Akabbur Ali v. Emperor*.
 ('25) AIR 1925 Cal 329 (332) : 52 Cal 463 : 26 Cr. L. J. 455, *Bahadur Molla v. Ismail*. (Even where the appealable judgment is a proceeding under S. 562.)
 ('35) AIR 1935 Mad 157 (158) : 58 Mad 517 : 36 Cr. L. J. 589, *Mayandi v. Pala*.
 [See also ('26) AIR 1926 Bom 382 (382) : 27 Cr. L. J. 873, *Madhav v. Emperor*.]
 4. ('31) AIR 1931 Sind 151 (152) : 25 SLR 337 : 32 Cr. L. J. 1142, *Tejuma v. Emperor*.
 5. ('40) AIR 1940 Rang 223 (224) : 1940 R L R 381, *Shankar Sukul v. The King*.

Note 1a

1. ('37) AIR 1937 Cal 413 (414) : 38 Cr. L. J. 876 : I L R (1937) 1 Cal 123, *Kali Kumar Mitter v. Emperor*.

Note 2

1. ('31) AIR 1931 Sind 151 (152) : 25 Sind L R 337 : 32 Cr. L. J. 1142, *Tejuma Jaguma v. Emperor*. (Words "appealable judgment" and "right of appeal" in section should be read together and the right of appeal should be the same in the case of both the co-accused.)

Note 3

1. ('27) AIR 1927 Cal 307 (308) : 54 Cal 52 : 28 Cr. L. J. 481, *Gallagher v. Emperor*. (Though the other accused is not a European British subject.)

416.* (Saving of sentences on European British subjects.) *Repealed by section 26 of the Criminal Law Amendment Act, XII of 1923.*

Section 416

417.† The *Provincial Government*^a may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Section 417

Appeal on behalf of Government in case of acquittal.

a. Substituted by A. O. for "Local Government."

Synopsis

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|--|--|
| <ol style="list-style-type: none"> 1. Scope and applicability of the section. 2. "The Provincial Government." 3. "May direct." 4. "Public Prosecutor." | <ol style="list-style-type: none"> 5. "High Court." 6. Order of acquittal. 7. Interlocutory orders. 8. Limitation. See Authors' Limitation Act, Article 157. |
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Other Topics (miscellaneous)

Acquittal of serious charge though conviction of some other charge. See Note 6.

Amendment of charges — Order — If appealable. See Note 7.

Appeal by accused as well as by Government. See Note 3.

Dismissal for non-appearance under Section 247—Is acquittal. See Note 6.

High Court not to question power of Provincial Government. See Note 3.

Inapplicable to Bengal Act, 12 of 1932. See Note 1.

Legislative changes. See Note 1.

No right of appeal to private person. See Note 2.

Not controlling S. 439. See Note 1.

Object is to remedy injustice and not to get High Court's opinion on abstract points of law. See Note 1.

Order under Section 118—Not acquittal. See Note 6.

Power of Provincial Government — Nature and exercise. See Note 3.

Refusal to try for want of jurisdiction —No appeal. See Note 7.

Sections 414 and 260 — Summary acquittal. See Note 1.

Sessions Judge or District or Deputy Magistrate — No power in cases of acquittal. See Note 5.

Who can move Provincial Government. See Note 2.

Withdrawal of complaint under S. 248 — Is acquittal. See Note 6.

* Code of 1898 ; S. 416.

416. Nothing in sections 413 and 414 applies to appeals from sentences passed under Chapter XXXIII on European British subjects.

1882 : S. 416; 1872 : S. 274, para. 3; 1861 — Nil.

† Code of 1882 : S. 417 — Same.

Code of 1872 : S. 272, paras. 1 and 2.

272. The Local Government may direct an appeal by the Public Prosecutor or other officer specially or generally appointed in this behalf, from an original or appellate judgment of acquittal; but in no other case shall there be an appeal from a judgment of acquittal passed in any criminal Court.

Such appeal shall lie to the High Court, and the rules of limitation shall not apply to appeals presented under this section.

Code of 1861 — Nil.

Section 417
Note 1

1. Scope and applicability of the section.—Section 407 of the Code of 1861 prohibited appeals from a judgment of acquittal of any criminal Court and an order of acquittal was therefore conclusive.¹ The extraordinary remedy of an appeal against an acquittal received a statutory recognition for the first time in 1872² in the interests of public safety, peace and order.³

But the Legislature has by no means overlooked the fact that an appeal against an acquittal is an exception to the general principle of criminal law, and is one which needs considerable safeguarding. Such safeguards are three in number, namely:—

- (a) that the right of appeal shall be exercised by the Provincial Government only,
- (b) that every such appeal shall be made through the Public Prosecutor,
- (c) that every such appeal shall be tried by the High Court only.

Before, therefore, a person acquitted can undergo any further trial for the offence of which he has been acquitted, the highest executive authority must hold that it is desirable; the highest legal authority must advise that it is legal and proper and the highest judicial authority must find that it is just that the order should be set aside.⁴

The object of the section is only to enable the Provincial Government to have a wrongful acquittal converted into a conviction or to have a re-trial and not to enable it to obtain from the High Court opinions on abstract questions which do not arise on the facts established.⁵

The provisions of this section are not qualified by any restriction which may be derived from a consideration of the terms of S. 414; an appeal will, therefore, lie against an order of acquittal in a case tried summarily under S. 260.⁶ This section does not control the powers of

Section 417 — Note 1

1. ('69) 11 Suth W R Cr 29 (34) (FB), *In re Gorachand Ghose*.
('66) 5 Suth W R Cr 2 (3), *Queen v. Toyab Sheikh*.
('66) 5 Suth W R Cr 45 (46), *Queen v. Gorachand*. (Under S. 404 Court may set aside judgment of acquittal for error in point of law.)
('67) 8 Suth W R Cr 47(49, 51, 52): Beng LR Sup Vol. 750, *Queen v. Sheikh Bazu*.
[See also ('72) 9 Bom H C R Cr 346 (354), *Reg. v. Narayan Babaji*.]
2. ('31) AIR 1931 All 439 (441), *Emperor v. Ram Adhin Singh*.
('04) 1 Cr. L. J. 781 (788) : 1904 Pun Re No. 7 Cr, *Emperor v. Chattar Singh*.
('04) 1 Cr. L. J. 674 (677, 678) : 17 C P L R 75, *Emperor v. Mt. Gulbi*.
3. ('10) 11 Cr.L.J. 66(66):1909 P. R. No. 15 Cr: 4 I.C. 864, *Emperor v. Harnaman*.
See also S. 423 Note 15.
4. ('04) 1 Cr. L. J. 674 (684, 685) : 17 C P L R 75, *Emperor v. Mt. Gulbi*.
5. ('10) 11 Cr. L. J. 65 (65) : 4 I. C. 863 : 1909 Pun Re No. 14 Cr, *Emperor v. Fateh Din*.
('11) 12 Cr.L.J. 364 (371):11 I. C. 132: 1911 Pun Re No. 10 Cr, *Emperor v. Kiru*.
6. ('34) AIR 1934 All 842 (844) : 35 Cr. L. J. 1229, *Emperor v. Noor Ahmad*.

the High Court under s. 439.⁷ This section is inapplicable to cases of orders of acquittal passed by special Magistrates under Bengal Act 12 of 1932 under which there is no right of appeal to the High Court.⁸

Section 417
Notes 1-2

In an appeal against an order of acquittal, it is for the Government to show that the judgment appealed against is wrong.⁹

An order of acquittal made without jurisdiction may be set aside in appeal under this section.¹⁰

See:—S. 422, as to notices of appeal presented under this section;

S. 423, as to the powers of an appellate Court in disposing of an appeal presented under this section;

S. 427, as to the arrest of an accused person in appeal from acquittal; and

S. 431, for abatement of appeal under this section.

2. "The Provincial Government." — It is only the Provincial Government that can prefer an appeal under this section.¹ The object of limiting the right of appeal against acquittals to the Provincial Government is to prevent personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal, and to ensure that such interference shall take place only in cases where there has

7. ('30) AIR 1930 Lah 159 (160) : 31 Cr. L. J. 584, *Nathumal v. Abdul Haq*. (And reference can be entertained when Provincial Government has been moved to prefer appeal or having been moved has declined to prefer such appeal.)

8. ('33) AIR 1933 Cal 776 (776) : 60 Cal 1482 : 34 Cr. L. J. 1070, *Superintendent and Remembrancer of Legal Affairs v. Luchmi Narayan*.

9. ('32) 33 Cr. L. J. 929 (930) : 139 I. C. 756 (Oudh), *Emperor v. Paragi*. (Appellate Court must be slow to differ from opinion of trial Judge as regards testimony of witnesses unless there are good grounds for it.)

('34) AIR 1934 Pesh 129 (132) : 36 Cr. L. J. 443, *Government Advocate, North-West Frontier Province v. Amir Hamza*. (Where two opinions can be formed on the evidence and one of them has been formed by the trial Court, appellate Court will not disagree even if the balance of probabilities be in favour of the opposite opinion.)

('35) 36 Cr. L. J. 1243 (1245) : 157 I. C. 691 (Lah), *Sultan v. Emperor*.

[See ('35) AIR 1935 Nag 69 (75), *Local Government v. Mt. Guji*. (When appellate Court does not consider the judgment of acquittal a perverse one, it will not interfere.)]

10. ('28) AIR 1928 Rang 49 (49) : 5 Rang 710 : 29 Cr. L. J. 115, *Emperor v. Nga-Lu Gale*. (Accused pleading guilty of charge under S. 19 (c), Arms Act—Conviction by First Class Magistrate—Acquittal by Sessions Court in appeal—Appellate order is without jurisdiction and High Court can set it aside.)

[See ('07) 6 Cr. L. J. 287 (288, 289) : 4 Low Bur Rul 49, *Emperor v. Yena*. (Acquittal in incompetent appeal—Acquittal may be set aside—But in particular circumstances of case High Court did not consider it necessary to do so.)]

Note 2

1. ('16) AIR 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91, *Graham & Co. v. Elsey*. (Application made by complainants in case to set aside order of acquittal cannot be entertained.)

('14) AIR 1914 Mad 628 (631) : 38 Mad 1028 : 15 Cri L Jour 236, *In re Shinnu Goundan*. (Appeals against acquittals cannot be limited to cases in which Court owing to error of law comes to wrong decision on evidence before it.)

('15) AIR 1915 Cal 388 (388) : 42 Cal 612 : 16 Cri L Jour 122, *Faujdar Thakur v. Kasi Choudhuri*.

('96) 23 Cal 975 (980), *Queen-Empress v. Jabanulla*.

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Notes 2-3

been a miscarriage of justice so grave as would induce the Provincial Government to move in the matter.² Consequently a private person has no right of appeal under this section.³ But so far as the wording of this section is concerned, there is nothing in it to show who can move the Provincial Government to direct an appeal under this section. It is a matter of practice that the Provincial Government is and can be moved by private individuals or by the Police through the District Magistrate or by the latter himself as the head of the criminal administration in his district.⁴

3. "May direct." — The power given to the Provincial Government by this section is of an exceptional and unusual character. It should be sparingly used¹ and with circumspection,² care and

2. ('94) 22 Cal 164 (170), *Deputy Legal Remembrancer v. Karuna Baistobi*.

('16) AIR 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91, *Graham & Co. v. Elsey*.

[See ('14) AIR 1914 Mad 628 (631) : 38 Mad 1028 : 15 Cr.L.J. 236, *In re Shinnu Goundan*.]

3. ('27) AIR 1927 Nag 170 (173) : 23 Nag L R 40 : 28 Cri L Jour 523, *Sher Khan v. Anwar Khan*.

('31) AIR 1931 Rang 86 (86) : 8 Rang 671 : 32 Cri L Jour 929, *Emperor v. Maung Tun Nyan*. (High Court satisfied that subordinate Court took erroneous view of evidence; it is bound to act on this evidence and convict the accused.)

4. ('37) AIR 1937 Sind 100 (101) : 38 Cr.L.J. 665, *Karachi Municipal Corporation v. Thoomal Khushaldas*. (The normal procedure for the party aggrieved is to apply to the District Magistrate, who will then refer the matter, if he thinks proper, to Government, and Government can if they think proper sanction proceedings under S. 417.)

('23) AIR 1923 Lah 163 (166) : 24 Cri L Jour 433, *Mul Singh v. Emperor*.

('22) AIR 1922 Mad 502 (503) : 45 Mad 913 : 23 Cr. L. J. 583 (FB), *Sankaralinga Mudaliar v. Narayana Mudali*.

('25) AIR 1925 Pat 321 (322) : 26 Cri L Jour 516, *Anant Singh v. Hari Charan*.

('28) AIR 1928 Sind 176 (176) : 30 Cri L Jour 251, *Emperor v. Dito*.

('92-95) 1 Upp Bur Rul 47 (47), *Queen-Empress v. Nga Tun Win*. (District Magistrate.)

See also S. 439 Note 12.

Note 3

1. ('38) AIR 1938 Sind 80 (81) : 39 Cri L Jour 504 : 32 Sind L R 689, *Emperor v. Gulab Shah*. (Should be used only where there is no reasonable doubt upon record as to guilt of accused.)

('81) 4 All 148 (149) : 1881 All W N 159, *Empress of India v. Gayadin*. (Judgment of acquittal honest and not unreasonable — Appeal against such judgment should be dismissed.)

('31) AIR 1931 All 712 (716) : 32 Cri L Jour 1073, *Emperor v. Baldeo Koeri*. (In respect of pure question of fact powers are enforced only in those cases where, through incompetence, stupidity or perversity of subordinate tribunal, such unreasonable or distorted conclusions are drawn from evidence as to produce positive miscarriage of justice.)

('20) AIR 1920 Bom 217 (219) : 21 Cri L Jour 17, *Emperor v. Sakharan Manji*. (But discretion to exercise power appertains to Government and is not subject to control by High Court.)

('24) AIR 1924 Bom 335 (337) : 25 Cri L Jour 786, *Emperor v. Moti Khoda*. (Do.)

('15) AIR 1915 Sind 8 (9) : 9 Sind L R 17 : 16 Cri L Jour 604, *Emperor v. Kadir Bux*. (Do.)

2. ('33) AIR 1933 Mad 230 (230) : 34 Cr.L.J. 948, *Public Prosecutor v. Maqandi Nadar*.

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Note 3

caution.^{2a} It is a special weapon intended for exceptional occasions and which is to be only used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved; it cannot be expected that the Government will dull the edge of that statutory provision by utilizing it freely in cases which are of no or little general interest.³ The making of a direction under this section should be limited to those instances in which there is a grave miscarriage of justice⁴ or where it is required in the interests of justice and of the public.⁵

The exercise of the discretion is not subject to control by the High Court and cannot be questioned in dealing with such appeals.⁶

Can an appeal under this section be preferred by the Provincial Government against an order of acquittal when an appeal preferred by the accused against his conviction has already been heard and decided by the High Court? This question can only arise in cases where an accused person is acquitted of a graver charge but convicted of a lesser charge on the same facts. In such a case, both the Provincial Government and the accused person have a right of appeal. If both the appeals are preferred they should ordinarily be heard together; but if the appeal of the accused person is heard and decided by a High Court before the Provincial Government has appealed, is the appeal of the Provincial Government barred? A Full Bench decision of the

2a. ('38) AIR 1938 Sind 108 (113) : 39 Cri L Jour 630 : I L R (1939) Kar 41, *Emperor v. Pursomal Gerimal*.

('98) 21 All 122 (126) : 1898 All W N 208, *Queen-Empress v. Tinnal*.

('04) 1 Cri L Jour 781 (790) : 1904 Pun Re No. 7 Cr, *Emperor v. Chattar Singh*.

3. ('26) AIR 1926 Pat 176 (179) : 5 Pat 25 : 27 Cr. L. J. 235, *Siban Rai v. Bhagwant Dass*.

('29) AIR 1929 Pat 139 (140) : 7 Pat 579 : 30 Cri L Jour 673, *Wazir Kunjra v. Emperor*.

('98) 1898 Pun Re No. 15 Cr, p. 34 (35), *Queen-Empress v. Khushal Singh*.

('11) 12 Cri L Jour 364 (370) : 11 I. C. 132 : 1911 Pun Re No. 10 Cr (FB), *Emperor Kiru*.

[But see ('39) AIR 1939 Lah 406 (409) : 40 Cr. L. J. 942, *Shamlal v. Ohamanlal*. (If a Judge or the Executive Government find that an obvious error in a decision has been committed, whether the question involved is of greater or lesser public importance, a case of injustice is established and one in which it is the duty of Government to make an appeal — Per Ram Lal, J., in the order of reference.)]

4. ('94) 22 Cal 164 (170), *Deputy Legal Remembrancer v. Karuna Baistobi*.

('31) AIR 1931 All 712 (716) : 32 Cri L Jour 1073, *Emperor v. Baldeo Koeri*.

5. ('81) 4 All 148 (149, 150) : 1881 A W N 159, *Empress of India v. Gayadin*.

('94) 16 All 212 (214) : 1894 A W N 49, *Queen-Empress v. Robinson*.

('82) 1882 All W N 64 (64), *Empress v. Wali Muhammad*.

('31) AIR 1931 All 439 (442), *Emperor v. Ram Adhin Singh*.

('16) AIR 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91, *Graham & Co. v. Elsey*.

[See ('04) 1 Cri L Jour 674 (684) : 17 C P L R 75, *Emperor v. Mt. Gulbi*.]

[See also ('23) AIR 1923 Lah 601 (603) : 26 Cr. L. J. 337, *Ganga Singh v. Ramzan*. (Complainants had remedy in Civil Courts.)]

6. ('04) 1 Cri L Jour 674 (686) : 17 C P L R 75, *Emperor v. Mt. Gulbi*. (Apart from the merits of the appeal itself.)

('20) AIR 1920 Bom 217 (219) : 21 Cri L Jour 17, *Emperor v. Sakharan Manaji*.

('24) AIR 1924 Bom 335 (337) : 25 Cri L Jour 786, *Emperor v. Moti Khoda*.

('18) AIR 1918 Lah 41 (45) : 1917 Pun Re No. 43 Cr : 19 Cr. L. J. 85, *Emperor v. Agran*.

('15) AIR 1915 Sind 8 (9) : 9 Sind L R 17 : 16 Cr. L. J. 604, *Emperor v. Kadir Bux*. (Acquittal reversed.)

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Notes 3-5

Nagpur Judicial Commissioner's Court⁷ has held, overruling the view of the same Court in an earlier case,⁸ that an appeal against an acquittal for a major offence can be preferred by the Provincial Government although an appeal preferred by the accused against his conviction for a minor offence has been heard and decided by the High Court. But, where the appeal by the accused is pending hearing, it should be postponed, if in the opinion of the standing counsel for the Government it is likely that the Government will appeal against the acquittal so that both may be heard together. But it need not be postponed if there is only a possibility that the Government may desire to appeal.

4. "Public Prosecutor." — Under this section, it is the Public Prosecutor that is to be directed to present an appeal to the High Court. The term "Public Prosecutor" is defined in clause (t) of S. 4 (1) of the Code. Section 492 provides for the appointment generally or in any case or for any specified class of cases, one or more officers called "Public Prosecutors."¹ Therefore, an appeal against an acquittal presented to the High Court by the Superintendent and Remembrancer of Legal Affairs, Bengal, who by Notification has been appointed by the Provincial Government to be, by virtue of his office, Public Prosecutor in all cases heard by the High Court of Bengal in the exercise of its appellate jurisdiction, is not incompetent.² But the Legal Remembrancer of Bengal cannot be deemed to be the Public Prosecutor for the Province of Behar, from the mere fact that he has been directed by the Government of Behar and Orissa to present such an appeal without his being *appointed* as such and when there is already a Public Prosecutor for the Province of Behar.³

5. "High Court." — An appeal under this section lies only to the High Court. So a District Magistrate¹ or a Deputy Magistrate² or

7. ('32) AIR 1932 Nag 121 (124, 125) : 28 Nag L R 233 : 33 Cri L Jour 849 (FB), *Mohammadgul Rohilla v. Emperor*, (Contra Niyogi, A. J. C., agreeing with AIR 1932 Nag 73.)

See also S. 430 Note 1.

8. ('32) AIR 1932 Nag 73 (74) : 33 Cr. L. J. 728, *Emperor v. Modkia*. (Overruled by AIR 1932 Nag 121.)

Note 4

1. ('14) AIR 1914 Cal 560 (560) : 41 Cal 425:15 Cri L Jour 46, *Emperor v. Gaya Prasad*. (Fact that certain person has been directed to present appeal under this section does not involve his appointment as Public Prosecutor.)

2. ('19) AIR 1919 Cal 203 (203) : 46 Cal 544 : 20 Cri L Jour 170, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Tularam Barodia*.

3. ('14) AIR 1914 Cal 560 (560, 561) : 41 Cal 425 : 15 Cri L Jour 46, *Emperor v. Gaya Prasad*.

Note 5

1. ('91) 1891 A W N 120 (120, 121), *Empress v. Hardeo Singh*.

('03) 7 Cal W N 493 (494), *Bishun Das Ghose v. Emperor*.

('07) 11 Cal W N xci (xci), *Dwarka Nath Shahu v. Emperor*.

('83) 7 Mad 213 (214):2 Weir 477, *Rangaswami Ayyangar v. Narasimhulu Nayak*.

2. ('02) 26 Mad 478 (480) : 18 M L J 263 : 2 Weir 483, *Sami Ayya v. Emperor*. (Reversal by Deputy Magistrate of order acquitting accused on charge of theft is invalid.)

a Sessions Judge³ has no right to entertain an appeal against an order of acquittal.

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Notes 5-7

6. Order of acquittal.—The words “conviction” and “acquittal” are not applied in the Code to an order under S. 118 and are inapplicable to it. Therefore, an order of a Sessions Judge setting aside the order of a Magistrate calling upon a person to furnish security for good behaviour is not an order of acquittal within the meaning of this section so as to enable the Provincial Government to prefer an appeal under this section.¹

An order dismissing the complaint for the non-appearance of the complainant under S. 247 is an order of acquittal within the meaning of this section.²

The words ‘appellate order of acquittal’ mean and include all orders of an appellate Court by which a conviction is set aside.³

The ‘acquittal’ contemplated in the section need not be on all the charges made against the accused. The Provincial Government is not deprived of its right to appeal in cases where an accused person has been acquitted of a serious charge merely because at the same trial, he was convicted of a less serious charge.⁴ So, where an accused charged with a serious charge is acquitted of that charge but is convicted of a less serious one, it is open to the Government to prefer an appeal so far as the charge on which he was acquitted is concerned.⁵ The view held in the undermentioned cases⁶ that an ‘acquittal’ means a complete acquittal on all the charges is no longer correct since the decision of the Privy Council in *Kishan Singh v. Emperor*.⁷

7. Interlocutory orders.—There is no appeal provided against any *interlocutory order*. So where a Sessions Judge declines to try a

3. ('04) 1 Cri L Jour 700 (701): 1 A L J 415, *Sayid Khan v. Emperor*. (Order of acquittal passed by Magistrate without any charge being framed or evidence for defence taken.)

('98) 2 Cal W N celvi (celvii), *Baroda Nath v. Karait Sheikh*.

[See also ('11) 12 Cr.L.J. 575 (576):12 I. C. 839 (All), *Darbari Mal v. Emperor*.]

Note 6

1. ('28) AIR 1928 All 1 (1, 2) : 29 Cr. L. J. 92, *Emperor v. Baba Ram*.

('26) AIR 1926 Oudh 329 (329, 330) : 1 Luck 231 : 27 Cr. L. J. 626, *Emperor v. Samai Deen*. (But Local Government has right to apply in revision.)

('83) 9 Cal 878 (879), *Chand Khan v. Empress*.

2. See Note 7 to S. 247.

3. ('75) 24 Suth W R Cr 41 (41), *Govt. of Bengal v. Gokool Chunder Choudry*.

4. ('25) AIR 1925 Oudh 723 (725) : 26 Cr. L. J. 1364, *Sitaram v. Emperor*.

5. ('28) AIR 1928 P C 254 (256) : 50 All 722 : 55 Ind App 390 : 29 Cr. L. J. 828 (PC), *Kishan Singh v. Emperor*. (Ss. 302 and 304.)

('77) 2 Cal 273 (276, 277), *Empress of India v. Judoonath Gangooly*. (Ss. 302 and 304.)

('30) AIR 1930 Lah 338 (340) : 32 Cr. L. J. 56, *Emperor v. Sada Singh*. (S. 302 and Ss. 302/109.)

('25) AIR 1925 Oudh 723 (725): 26 Cr. L. J. 1364, *Sita Ram v. Emperor*. (Ss. 396 and 395.)

6. ('28) AIR 1928 Lah 230 (231): 29 Cr.L.J. 905, *Emperor v. Giam Singh*. (Change of conviction from S. 353 to S. 352 does not amount to acquittal under S. 353 and no appeal lies.)

[See ('27) AIR 1927 Lah 369 (370) : 8 Lah 136 : 28 Cr. L. J. 508 (508), *Fazal Khan v. Emperor*. (Trial under S. 302 — Conviction under S. 304 does not amount to acquittal under S. 302.)]

7. ('28) AIR 1928 P C 254 (256) : 50 All 722 : 55 Ind App 390 : 29 Cr. L. J. 828 (PC).

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case on the ground of want of jurisdiction, there is no order of acquittal and no appeal lies against such an order.¹ On the question whether it is open to the Government to prefer an appeal on an order of the Sessions Judge refusing to amend or add new charges, there is a difference of opinion. In *Queen-Empress v. Vaji Ram*,² Telang, J., held that "the appeal allowed was only from any original or appellate order of acquittal and the order refusing to allow additional charges is not an order which falls within those terms especially when it is not even an order which can be said to form the basis of the order of acquittal or a necessary condition of its tenability."

However, in *Emperor v. Stewart*,³ while Rupchand Bilaram, A. J. C., agreed with this view of Telang, J., Kincaid, J. C., held that although the section gives no power of appeal against an order refusing to amend charges, if such order is *followed by an original or appellate order of acquittal*, the Provincial Government may direct an appeal to be presented.

8. Limitation.— See Authors' Commentaries on Limitation Act, Art. 157.

Section 418

418.* (1) An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

(2) Notwithstanding anything contained in sub-section (1) or in section 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.

Explanation.— The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law.

The original section 418 was renumbered as sub-section (1) of that section and sub-s. (2) was newly inserted by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.

Synopsis

1. Scope and applicability of the section.
2. Trial by jury.
3. "On a matter of law only."
4. Sub-section (2).

* 1882 : S. 418; 1872 : S. 271; 1861 : S. 408.

Note 7

1. ('12) 13 Cr. L. J. 169 (170) : 13 Ind Cas 921 : 34 All 118, *Emperor v. Ram Narresh Singh*.

See S. 404 Note 1.

2. ('92) 16 Bom 414 (428).

3. ('27) AIR 1927 Sind 28 (29) : 21 Sind L R 55 : 27 Cri L Jour 1217. (But see Rupchand Bilaram, A. J. C., p. 39.)

Other Topics (miscellaneous)

Assessor case tried by jury. See Note 2.
 Inadmissible evidence or want of evidence—Question of law. See Note 3.
 Misdirection—Non-direction—Matter of law. See Note 3.
 One charge by jury and another as assessors. See Note 2.
 Petition to state illegalities. See Note 2.

Questions of fact in a jury case—When considered by High Court. See Note 1.
 Section inapplicable to assessor cases or to trial by Magistrates. See Note 1.
 Sufficiency of evidence—Question of fact. See Note 3.
 Verdict of jury—Final on facts. See Note 2.

**Section 418
Note 1**

1. Scope and applicability of the section.—This section provides that an appeal will lie on a matter of *fact* as well as a matter of *law*, except where the trial is by jury in which case an appeal will lie on a matter of *law* only.

The section applies equally to all criminal appeals, whether made by the Provincial Government against an acquittal or made by accused person against a conviction.¹ Thus, where in a jury case the Provincial Government preferred an appeal against an acquittal on questions of fact, it was held that the appeal was incompetent.² But, in a case tried by a Judge with the help of assessors³ or by a Magistrate,⁴ it is competent for the Provincial Government to appeal against an acquittal both on the question of law and on the question of fact. The section does not, in any way, curtail the powers of the High Court to deal with questions of fact as well, in a jury case, in a reference under S. 307⁵ or under S. 374⁶ of the Code.

Section 418 — Note 1

1. ('98) 20 All 459 (464) : 1898 A W N 117, *Queen-Empress v. Prag Dat.*
 ('33) AIR 1933 All 535 (538) : 55 All 689 : 35 Cr.L.J. 360, *Emperor v. Sheo Dayal.*
 ('04) 1 Cri L Jour 674 (678, 679) : 17 C P L R 75 (92), *Emperor v. Mt. Gulbi.*
 ('36) AIR 1936 Oudh 108 (109) : 36 Cri L Jour 1467 (1469), *Emperor v. Tehri.*
2. ('84) 10 Cal 1029 (1030), *Govt. of Bengal v. Parameshwar Mullick.*
 ('36) AIR 1936 Oudh 108 (109) : 36 Cr.L.J. 1467 (1469), *Emperor v. Tehri.* (No point other than one of law allowed to be raised on either side at hearing of appeal.)
3. ('33) AIR 1933 All 535 (538) : 55 All 689 : 35 Cri L Jour 360, *Emperor v. Sheo Dayal.* (All that the appellate Court has to see is whether offence charged is proved against the accused.)
4. ('09) 10 Cri L Jour 499 (500) : 4 Ind Cas 124 (Cal), *Govt. of Bengal v. Gannoo.*
 ('17) AIR 1917 Cal 687 (687) : 17 Cr.L.J. 9, *Deputy Legal Remembrancer, Behar v. Matukdhari Singh.* (There are no special rules for dealing with evidence in such appeal on questions of fact.)
5. ('87) 9 All 420 (424, 425) : 1887 All W N 39, *Queen-Empress v. Macarthy.*
 ('17) AIR 1917 All 173 (175) : 39 All 848 : 18 Cr.L.J. 491, *Ikramuddin v. Emperor.*
 ('29) AIR 1928 All 207 (211) : 50 All 625 : 29 Cr.L.J. 353 (F B), *Emperor v. Shera.*
 (No allegation of misdirection by trial Judge or misunderstanding of law by jury—High Court can revise verdict.)
 ('73) 20 Suth W R Cr 1 (4) : 11 Beng L R 14, *Queen v. Koonjo Seth.*
 ('25) AIR 1925 Lah 401 (402) : 6 Lah 98 : 26 Cri L Jour 1241, *Emperor v. Bimal Parshad.* (High Court can interfere though finding of jury is not perverse or manifestly wrong.)
 See also S. 307 Note 11.
6. ('37) AIR 1937 Sind 162 (163, 164) : 31 S L R 82 : 38 Cr.L.J. 808, *Khadim v. Emperor.*
 ('36) AIR 1936 Cal 73 (83) : 37 Cr.L.J. 394 : 63 Cal 929, *Benoyendra Chandra v. Emperor.*
 ('97-98) 2 Cal W N 49 (50), *Queen-Empress v. Chairadhari Goala.*
 ('24) AIR 1924 Cal 625 (628) : 26 Cri L Jour 5, *Hassenullah Sheikh v. Emperor.*
 ('21) AIR 1921 Sind 84 (86, 87) : 15 Sind L R 103 : 23 Cri L Jour 33 (F B), *Gul v. Emperor.* (High Court can go behind unanimous verdict of jury and substitute its own verdict.)
 [See ('73) 19 Suth W R Cr 57 (57), *Queen v. Ja fir Ali.*]

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Notes 1-2

The section does not apply to cases tried by a jury in a High Court or a Court of Session under the provisions of chapter XXXIII of the Code. In those cases, under S. 449, an appeal lies to the High Court on a matter of fact as well as a matter of law. See S. 449 and Notes thereunder.

The section does not confer a right of appeal from the verdict and judgment in a trial held at the sessions of the High Court.⁷ But a Judge of the Sind Judicial Commissioner's Court sitting in its Sessions Court jurisdiction is a *Sessions Judge* and an appeal lies to the Judicial Commissioner's Court against a conviction recorded on a trial held before him sitting with a jury.⁸ See also S. 266 Note 4.

2. Trial by jury.—An appeal under this section in cases tried by jury lies on matters of law only and the appellate Court cannot go into the facts of the case.¹ Where facts are in issue the verdict of a jury is absolutely final and must be given effect to. The section jealously guards the right of the accused to the finality of the verdict of the jury, so that an appellate Court cannot, by going into a question of fact, substitute its own opinion for the verdict of the jury.^{1a}

7. ('35) AIR 1935 Rang 67 (69) : 13 Rang 104 : 36 Cr. L. J. 595 (FB), *H. W. Scott v. Emperor*.

8. ('39) AIR 1939 Sind 209 (211, 212) : 41 Cri L Jour 28 : 1 L R (1940) Kar 249, *Seiwaram v. Emperor*. (Sentence passed by a Judge of Judicial Commissioner's Court sitting in its Sessions Jurisdiction—Appeal lies to Judicial Commissioner's Court on point of law only.)

Note 2

1. See ('66) 6 Suth W R Cr 1 (1), *Queen v. Grishchunder Bundoo*. (A person tried by a jury is entitled to an appeal on the facts if the offence was committed before the passing of the Penal Code.)

1a. ('39) AIR 1939 Bom 457 (458, 460) : 1 L R (1939) Bom 648 : 41 Cr. L. J. 176, *Emperor v. Jhina Soma*. (To lightly interfere with verdict of a jury with which Sessions Judge has agreed would be to reduce trial by jury in India to a farce.)

('37) AIR 1937 All 195 (196) : ILR (1937) All 419 : 38 Cr. L. J. 465, *Manjia v. Emperor*.

('17) AIR 1917 All 173 (175, 176) : 39 All 348 : 18 Cri L Jour 491, *Ikarammuddin v. Emperor*. (Appellate Court cannot look at evidence and find accused guilty of offence with which he was not charged and which was not laid before jury.)

('94) 1894 Rat 730 (732), *Queen-Empress v. Balappa*. (The section gives finality to verdict of jury when there has been no error of law nor misdirection.)

('01) 25 Bom 680 (692) : 3 Bom L R 278 (FB), *King-Emperor v. Parbhusankar*. (The words in section "where trial was by jury" mean "where trial in fact was by jury" and not "where trial should have been by jury".)

('19) AIR 1919 Cal 514 (518) : 46 Cal 895 : 20 Cri L Jour 324, *Romeshchandra v. Emperor*. (Evidence prejudicial to accused wrongly admitted—Judge directing jury to discard it—Verdict of guilty by jury—Conviction should be set aside.)

('84) 10 Cal 1029 (1030), *Govt. of Bengal v. Parameshwar Mullick*.

('94) 21 Cal 955 (976, 977), *Wafadar Khan v. Queen Empress*.

('97) 25 Cal 230 (231), *Ali Fakir v. Queen-Empress*.

('11) 12 Cri L Jour 193 (195) : 10 Ind Cas 684 (Cal), *Rashidazzaman v. Emperor*.

(1865) 2 Suth W R Cr 5 (5), *Queen v. Gopaul Dass*.

('67) 8 Suth W R Cr 3 (3), *Queen v. Mt. Bhooodea*.

('70) 13 Suth W R Cr 26 (26), *Queen v. Shuru fooddeen*.

('71) 16 Suth W R Cr 19 (20), *Queen v. Rutton Dass*. (No evidence before jury on which accused could be convicted—Verdict of guilty cannot be sustained.)

('72) 18 Suth W R Cr 45 (46), *Queen v. Nidheeram Bagdee*.

('90) 14 Mad 36 (37, 38) : 2 Weir 390, *Queen-Empress v. Chinna Tevan*.

('84) 2 Weir 488 (488), *In re Govt. Pleader*. (Want of accuracy in stating effect of evidence may amount to misdirection in law.)

('31) AIR 1931 Oudh 171 (171) : 6 Luck 705 : 32 Cri L Jour 858, *Mangal Singh v. Emperor*. (Severity of sentence is matter of law.)

Section 418
Note 2

The words "where the trial was by jury" mean "where the trial was *in fact* held by jury" and not "where the trial ought to have been held by jury" and, therefore, where the accused is tried by a jury in a case which ought to have been tried with the aid of assessors, trial will be treated as one by a jury and no appeal lies except on a matter of law.² The contrary view held in the undermentioned decisions³ can no longer be considered to be good law.

Where an accused person is tried on one charge by a jury and on another charge by the Judge, with the aid of the same jury as assessors, an appeal will lie against conviction on the latter charge on a question of *fact* as well as on a question of law.⁴ In the undermentioned case⁵ it was held that where the charge tried by the jury and the charge tried by the Judge with the aid of the same jury as assessors are so connected together that, if the facts relating to the former charge

- (134) AIR 1934 Oudh 122 (122) : 35 Cri L Jour 566, *Shubrati v. Emperor*.
 (131) AIR 1931 Pat 379 (381):11 Pat 143:32 Cr. L. J. 1197, *Aghore Dutta v. Emperor*.
 (198) 2 Cal W N 702 (718), *Queen-Empress v. Bhairab Chunder*.
 (128) AIR 1928 Mad 1186 (1189) : 51 Mad 956: 30 Cri L Jour 317 (FB), *Veerappa Goundan v. Emperor*.
 [See (166) 5 Suth W R Cr 40 (40), *Queen v. Hulodhur Ghosh*. (Rejection of appeal preferred out of time.)
 See also S. 423 Note 40.
 2. (138) AIR 1938 Cal 51 (57, 65, 66): 1 L R (1938) 1 Cal 290: 39 Cri L Jour 161, *Goloke Behari v. Emperor*. (Per Mc Nair, J.; Biswas, J. contra.)
 (137) AIR 1937 Cal 756 (759, 760) : 1 L R (1937) 2 Cal 315 : 39 Cri L Jour 182, *Ekkabbar Mandal v. Emperor*.
 (101) 25 Bom 680 (688 to 694): 3 Bom L R 278 (FB), *King-Emperor v. Parbusankar*. (Per Jenkins, C. J.)
 (133) AIR 1933 All 128 (129, 130):55 All 68:34 Cr. L. J. 441, *Dakhni v. Emperor*.
 (109) 10 Cr. L. J. 30 (31) : 2 I. C. 480: 33 Bom 423, *Mausing Bechar v. Emperor*. (Some offences triable by jury—Some offences triable by jurors as assessors—All offences tried by jury.)
 (126) AIR 1926 Bom 134 (135) : 27 Cr. L. J. 650, *Emperor v. Gulabchand Dosaji* (Accused charged under S. 412 may be convicted under S. 411 though not charged.)
 (103) 26 Mad 243 (246, 248) : 2 Weir 463, *Pattikadan Ummaru v. Emperor*. (Per Bhashyam Ayyangar, J.; Benson, J. contra— Trial by jury for offence triable by jury—Acquittal — Opinion of guilt in respect of offences not triable by jury — Conviction—Appeal on facts.)
 (185) 9 Mad 42 (43, 44), *Queen-Empress v. Lekshmana*.
 (130) 1930 Mad W N 776 (776), *Karuppa Thevan v. Emperor*. (Trial by jury instead of with assessors is not invalid—Accused who does not take objection in trial Court cannot complain afterwards.)
 (198) 25 Cal 555 (557), *Surja Kurmi v. Queen-Empress*.
 (179) 4 Cal L Rep 405 (408), *In re Bhootnath Dey*.
 [See (131) 1931 Mad W N 129 (130), *Ramanna v. Emperor*. (Obiter).]
 See also S. 269 Note 3.
 3. (172) 18 Suth W R Cr 59 (59), *Queen v. Narkoo*.
 (175) 24 Suth W R Cr 30 (30), *Queen v. Doorga Churn Shome*. (Judge's charge was treated as his judgment.)
 (173) 3 Cal 765 (766), *Empress v. Mohim Chunder Rai*. (Error of procedure not affecting merits of case ought not to affect prisoner's right of appeal.)
 (193) 1893 Rat 961 (962), *Queen-Empress v. Lalbu*.
 (196) 26 Mad 243n (243n): 2 Weir 709 : 6 Mad L Jour 14 (16), *Muthusamy Pillai v. Queen-Empress*.
 (188) 1888 Pun Re No. 18 Cr, p. 33 (33), *Skilling v. Empress*. (Appeal heard on merits of conviction by lower Court.)
 [See (170) 14 Suth W R Cr 32 (32), *Queen v. Abdool Kareem*.]
 4. (113) AIR 1918 Mad 821 (822): 18 Cr.L.J. 346, *Karuppa Goundan v. Emperor*.
 5. (140) 1940 N L J 565 (567, 568), *Monjilal v. Emperor*. (In a case when a man is on trial for his life every ambiguity in the law of procedure should be resolved in his favour.)

Section 418
Notes 2-3

cannot be challenged, the conclusion will be irresistible that the conviction on the latter charge is properly made, the appellant can challenge the facts on which his conviction on the former charge is based. As appeals in cases tried by a jury can only be on a point of law, every petition of appeal should state distinctly in what respect the law has been contravened. It is not for the Court to hunt through the records and find out any illegality that may arise.⁶

3. "On a matter of law only."—A misdirection or non-direction by the Judge to the jury is a matter of law. If the verdict has been influenced by evidence, which was inadmissible or proceeds on no evidence at all, this is again a matter of law.¹ But the reception of inadmissible evidence which has not influenced the verdict does not vitiate the trial.²

The *sufficiency or otherwise* of evidence is not a matter of law; whether the jury believes the evidence to be sufficient or not is a pure question of fact.³

The explanation to the section recognizes another matter of law, namely, the alleged severity of a sentence.⁴ See also the under-mentioned cases.⁵

6. (1864) 1 Suth W R Cr 21 (21), *Queen v. Gopaul Bhercewala*.
See also S. 419 Note 6.

Note 3

1. ('30) AIR 1930 All 24 (26): 31 Cri L Jour 33, *Emperor v. Mohammad*.
(03) 27 Bom 626 (632): 5 Bom L R 599, *Emperor v. Vaman Shivram*.
(67) 7 Suth W R Cr 6 (6), *Queen v. Chand Bagdee*. (Conviction on no evidence.)
(71) 15 Suth W R Cr 46 (47), *Queen v. Bahar Ali Kahar*. (Total absence of all evidence to show that prisoner had committed crime.)
(90) 17 Cal 642 (667) (FB), *Queen-Empress v. O'Hara*. (Judge read to jury statements which had not been admitted in evidence.)
(32) AIR 1932 Cal 295 (296): 33 Cri L Jour 477, *Golan Asphia v. Emperor*.
(16) AIR 1916 Mad 851 (854): 39 Mad 449: 16 Cr.L.J. 294, *Annavi Muthiriyar v. Emperor*. (Admission of inadmissible evidence without warning jury.)
2. ('14) AIR 1914 P C 155 (164): 15 Cri L Jour 326 (P C), *Ibrahim v. Emperor*.
(30) AIR 1930 Pat 247 (251): 9 Pat 474: 31 Cr.L.J. 721, *Sohrai Sao v. Emperor*.
3. (1865) 2 Suth W R Cr 3 (3), *Queen v. Muddun Sirdar*. (Deposition of single credible witness is sufficient in law.)
4. ('31) AIR 1931 Oudh 171 (171): 6 Luck 705: 32 Cr.L.J. 858, *Mangal Singh v. Emperor*. (Conviction under Ss. 366/368, Penal Code — Sentence of seven years' rigorous imprisonment.)
(25) AIR 1925 Rang 239 (239): 3 Rang 220: 26 Cri L Jour 1371, *U Zagriya v. Emperor*. (Overruled in AIR 1935 Rang 67 (F B), on another point.)
5. ('39) AIR 1939 Sind 209 (212): 41 Cr.L.J. 28: 1 L R (1940) Kar 249, *Sewaram v. Emperor*. (Burden of proving innocence put on accused — It is error of law.)
(37) AIR 1937 All 195 (196): 1 L R (1937) All 419: 38 Cri L Jour 465, *Manja v. Emperor*. (Judge supposing that he had no jurisdiction to disagree with verdict of jury — It is a matter of law.)
(36) AIR 1936 Oudh 268 (269): 37 Cr. L. J. 749, *Bindeshi v. Emperor*. (Sessions Judge has jurisdiction to hold inquiry into the alleged misconduct of juror. The question whether the Judge should or should not hold an inquiry is a matter within his discretion and the High Court will not interfere in appeal unless it is convinced that the Sessions Judge exercised a wrong discretion.)
(28) AIR 1928 Cal 827 (828): 30 Cri L Jour 54, *Abdul Barik v. Emperor*. (Jury practically abdicating their functions in favour of the Judge—Retrial ordered.)
(30) AIR 1930 Cal 130 (131): 31 Cr. L. J. 771, *Osman Gani v. Emperor*. (It is a question of fact whether a statement made to a police-officer in the course of an investigation comes under S. 162 or is made by way of complaint to commence an investigation under S. 164.)

4. Sub-section (2).—This sub-section was added in 1923. Before that it was held in a series of cases¹ that where in a trial by jury, of several accused, one of the accused was sentenced to death and others to lesser punishments, and all of them appealed, the High Court, on a reference under S. 374 in respect of the person sentenced to death, could go into the facts, but in dealing with the appeals of other persons, they must be confined to matters of law and could not enter into the facts. This anomaly has been removed by the insertion of this sub-section which provides that when in the case of a trial by jury, one person is sentenced to death, and another to lesser punishment, the second accused may appeal on a matter of fact as well as on a matter of law.²

Section 418
Note 4

419.* Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367.

Section 419

Synopsis

- | | |
|--|---------------------------------------|
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| 2. Copy of judgment to accompany. | 7. Form of petition. |
| 3. Who can present petition of appeal. | 8. Withdrawal of appeals. |
| 4. Presentation to be in person. | 9. Limitation. |
| 5. To whom appeal should be presented. | 10. Stamp. |
| | 11. Petition in non-appealable cases. |
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Other Topics (miscellaneous)

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| Absence of completed judgment. See Note 2. | Appeal out of time. See Note 9. |
| Accused to be asked of their intention to appeal. See Note 9. | Dispensation with copy of judgment. See Note 2. |
| Accused with conflicting interests—No appeal by same pleader. See Note 3. | False statement in appeal petition—No offence. See Note 6. |
| Additional points by supplementary petition. See Note 6. | Form of appeal applicable to jail appeals also. See Note 1. |
| Allegation against capacity of jurors — Affidavit in time to file counter-affidavit before hearing. See Note 7. | Form, even if no grounds. See Note 7. |
| | Illegality in a trial by jury. See Note 6. |
| | Irrelevant or scandalous matters about trial Judge. See Note 6. |

* 1882 : S. 419 ; 1872 : S. 275 ; 1861 : S. 416.

Note 4

1. ('93) 2 Cal W N 49 (53), *Queen-Empress v. Chatradhari Goala*. ('73) 19 Suth W R Cr 57 (57), *Queen v. Jaffir Ali*. ('24) AIR 1924 Cal 625 (628) : 26 Cri L Jour 5, *Hassenulla Sheikh v. Emperor*. ('21) AIR 1921 Sind 84 (86, 87) : 15 Sind L R 103 : 23 Cri L Jour 33 (F B), *Gul v. Emperor*.
2. ('37) AIR 1937 Sind 162 (164) : 31 Sind L R 82 : 38 Cr. L. J. 808, *Khadim v. Emperor*. (S. 376 of the Code should be read with S. 418 (2).) ('33) AIR 1933 Cal 426 (429) : 34 Cri L Jour 533 (S B), *Asraf Ali v. Emperor*. ('32) AIR 1932 Pat 302 (302, 303) : 34 Cri L Jour 83, *Emperor v. Rashbehari Lal*.

Section 419
Notes 1-3

Legislative changes. See Note 3.	Putting in petition box — No presentation. See Note 4.
Limitation in civil and criminal appeals. See Note 9.	Rejection of appeal for want of copy of judgment. See Note 2.
Memo of appearance. See Note 3.	Sending by post. See Note 4.
No verification of appeal petition needed. See Note 7.	Single judgment in joint trial of several accused — Single or separate appeals. See Note 7.
Non-mention of plea in memo of appeal — Allowed, if whole trial vitiated. See Note 6.	Three accused — Appearance by a pleader — Presentation by another pleader for one accused only. See Note 3.

1. Scope of the section.—Section 420 deals with the presentation of appeals from jail. This section is general and prescribes the *form* in which a petition of appeal, whether from jail or otherwise, is to be presented.¹

Where an appeal is presented through the officer in charge of the jail under S. 420 and is dismissed summarily under S. 421, no further appeal can be brought under this section.² Nor does an appeal lie from the order of the High Court, dismissing the previous appeal under S. 421.³ See also Note 9 to S. 421.

2. Copy of judgment to accompany.—Every petition of appeal should normally be accompanied by a copy of the judgment.¹ The absence of a complete judgment in the record is, however, not a ground for refusing to entertain the appeal.^{1a}

Where a petition of appeal is not accompanied by a copy of the judgment, the appeal may be rejected.²

The Court may, however, in its discretion, in proper cases, *dispense with* the copy of the judgment.³ Where three accused preferred a joint appeal with a single copy of judgment, but furnished stamps necessary for three separate copies of judgment, it was held that the Court should, in exercise of the discretion, dispense with separate copies of judgment and hear the appeal.⁴ Similarly, where the full order appealed against was furnished along with one of the connected applications, it was held that the production of the judgment in other applications might be dispensed with.⁵

3. Who can present petition of appeal. — Under the Code of 1872, there was no specific provision as to who should present an appeal and it was held that any person authorized by the appellant

Section 419 — Note 1

- (191) 13 All 171 (179) : 1891 A W N 48 (F B), *Queen-Empress v. Pohpi*.
- (140) AIR 1940 Oudh 369 (371) : 41 Cri L Jour 711, *Jodha v. Emperor*.
- (136) AIR 1936 Oudh 219 (222) : 37 Cr. L. J. 362 : 12 Luck 30, *Ram Jas v. Emperor*.
- (135) AIR 1935 Pat 426 (427, 430) : 37 Cri L Jour 58 : 14 Pat 392, *Pem Mahton v. Emperor*.
- (135) AIR 1935 Pat 426 (427, 430) : 37 Cr. L. J. 58 : 14 Pat 392, *Pem Mahton v. Emperor*.

Note 2

- Sec* ('74) 1874 Rat 82 (82, 83). (Copy in prisoner's own language is sufficient.)
- 1a. ('79) 2 Weir 438 (439).
- (134) AIR 1934 All 206 (207) : 56 All 299 : 35 Cri L Jour 441, *Bansgopal v. Emperor*. (Order rejecting appeal is not judgment within meaning of S. 369.)
- (129) AIR 1929 Lah 614 (614, 615) : 30 Cr. L. J. 235, *Parmanand v. Mohan Lal*.
- (103) 5 Bom L R 704 (704), *Emperor v. Sitaram*.
- (129) AIR 1929 Lah 614 (614) : 30 Cri L Jour 235, *Parmanand v. Mohan Lal*.

could present it.¹ Under the Code of 1882, and the present Code, only the *appellant* or his *pleader* can make such presentation. The word "pleader" includes a *mukhtar* appointed with the permission of the Court² and he is entitled to present an appeal on behalf of his party. Presentation by a pleader's clerk is considered equivalent to a presentation by the pleader and is valid.³ But a person, who is not a pleader's clerk and one over whose conduct and action he has no control, has no power to present an appeal on behalf of the party.⁴ Where a petition of appeal on behalf of three accused was signed under a vakalat by their pleader, but the presentation was made by another pleader, who had a vakalat only from one of the accused, it was held that the appeal should be treated as properly presented.⁵

Where two accused have conflicting interests, they should not appeal through the same pleader.⁶

It is not necessary that a vakalat should be filed. A memorandum of appearance is sufficient to validate a presentation.⁷

4. Presentation to be in person. — The presentation of a petition of appeal should be made *in person*. A petition put into a petition box kept for the convenience of the parties cannot be recognized for the reason that it could have been deposited there by a third party.¹ Nor can a petition be sent by *post*.² Where, however, the District Magistrate proceeded to treat a petition sent by post as if it was duly presented, it was held that it should not be dismissed without giving the petitioner an opportunity of being heard.³

5. To whom appeal should be presented. — No specific provision has been made by the Code as to the person to whom an appeal is to be presented, and the question, therefore, has been held to be merely one of administrative convenience and a presentation to an officer of the Court, such as a bench clerk, or to one of the

Note 3

1. ('77) 1 Mad 304 (304) : 2 Weir 469, *In re Subba Aitala*.
(181) 6 Bom 14 (15), *Imperatrix v. Shivram Gundu*.
2. ('11) 12 Cr. L. J. 118 (118) : 9 L.C. 711 : 4 S. L. R. 195, *Topanmal v. Emperor*.
3. ('96) 20 Mad 87 (87) : 2 Weir 470, *Empress v. Karuppa Udayan*.
(194) 2 Weir 469 (469), *In re Samuel*.
4. ('97) 21 Mad 114 (115) : 2 Weir 470, *Empress v. Ramaswami*.
5. ('97) 2 Weir 470 (471), *In re Muthu Mera Levai*.
6. ('36) AIR 1936 Lah 859 (860, 861) : 17 Lah 771 : 38 Cri L Jour 115, *Mulhe v. Emperor*.
(190) 1890 Pun Re No. 13 Cr, p. 25 (25, 26), *Hira v. Empress*.
7. ('24) AIR 1924 Mad 192 (192):25 Cr. L. J. 73, *Manikonda Lingayya v. Emperor*.
(126) AIR 1926 Pat 296 (297, 298) : 27 Cr. L. J. 666, *Subda Santal v. Emperor*.
(No appointment in writing is necessary.)
See also S. 340 Note 10.

Note 4

1. ('96) 19 Mad 354 (355) : 2 Weir 468, *Queen-Empress v. Vasudevayya*.
2. ('91) 15 Mad 137 (137, 138) : 2 Weir 468, *Empress v. Ariappa*.
(184) 2 Weir 467 (468), *In re Laurisetti Pitchaiya*.
3. ('89) 1889 Rat 464 (465), *Queen-Empress v. Bhagwan*.

Section 419
Notes 5-7

Judges, is not invalid.¹

6. Contents of petition. — A petition of appeal should not contain irrelevant, defamatory and scandalous expressions concerning the trying Magistrate. If it does, it will be returned for expunging the objectionable matter.¹

In cases of trial by jury, the appeal can only be on a point of law and the appeal petition should state clearly what points of law have been contravened.²

Where an appellant, who has not got all necessary copies when presenting an appeal, reserves to himself liberty to bring forward additional points of appeal afterwards, it is perfectly regular, under such circumstances, to raise such additional points by a supplemental petition.³

A false statement made in a petition of appeal will not render the appellant liable for prosecution for making such false statement.⁴ See also section 342 Note 31.

When it is contended that an alleged illegality or error vitiates the whole trial, such a plea, though not taken in the memorandum of appeal, will be allowed to be raised at the hearing of the appeal.⁵

7. Form of petition. — Even if the prisoners wish to state no grounds for their appeal, still their appeal must, according to law, be in the form of a petition.¹ There is no provision of law which requires the petitioner to verify the petition of appeal.²

Where appeals are filed by several persons convicted by a single judgment in a joint trial, they should, according to the Judicial Commissioner's Court of Nagpur, be made separately.³ The practice in the Chief Court of Oudh seems to be that such persons can file a single appeal with a single copy of judgment.⁴ The Lahore High Court has

Note 5

1. ('39) AIR 1939 Mad 669 (669, 670): 40 Cr. L. J. 960, *In re Gonappala Basappa*. (Appeal presented to the second clerk of office of appellate Court as head clerk was absent on leave.)
- ('16) AIR 1916 Mad 110 (111): 39 Mad 527: 16 Cr. L. J. 593 (F B), *Public Prosecutor v. Kadiri Koya Haji*.

Note 6

1. ('89) 15 Bom 488 (489, 490, 491), *In re Clive Durant*. ('06) 3 Cr. L. J. 376 (379): 29 Mad 100, *Suryanarayana v. Emperor*.
2. (1864) 1 Suth W R Cr 21 (21), *Queen v. Gopaul Bherewalla*. See also S. 418 Note 2.
3. ('71) 8 Bom H C R Cr 126 (135, 136), *Reg. v. Kashinath*.
4. ('79) 1879 Pun Re No. 17 Cr, p. 45 (46), *Ghanaya v. Empress*. ('81) 1881 Pun Re No. 41 Cr, p. 102 (103), *Empress v. Sunt Lal*. ('99) 12 Mad 451 (453): 1 Weir 113, *Empress v. Subbayya*. ('28) AIR 1928 Pat 574 (577): 29 Cr. L. J. 613, *Amir Ali v. Dukhan Momin*.
5. ('31) AIR 1931 Oudh 113 (113): 6 Luck 386: 32 Cr. L. J. 91, *Ram Laitan v. Emperor*.

Note 7

1. ('70) 13 Suth W R Cr 69 (69), *Empress v. Nitto Gopal Paulit*.
2. ('79) 1879 Pun Re No. 17 Cr, p. 45 (46), *Ghanaya v. Empress*. ('89) 12 Mad 451 (453): 1 Weir 113, *Queen-Empress v. Subbayya*.
3. ('27) AIR 1927 Nag 48 (48): 27 Cr. L. J. 1062, *Maharaj Singh Gond v. Emperor*.
4. ('17) AIR 1917 Oudh 329 (330): 18 Cr. L. J. 512, *Mt. Batasha v. Emperor*.

also held that a joint appeal is legal where the interests of the accused are common.⁵

Section 419
Notes 7-12

Where the memorandum of appeal alleges that one of the jurors was hard of hearing, another ignorant of English and unable to follow the arguments in Court, such facts should be supported by an affidavit before the appeal comes on for hearing, in time, so that the Crown could make the necessary enquiries and file counter-affidavit.⁶

8. Withdrawal of appeals. — See Note 8 to Section 423.

9. Limitation. — See Authors' Commentaries on Limitation Act, Articles 150, 154 and 155.

10. Stamp. — The appeal petition presented by a pleader on behalf of an appellant in *duress* need not bear a court-fee stamp as per clause 17 of S. 19 of the Court-fees Act.¹ The appellants, who are not in custody, cannot take advantage of the unstamped copy of the judgment of the lower Court which the appellants, who were in prison, were entitled to use. Those appellants, who were not in custody, must affix the necessary stamp.²

11. Petition in non-appealable cases. — Though a petition has been filed as an appeal, where no appeal lies, the High Court can deal with it as in revision.¹

12. Territorial jurisdiction. — Appellate jurisdiction existing at the time of presentation of an appeal is not lost by the subsequent transfer of territory.¹

420.* If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer

Section 420

Procedure when
appellant in jail.

* 1882 : S. 420; 1872 : S. 277; 1861 : S. 418.

5. ('36) AIR 1936 Lah 859 (860); 17 Lah 771; 38 Cr.L.J. 115, *Mulhe v. Emperor*.
6. ('32) AIR 1932 Pat 302 (303) : 34 Cr. L. J. 83, *Emperor v. Rashbehari Lal*.

Note 10

1. ('18) AIR 1918 Nag 125(126); 14 Nag L R 77; 19 Cr.L.J. 494, *Emperor v. Maroti Teli*. (10 Cal 61, Followed.)
(24) AIR 1924 Rang 160 (160) : 1 Rang 510 : 25 Cr. L. J. 277, *In re Court-fees Act, S. 19(xvii)*.
(22) AIR 1922 U B 14(15); 23 Cr. L. J. 121; 4 U B R 72, *Jaganath v. Emperor*.
2. ('82) 2 Weir 467 (467), *In re Venkata Konda Reddi*.

Note 11

1. ('05) 2 Cr. L. J. 105 (106) : 2 A L J 173, *Gajju v. Emperor*.

Note 12

1. ('12) 13 Cr.L.J. 169 (170) : 13 I. C. 921 : 34 All 118, *Emperor v. Ram Naresh*.
(11) 12 Cr. L. J. 401 (401) : 11 I. C. 585 : 33 All 578, *Mahabir v. Emperor*.
(Transfer of territory from British India after presenting appeal, jurisdiction of appellate Court to hear appeal not gone.)

Section 420
Notes 1-3

in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate Court.

1. "Copies accompanying the same."— A copy of the judgment should accompany appeals presented to jail officers under this section in the same manner as an appeal under S. 419. Appeals not accompanied by such copies should not be forwarded to the appellate Court, but should be returned to the appellant.¹ When a prisoner in jail applies through the Superintendent of the jail for a copy of judgment in order to prefer an appeal, it is the Magistrate's business to procure and forward the copy applied for, or to arrange that this should be done.² See Note 2 to section 419.

2. Presentation to the officer in charge of the jail.— The presentation to the officer in charge of the jail is good and sufficient whatever delay there may be in forwarding the petition to the appellate Court.¹ Every facility such as pen, paper and ink should be given to the prisoner in jail to enable him to prepare his petition.²

3. "Forward such petition and copies to the proper appellate Court."— A vacation Judge can hear and dispose of an appeal from jail.¹ According to the Criminal Circulars issued by the Calcutta High Court, the officer in charge of the jail should not forward petitions of appeal from prisoners to the High Court in cases in which sentences or orders have already been passed by an appellate Court on appeal. In such cases, parties should apply to the High Court by motion made by a pleader in open Court.² According to the said Circulars, the petition of appeal against sentences or orders passed by the Sessions Judge, presented to officer in charge of the jail, should be forwarded by such officer direct to the High Court, intimation of the fact being at once given to the Sessions Judge whose sentence or order is appealed against.³ All communications from the officer in charge of the jail to the Sessions Judge, relative to appeals of the prisoners to him, should be made to the Judge direct and not through the District Magistrate who has no concern with the decision of the Sessions Judge in appeal, and the appellate Court should certify its decision to the Magistrate from whose decision the appeal has been preferred and such

Section 420 — Note 1

1. ('67) 8 Suth W R Cr Cir 7 (7), *Criminal Circular No. 9.*
2. ('92-96) 1 Upp Bur Rul 5 (5, 6), *Maung Za Kye v. Queen-Empress.*

Note 2

1. ('90) 1890 Pun Re No. 29 Cr, p. 96 (97), *Muhammad v. Empress.*
- ('92-96) 1 Upp Bur Rul 129 (129), *Nga Po Thawng v. Empress.*
- ('92-96) 1 Upp Bur Rul 180 (180), *Bhagawati v. Queen-Empress.*
2. ('70) 13 Suth W R Cr 69 (69), *In re Nitto Gopal Paulit.*

Note 3

1. ('23) AIR 1923 Mad 426 (428) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhammad Haji v. Emperor.*
2. ('69) 12 Suth W R Cr Cir 5 (5), *Criminal Circular Memo, No. 8 of 1869.*
3. ('67) 8 Suth W R Cr Cir 5 (5), *Criminal Circular No. 9 of 1867.*

Magistrate should inform the appellant in writing, through the officer in charge of the jail, of the result of the appeal.⁴

Section 420.
Notes 3-6

4. **Limitation.** — See Authors' Commentaries on the Limitation Act, Articles 150, 154 and 155.

5. **Stamp.** — See Note 10 to Section 419.

6. **Appointment of counsel in appeals from jail.** — See the undermentioned case.¹

421.* (1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Section 421

Summary dismissal of appeal.

Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

* Code of 1882 : S, 421 — Same.

Code of 1872 : S. 278.

278. The Appellate Court shall fix a reasonable time within which the appellant or his counsel or authorized agent may appear, and it may reject the appeal if, on a perusal of the petition of appeal and the copy of the judgment or order appealed against, and after hearing the appellant or his counsel or authorized agent if he appears it considers that there is no sufficient ground for questioning the correctness of the decision or for interfering with the sentence or order appealed against.

Before rejecting the appeal the Court may call for and peruse all or any part of the proceedings of the lower Court, but shall not be bound to do so.

Code of 1861 : S. 417.

417. It shall be competent to the Appellate Court to reject the appeal if, on a perusal of the petition of appeal and the copy of the sentence or order appealed against, and after hearing the appellant or his counsel or agent if they appear, the Court shall consider that there is no sufficient ground for questioning the correctness of the decision or for interfering with the sentence or order appealed against. Before rejecting the appeal, the Court may call for and peruse any part of the proceedings of the lower Court, but shall not be bound to do so.

4. ('69) 12 Suth W R Cr Cir 1 (1), *Criminal Circular No. 6 of 1869.*

Note 6

1. ('27) AIR 1927 Oudh 869 (375) : 2 Luck 631 : 29 Cr. L. J. 129, *Ram Prasad v. Emperor*. (Practice of not allowing appellants from jail to argue in person is in their interest.)

Section 421
Note 1

Synopsis

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| <ol style="list-style-type: none"> 1. Scope and applicability of the section. 2. "Shall peruse the same." 3. "May dismiss the appeal summarily." 4. "No sufficient ground for interfering." 5. Right of appellant to be heard—Proviso. | <ol style="list-style-type: none"> 6. "May call for the record of the case."—Sub-section (2). 7. Judgment and record of reasons. 8. Withdrawal of appeal. 9. Review. See Note 1 to S. 430. 10. Revision. 11. Appeal. |
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Other Topics (miscellaneous)

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| <p>Admission of appeal — No bar to consideration of appealability later. See Note 1.</p> <p>Appeal — Admission, as to one charge and rejection as to other—Undesirable. See Note 1.</p> <p>Appellant to be heard before dismissal as barred. See Note 2.</p> <p>Applicability to convictions and acquittals alike. See Note 1.</p> <p>Co-accused—Summary rejection though admission of appeal by the other. See Note 3.</p> <p>Disposal of appeal on merits even in the absence of appellant. See Note 2.</p> <p>Dismissal under this section and one under S. 423—Difference. See Note 1.</p> <p>Hearing before admission — If affects right of hearing after sending for records. See Note 5.</p> <p>Hearing includes right of reply and reference to copies of evidence. See Note 5.</p> | <p>Immediate dismissal of barred appeal. See Note 2.</p> <p>No admission of appeal as to sentence only. See Note 1.</p> <p>No alteration of sentence in dismissing appeal summarily. See Note 1.</p> <p>No re-opening of whole appeal after considered decision of some points. See Note 1.</p> <p>No summary rejection after admission. See Note 1.</p> <p>Notice of hearing to be given. See Note 5.</p> <p>Right of hearing in jail appeals under S. 420. See Note 5.</p> <p>Sending for record — Not admission of appeal. See Note 6.</p> <p>Summary dismissal — Remand on appeal therefrom. See Note 7.</p> <p>What is not reasonable opportunity of hearing. See Note 5.</p> <p>What is reasonable opportunity. See Note 6.</p> |
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1. Scope and applicability of the section. — This section gives an appellate Court, a summary power of dismissing an appeal, if after perusing the petition and the copy of judgment, and, if necessary, the records and if after hearing the appellant or his pleader, it considers that there is no sufficient ground for interference.¹ The essential difference between the dismissal of an appeal under this section and its dismissal under S. 423 is that, in the latter case the appeal is disposed of after *trial*, whereas in the former, the Court by summarily dismissing it refuses to *try it at all*.² Even where an appeal has not been summarily dismissed, the Court is not precluded, when it hears the appeal under S. 423, from deciding whether an appeal lies.³

The provisions of this section apply both to appeals presented under S. 417 against orders of acquittal and to other appeals.⁴ As to

Section 421 — Note 1

1. ('83) 5 All 386 (387) : 1883 A W N 72, *Empress v. Sajiwan Lal*.
- ('81) 1881 Pun Re No. 31 Cr, p. 81 (82, 83), *Budruddin v. Empress*.
- ('20) AIR 1920 Pat 663 (665, 666) : 21 Cr. L. J. 609, *Panchi Mandar v. Emperor*.
2. ('92) 6 C P L R Cr 24 (26), *Empress v. Patiram*.
3. ('13) 14 Cr. L. J. 254 (254) : 19 IC 510 : 40 Cal 631, *Aziz Sheikh v. Emperor*.
4. ('75) 1 All 1 (5), (F B) *Queen v. Gholam Ismail*.

whether this section applies to appeals under S. 476B, see Note 4 to section 476B.

Section 421
Note 1

The appellate Court, while acting under this section, cannot dispose of the appeal piece-meal. So, where an appellant was convicted at one trial on two separate charges, and the appellate Court admitted the appeal with regard to one charge and summarily dismissed the appeal with regard to the other, it was held that the procedure, though not illegal, was unusual and undesirable.⁵

An appeal can be dismissed summarily only when the appellate Court considers that there is no sufficient ground for interfering. Hence, where the appellate Court considers that there is sufficient ground for interfering with regard to the sentence though not with the conviction, it is not a case for summary dismissal of the appeal.⁶ Nor can the appellate Court admit an appeal with restrictions. Thus, it cannot admit an appeal with regard to sentence only.^{6a} The whole appeal will be open to consideration for the final hearing.⁷ The reason is that the terms of the section exclude the possibility of partial summary dismissal, *e. g.*, in so far as the conviction is appealed against.⁸

The Bombay High Court has held that when the High Court on a criminal appeal considers that the conviction should be maintained but that the sentence is too severe, the difficulty of having to hear the entire appeal unnecessarily can be avoided by first reducing the sentence in the exercise of its revisional jurisdiction and then dismissing the appeal summarily on the ground that there is no further cause for interference.⁹

But it has been held that, where the other points have been specifically considered and a definite order of dismissal on other points has been passed, the whole appeal cannot be re-opened again.¹⁰

While summarily dismissing an appeal under this section, an

5. ('27) AIR 1927 Rang 239 (240) : 5 Rang 274 : 28 Cr. L. J. 765, *L. M. Ismail v. Emperor*.

6. ('35) AIR 1935 P C 89 (91) : 36 Cr. L. J. 838 : 62 I A 129 : 62 Cal 983 (P C), *Emperor v. Dahu Raut*.

6a. ('37) AIR 1937 Bom 148 (149) : 38 Cri L Jour 572 : I L R (1937) Bom 365, *Dhankor Bai v. Emperor*. (Practice of marking appeals as admitted with regard to sentence only not in accordance with the Code.)

('35) AIR 1935 P C 89 (91) : 36 Cri L Jour 838 : 62 I A 129 : 62 Cal 983 (P C), *Emperor v. Dahu Raut*.

7. ('14) AIR 1914 Cal 276 (277) : 14 Cr. L. J. 485 (486) : 41 Cal 406, *Nafar Sheikh v. Emperor*.

('25) AIR 1925 Pat 453 (454, 455) : 4 Pat 254 : 26 Cri L Jour 862, *Gaya Singh v. Emperor*.

('31) AIR 1931 Pat 351 (351) : 32 Cr. L. J. 1017, *Rijhu v. Emperor*.

See also S. 407 Note 1, S. 412 Note 1 and S. 423 Note 7.

8. ('35) AIR 1935 P C 89 (91) : 36 Cri L Jour 838 : 62 I A 129 : 62 Cal 983 (P C), *Emperor v. Dahu Raut*.

9. ('37) AIR 1937 Bom 148 (149) : 38 Cri L Jour 572 : I L R (1937) Bom 365, *Dhankor Bai v. Emperor*.

10. ('33) AIR 1933 Pat 38(39) : 11 Pat 697 : 34 Cr. L. J. 118, *Kuldip Das v. Emperor*.

Section 421
Notes 1-2

appellate Court cannot alter¹¹ or enhance¹² or reduce¹³ the sentence or modify the order appealed from in any other way.¹⁴

An appeal once admitted cannot be dismissed summarily under this section.¹⁵

Unless an appeal is dismissed summarily, the appellate Court is bound to issue notice under S. 422 and to send for the record of the case under S. 423.¹⁶

The dismissal of an appeal *temporarily*, as for instance, the dismissal of an appeal till the decision of a civil suit, is unknown to law. If necessary, the appellate Court can postpone the decision of an appeal in a proper case.¹⁷

2. "Shall peruse the same." — There is no provision in the Code for the dismissal of an appeal on account of the non-appearance of the appellant or his pleader. The appellate Court is bound, even in the absence of the appellant or his pleader, to peruse the judgment and the record, if it has been sent for, and decide the appeal judicially.¹

11. ('01) 2 Weir 475 (475), *In re Naga*.

('93-1900) 1893-1900 Low Bur Rul 606 (607), *Nga Po Kin v. Empress*.

12. ('73) 1873 Rat 74 (74), *Reg v. Mathur Laldass*.

('75) 24 Suth W R Cr 29 (29), *Akool Sirkar v. Partama*. (No power by S. 26 of Act XI of 1874, to enhance sentence.)

('77) 1877 Pun Re No. 14 Cr, p. 31 (31), *Ganda Singh v. Dhana*.

13. ('86) 1886 Rat 304 (305), *Queen-Empress v. Govind Rao*. (Case should be reported to High Court or appeal should be heard as directed by S. 423.)

('88) 1888 Rat 384 (385), *Queen-Empress v. Bana*.

('93-1900) 1893-1900 Low Bur Rul 606 (607), *Nga Po Kin v. Empress*.

14. ('36) AIR 1936 Pat 109(109):37 Cr.L.J. 234, *Baldeo Singh v. Mt. Dhenoo Goalin*.

15. ('24) AIR 1924 Cal 642 (643): 23 Cr. L. J. 733, *Ram Hari v. Santosh Kumar*.

('23) AIR 1923 Pat 368 (368): 24 Cri L Jour 453, *Nawa Lal v. Emperor*.

('24) AIR 1924 Rang 294 (295): 25 Cri L Jour 933, *Ta Pu v. Emperor*.

16. ('35) AIR 1935 P C 89(92): 62 Cal 983: 36 Cr. L. J. 838: 62 Ind App 129 (PC), *Emperor v. Dalu Raut*. (Privy Council pointed out the inappropriateness of using the expressions "admitted" and "admission" in reference to appeals which are not summarily dismissed.)

See S. 423 Note 2.

17. ('18) AIR 1918 All 247(248): 19 Cr. L. J. 353, *Lachhmi Narain v. Bindrabai*.

See also S. 430 Note 2.

Note 2

1. ('38) AIR 1938 Sind 171(172): I L R (1939) Kar 204: 39 Cr. L. J. 890, *Emperor v. Balumal Hotchand*. (Judge must use independent discretion after reading copy of judgment—Failure of accused to prosecute appeal is no ground for summary dismissal.)

('35) AIR 1935 Pat 460 (460): 37 Cr. L. J. 93, *Gulab Das v. Emperor*.

('23) AIR 1923 All 175 (175): 24 Cri L Jour 662, *Ramchandrar v. Emperor*.

('92) 1892 Rat 593 (593, 594), *Queen-Empress v. Deoshankar*.

('95) 1895 Rat 739 (739, 740), *Queen-Empress v. Vali Mahomed*.

('95) 1895 Pun Re No. 21 Cr, p. 59 (59), *Koura v. Empress*. (Appeal dismissed on account of non-appearance of appellant's agent.)

('29) AIR 1929 Lah 849 (849): 30 Cri L Jour 902, *Nihal v. Emperor*.

('30) AIR 1930 Lah 659 (659): 11 Lah 242: 31 Cr. L. J. 979, *Roora v. Emperor*.

('09) 9 Cr. L. J. 553 (554): 2 I. C. 247: 5 Nag L R 76, *Ratanchand v. Emperor*.

('19) AIR 1919 Pat 54 (56): 20 Cri L Jour 271, *Shambhari Singh v. Emperor*.

('24) AIR 1924 Pat 376 (376): 24 Cri L Jour 475, *Baldeo Dubey v. Emperor*.

('11) 12 Cr. L. J. 481 (481): 12 Ind Cas 89, (Ajmer—Merwara), *Sheoji v. Emperor*.

('91) 13 All 171 (187): 1891 A W N 48, *Queen-Empress v. Polipi*.

[See ('39) AIR 1939 Rang 392 (394): 41 Cr. L. J. 108: 1940 R L R 145, *King v. Nga Ba Sein*. (Jail appeals are dismissed summarily after consideration of grounds of appeal, in addition to judgment and if necessary evidence.)]

See also S. 423 Note 3.

The section contemplates an appeal that can be properly put upon the file of the Court. Therefore, an appeal preferred out of time and without any explanation of the delay, may be dismissed at once,² but if the appellant is represented by a pleader, he should be given an opportunity of being heard in the matter of determining whether the delay should be excused and the appeal admitted.³

Section 421
Notes 2-4

3. "May dismiss the appeal summarily." — The powers conferred by this section, on the appellate Court, should be exercised sparingly and with great caution¹ and with judicial discretion.² Where important or complicated questions of fact and law are involved, or where disputed questions of title to immovable property are involved, the Court should not summarily dismiss an appeal but should send for the record and hear the appeal fully and decide.³ It is however not *illegal* to do so.⁴

The fact that the appeal of one co-accused has been admitted does not take away the power of the Court to dispose of the appeal of another accused summarily.⁵

4. "No sufficient ground for interfering." — Unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, the appeal cannot be dismissed *summarily* under this section.¹ As to whether the appellant is bound to satisfy the Court that there is sufficient ground for interfering with the conviction, see Note 14 to S. 423.

2. ('75) 1875 Rat 90 (90), *Reg v. Gulab Karim*.

3. ('27) AIR 1927 Bom 445 (446) : 28 Cri L Jour 653, *Emperor v. Nurudin*.

Note 3

1. ('86) 8 All 514 (515) : 1886 A W N 177, *Queen-Empress v. Ram Narain*. (Reasons, however concise, should be given.)

('22) AIR 1922 Pat 552 (552) : 24 Cri L Jour 477, *Padarath Kurmi v. Emperor*.

('33) AIR 1933 Pat 160 (160) : 34 Cri L Jour 1017, *Mt. Thakuri v. Emperor*.

2. ('18) AIR 1918 Cal 106 (106) : 19 Cri L Jour 228, *Kailash Chandra v. Emperor*.

('10) 11 Cri L Jour 631 (632) : 8 I C 379 : 13 Oudh Cas 309, *Aman Ali v. Emperor*.

(Discretion should be exercised upon sound and reasonable lines.)

('82) 1882 Pun Re No. 35 Cr, p. 42 (46), *Lal Khan v. Empress*.

3. ('97) 1897 Rat 916 (917), *Queen-Empress v. Adam Isaq*.

('18) AIR 1918 Cal 106 (106) : 19 Cri L Jour 228, *Kailash Chandra v. Emperor*.

('20) AIR 1920 Cal 891 (892) : 22 Cri L Jour 349, *Rahimaddi v. Emperor*.

('06) 4 Cri L Jour 57 (57) : 29 Mad 236, *Rangacharlu v. Emperor*. (Conviction based on evidence of witnesses whose credibility is impeached by accused on reasonable grounds.)

('24) AIR 1924 Mad 895 (895) : 26 Cri L Jour 411 : 48 Mad 385, *In re Turka Hussain Sahib*.

('18) AIR 1918 Pat 653 (654) : 19 Cri L Jour 209 : 3 Pat L Jour 389, *Sukhdeo Pathak v. Emperor*. (Judgment under consideration, long and intricate judgment.)

('22) AIR 1922 Pat 552 (552) : 24 Cri L Jour 477, *Padarath Kurmi v. Emperor*.

(Credibility of prosecution witnesses impugned, though not very successfully.)

('33) AIR 1933 Cal 515 (516) : 34 Cri L Jour 812, *Abdul Latif v. Ahamad*.

('06) 10 Cal W N cxxxv (cxxxvi), *Damri v. Emperor*. (Impropriety of summary dismissal having regard to nature of defence.)

See also Note 6.

4. ('31) AIR 1931 Cal 264 (264) : 32 Cri L Jour 568, *Safar Ali v. Emperor*.

5. ('01) 5 Cal W N 332 (334), *Jagat Chandra Sarma v. Lal Chand Das*.

Note 4

1. ('85) AIR 1935 P C 89 (92) : 62 Cal 983 : 36 Cri L Jour 838 : 62 Ind App 129 (P C), *Emperor v. Dahu Raut*. (Appellate Court thinking that conviction should stand but that sentence may be too severe—Appeal should not be dismissed summarily.)

Section 421
Note 5

5. Right of appellant to be heard — Proviso. — The proviso gives an appellant or his pleader, in cases of appeals filed under S. 419, the right to a reasonable opportunity of being heard in support of the appeal.¹ The proviso, by its words, restricts this right to cases coming under S. 419 and, therefore, does not apply to appeals presented under S. 420 from jail. Hence, in the cases of jail appeals, the Court can summarily dismiss the appeal on perusal of the papers without calling upon the appellant to appear.^{1a} But, although a convicted person presenting his appeal from jail has no *right* to be heard in person under this section, still, whenever the appellate Court considers it desirable that the accused should be heard, it has power to direct the production of the prisoner before it for disposing of the appeal.²

Where, however, the appellant from jail has also preferred an appeal through a pleader, the appellate Court is not competent to dismiss the appeal, without giving the pleader an opportunity of being heard.³

Under the proviso, the opportunity that is to be given of being heard should be reasonable. Reasonable opportunity cannot be said to have been given to the appellant or his pleader in the following cases, *viz.* :

- (1) Where the appellate Court calls upon the pleader to argue the appeal on the same day that it is presented, and refuses to grant him time to acquaint himself with the evidence in the case.⁴
- (2) Where on the presentation of a petition by a pleader, time is wanted, for some other pleader to argue the case but the Court

Note 5

1. ('25) AIR 1925 Lah 355 (356) : 26 Cr. L.J. 1169, *Muhammad Sadiq v. Emperor*.
 - ('29) AIR 1929 Nag 150 (151) : 30 Cri L Jour 791, *Chandra Shekar v. Rajaram*.
 - ('70) 1870 Rat 29 (30), *Reg. v. Beehar Pitambar*.
 - ('81) 6 Bom 14 (15), *Imperatrix v. Shivram Gundu*.
 - ('94) 1894 Rat 703 (703), *Queen-Empress v. Fakira*.
 - ('97) 1897 Rat 914 (914), *Queen-Empress v. Chumna*.
 - ('08) 9 Cri L Jour 189 (189, 190) : 12 C W N 248, *Rajkumar Singh v. Tincowri Mazumdar*. (Application under S. 195 (6) preferred by way of appeal against order granting sanction to prosecute.)
 - ('24) AIR 1924 Rang 294 (295) : 25 Cri L Jour 933, *Ta Pu v. Emperor*.
 - ('06) 4 Cri L Jour 57 (57) : 29 Mad 236, *Rangacharlu v. Emperor*. (Memorandum of appeal signed by pleader and presented by appellant—Reasonable opportunity to pleader to appear and argue should be given.)
- See also S. 423 Note 9.

1a. ('38) AIR 1938 Bom 279 (281) : 39 Cri L Jour 578 : ILR (1938) Bom 357, *Jalam Bharatsingh v. Emperor*. (Per Beaumont C. J.—General rule that no one should be condemned unheard cannot apply to appeal.)

('91) 13 All 171 (180, 187) : 1891 All W N 48, *Queen-Empress v. Pohpi*.

('27) AIR 1927 Sind 223 (223) : 20 Sind L R 189 : 27 Cri L Jour 933, *Loung v. Emperor*.

('23) AIR 1923 Mad 426 (432) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhammad Haji v. Emperor*.

2. ('38) AIR 1938 Bom 279 (280, 281) : 39 Cr. L. J. 578 : I L R (1938) Bom 357, *Jalam Bharatsingh v. Emperor*.

3. ('06) 4 Cri L Jour 373 (373) : 3 A L J 693 : 1906 A W N 303, *Bhawani Dehal v. Emperor*.

('26) AIR 1926 All 178 (179) : 48 All 208 : 26 Cr. L. J. 1621, *Emperor v. Mewa Ram*.

4. ('05) 2 Cr. L. J. 58 (59) : 7 Bom L R 89, *Emperor v. Gurshida Balapa*.

('09) 9 Cri L Jour 401 (402) : 36 Cal 385 : 1 I C 868, *Ramtahal Dusad v. Emperor*.

calls on him to argue it himself then and there.⁵

Section 421
Note 5

- (9) Where an appeal signed by a pleader is presented in person by the appellant and the Court, without giving time for the pleader to come and argue the case, forthwith calls upon the appellant himself to argue.⁶

But there is nothing in the section to prevent the appellate Court from hearing the appellant's pleader at the time of presentation, if the pleader himself desires to do so. No further opportunity need be given in such a case.⁷

As to what is reasonable time, it has been held that at least a week's time should be given.⁸ Where an appeal was filed in the headquarters of an appellate Court on 26th July 1875, and notice was given for hearing on 28th July 1875, at a place many miles from the headquarters, it was held that the appellant was not given a reasonable opportunity.⁹ Where a general notice was posted in the court house, stating that appeals will be heard for admission only on the first Court day next after presentation, it was held that it was not in compliance with the section and a time should be fixed in each case and notice should be given to the appellant or his pleader, in such case.¹⁰

Where no notice at all is given to the appellant or pleader of the date to which the appeal is posted, it is a clear case where no opportunity has been given to be heard.¹¹ No notice to the *Crown* is necessary before dismissing an appeal against a conviction summarily.¹²

The further question arises whether, after the appellant or his pleader has been heard, and the Court then sends for the records of the case, the Court is bound to give opportunity to the appellant or his pleader to be heard again on the records. All that the section requires is that the pleader shall have a reasonable opportunity of being heard, before there is a summary dismissal, and once having heard him, it is not obligatory on the Court to hear him again when it sends for the record, though it *may* do so, if the Court or the

5. ('09) 10 Cr.L.J. 491 (492) : 4 Ind Cas 37 (Mad), *In re Machi Reddi*.
(15) AIR 1915 Upp Bur 11 (12) : 2 Upp Bur Rul 52: 16 Cr. L. J. 538, *Nga Shwa Hmun v. Emperor*.

6. ('06) 4 Cri L Jour 57 (57) : 29 Mad 236, *Rangacharlu v. Emperor*.

7. ('27) AIR 1927 Bom 361 (361):28 Cr.L.J. 467, *Emperor v. Basavanappa Basava*.
(30) AIR 1930 Mad 863 (864) : 53 Mad 865: 32 Cr. L. J. 40, *Narasimhamurthi v. Emperor*.

8. ('24) AIR 1924 Mad 895 (895) : 48 Mad 385 : 26 Cr. L. J. 411, *Turka Hussain Sahib v. Emperor*.

(09) 9 Cri L Jour 401 (402): 1 I C 868: 36 Cal 385, *Ramtahal Dusadh v. Emperor*.

9. ('75) 24 Suth W R Cr 60 (60), *In re Huri Pershad*.

10. ('82) 5 Mad 11 (12): 2 Weir 472, *Malan v. Queen*.

11. ('19) AIR 1919 Pat 54 (55, 56):20 Cr.L.J. 271, *Shambehari Singh v. Emperor*.
(When petition of appeal is adjourned to another date, notice of it should be given to the appellant.)

12. See ('39) AIR 1939 Pat 24 (25) : 39 Cri L Jour 950, *Sonu Kurmi v. Emperor*.
(Where a Sessions Judge after hearing the appellant's pleader dismisses an appeal summarily and writes a judgment reviewing the evidence and meeting the points raised by appellant, the fact that he did not issue notice to the Crown cannot be made a ground of complaint.)

Section 421
Notes 5-6

pleader desires it.¹³ But a contrary view, namely that the Court is bound to hear the pleader a second time after the record is sent for and received has been taken in the undermentioned cases.¹⁴ It is submitted that the view is not justified by the language of this section and is also against the weight of authority.

The right of being heard in support will include the right of reply¹⁵ as well as the right to refer to certified copies of the evidence.¹⁶

6. "May call for the record of the case" — Sub-section (2).

— Under this sub-section, the Court may, before dismissing an appeal, call for the record of the case but it is not bound to do so.¹ Although a Judge would be acting within his powers in rejecting an appeal without calling for the records, such a course is, ordinarily, very inconvenient and should not be adopted.² A Court is not required to call for the records in an appeal in which the only question is a mere question of fact and the judgment of the Court below is so plain and clear that calling for the record would be a mere waste of time; but it is not right to reject an appeal summarily when a point of law which, on the face of it, is not without substance, has been raised or when the judgment is a long and intricate one requiring, obviously, careful consideration.³

13. ('39) AIR 1939 Cal 541 (541, 542): 40 Cri L Jour 839: I L R (1939) 1 Cal 314, *Akramaddin v. Emperor*.

('38) AIR 1938 Pat 12 (12): 39 Cri L Jour 254, *Basdeo Koiri v. Emperor*. (When sending for record he should note in order-sheet points for which he is sending for record.)

('36) 37 Cri L Jour 904 (904, 905): 164 I C 270 (Cal), *Manmatha Nath v. Union Board of Dhatrigram*.

('30) AIR 1930 Pat 499 (500, 501): 9 Pat 768: 31 Cri L Jour 1131, *Dawal Mahton v. Emperor*. (Dissenting from AIR 1917 Pat 331.)

('27) AIR 1927 Bom 361 (361): 28 Cri L Jour 467, *Emperor v. Basavanappa*.

('08) 10 Cri L Jour 204 (204, 205): 2 Sind L R 39, *Emperor v. Jirayo*.

14. ('36) AIR 1936 Cal 294 (295): 37 Cr. L. J. 831, *Jitendra Nath Gorai v. Emperor*. (There is not much use in sending for the record if the Judge is not prepared to hear the pleader.)

('32) AIR 1932 Cal 397 (398): 33 Cri L Jour 602, *Hatem Ali v. Emperor*. (Doubts, but follows on the grounds of *stare decisis*, AIR 1926 Cal 161 and AIR 1926 Cal 174, but it is not clear from the reports of the latter two decisions whether the pleader had already been heard once.)

('17) AIR 1917 Pat 331 (332): 18 Cri L Jour 639, *Jagdeo Rai v. Kali Rai*. (Dissented from in AIR 1930 Pat 499.)

[See also ('26) AIR 1926 Cal 161 (161): 27 Cr. L. J. 412, *Surendra Nath v. Emperor*, (In this case the High Court set aside the order of the lower Court on the ground that it had dismissed an appeal summarily without giving an opportunity to the appellant's pleader to be heard after the receipt of the records—But it is not clear whether the pleader had been heard already once.)

('26) AIR 1926 Cal 174 (175): 27 Cr. L. J. 382, *Lalit Kumar v. Emperor*. (Do.)]

15. ('11) 12 Cri L Jour 9 (9, 10): 9 I C 65: 38 Cal 307, *Amanat Sardar v. Nagnendra Biswas*.

16. ('08) 9 Cri L Jour 55 (56): 11 Oudh Cas 360, *Manga v. Emperor*.

Note 6

1. ('31) AIR 1931 All 555 (556): 53 All 797: 33 Cri L Jour 259, *Allah Baksh v. Emperor*.

('30) AIR 1930 Mad 863 (864): 53 Mad 865: 32 Cri L Jour 40, *Narasimhamurthi v. Emperor*.

2. ('83) 1883 All W N 145 (145), *Empress v. Jugal Kishore*.

3. ('18) AIR 1918 Pat 653 (654): 19 Cri L Jour 209: 3 Pat L Jour 389, *Sukhdeo Pathak v. Emperor*.

A mere sending for the record under this section is not tantamount to an admission of the appeal, as the Court has power to dismiss an appeal under this section even after calling for the record.⁴

When sending for the record, the Court should note in the order-sheet the points for which it is sending for the record.⁵

7. Judgment and record of reasons. — A Court, when dismissing an appeal summarily under this section, is not required to write a judgment in conformity with the provisions of S. 367.¹

Although the law does not fetter the discretion of an appellate Court in dismissing appeals summarily and it can do so without recording any reasons for so doing,² it is advisable to record its reasons for summary dismissal, in view of the possibility of such an order being challenged by an application for revision, in which case they will show that the Court had really considered the points raised in the appeal and that the appeal was without foundation.³ Therefore, though

(‘82) 1882 Pun Re No. 35 Cr, p. 42 (46), *Lal Khan v. Empress*. (Discretion allowed should be exercised on sound judicial principles.)

See also Note 3.

4. See (‘75) 1 All 1 (5) (FB), *Queen v. Gholam Ismail*.

5. (‘38) AIR 1938 Pat 12 (12, 13) : 38 Cri L Jour 254, *Basdeo Koiri v. Emperor*.

Note 7

1. (‘40) AIR 1940 Oudh 369 (371) : 41 Cri L Jour 711, *Jodha v. Emperor*.

(‘14) AIR 1914 All 311 (311, 312) : 36 All 496 : 15 Cri L Jour 512, *Kundan v. Emperor*.

(‘16) AIR 1916 All 197 (197) : 38 All 393 : 17 Cri L Jour 309, *Lal Behari v. Emperor*.

(‘95) 17 All 241 (242, 243) : 1895 A W N 68 (FB), *Queen-Empress v. Nannhu*.

(‘95) 20 Bom 540 (541), *Queen-Empress v. Warubai*.

(‘93) 21 Cal 92 (96), *Rash Behari Das v. Bal Gopal Singh*. (Court can reject appeal without the formality of either a recorded judgment or reasons of any description.)

(‘26) AIR 1926 Lah 196 (197) : 27 Cri L Jour 23, *Nazar Md. Khan v. Hara Singh*. (Nor reasons of any description necessary.)

(‘02) 25 Mad 534 (534) : 2 Weir 473, *King-Empress v. Krishnappa*.

(‘17) AIR 1917 Nag 203 (204) : 13 Nag L R 169 : 18 Cr. L. J. 993, *Ram Rao v. Emperor*.

(‘93) 6 C P L R Cr 24 (24, 26), *Empress v. Patiram*. (Order of summary rejection under S. 421 does not amount to judgment.)

(‘10) 11 Cri L Jour 631 (632) : 8 I. C. 379 : 13 Oudh Cas 309, *Aman Ali v. Emperor*. (Still the matter being one for discretion of the Court, it is very important that such discretion should be exercised upon sound and reasonable lines.)

(‘18) AIR 1918 Pat 597 (597) : 19 Cri L Jour 151 : 2 Pat L Jour 695, *Gurubari Behara v. Emperor*.

(‘25) AIR 1925 Pat 183 (184) : 25 Cri L Jour 1237, *Jagarnath Singh v. Emperor*.

(‘30) AIR 1930 Pat 331 (331) : 31 Cri L Jour 760, *Thakur Sahu v. Emperor*.

(‘83) 1883 Weir 3rd Edn. 1009 (1009), *In re Bala Subbanna*.

(‘93-1900) 1893-1900 Low Bur Rul 606 (606), *Nga Po Kin v. Empress*.

(1900-1902) 1 Low Bur Rul 270 (270, 271), *Taung Bo v. Crown*.

(‘06) 4 Cri L Jour 284 (284) : 1906 Upp Bur Rul 49, *Emperor v. Nga Sein Gyi*.

(‘19) AIR 1919 Low Bur 154 (156) : 19 Cri L Jour 316, *Nga Ba Myit v. Emperor*.

[See (‘26) AIR All 318 (318) : 27 Cri L Jour 449, *Shanker v. Emperor*.]

[But see (‘21) 22 Cri L Jour 321 (321) : 61 I. C. 49 (Pat), *Gobind Behari v. Emperor*.]

2. (‘31) AIR 1931 All 555 (556) : 53 All 797 : 33 Cri L Jour 259, *Allah Baksh v. Emperor*.

(‘94) 21 Cal 92 (96), *Rash Behari Doss v. Balgopal Singh*.

(‘05) 2 Cri L Jour 344 (344) : 9 C W N 623, *Nitya Pal v. Beni Madhab*.

(‘29) AIR 1929 Cal 773 (773) : 31 Cri L Jour 474, *Kalachand Ghose v. Tatu*.

(‘81) 1881 Pun Re No. 31 Cr, p. 81 (83), *Budruddin v. Empress*.

(1900-02) 1 Low Bur Rul 270 (271), *Taung Bo v. Crown*.

(‘26) AIR 1926 Lah 196 (197) : 27 Cri L Jour 23, *Nasar Md. Khan v. Hara Singh*.

3. (‘38) AIR 1938 Pat 366 (367) : 39 Cr. L. J. 732, *Bala Buz v. Emperor*.

(‘37) 38 Cr. L. J. 232 (233) : 166 Ind Cas 494 (Pat), *Brij Mohan v. Dasrath Singh*.

Section 421 Notes 6-7

Section 421
Notes 7-10

the appellate Court has power to dismiss an appeal summarily without giving reasons, if the High Court finds that the Court has not applied its mind to the consideration of the facts of the case, it will remand the case back to be heard on the merits.⁴

8. Withdrawal of appeal. — See Note 8 to Section 423.

9. Review. — See Note 1 to Section 430.

10. Revision. — It is within the power of the High Court, in revision, to say, after considering the facts of each particular case, whether or not the appellate Court has exercised a proper discretion in acting under this section and either remand the appeal to the lower appellate Court to be heard on its merits¹ or to go into the case itself

- (‘30) AIR 1930 Pat 331 (331) : 31 Cr. L. J. 760, *Thakur Sahu v. Emperor*.
 (‘86) 8 All 514 (515) : 1886 A W N 177, *Queen-Empress v. Ram Narain*.
 (‘95) 17 All 241 (242,243) : 1895 A W N 68 (FB), *Queen-Empress v. Nannhu*.
 (‘06) 4 Cr. L. J. 373 (373) : 3 A L J 693 : 1906 A W N 303, *Bhawani Dehal v. Emperor*.
 (‘14) AIR 1914 All 311 (312) : 36 All 496 : 15 Cr. L. J. 512, *Kundan v. Emperor*.
 (‘24) AIR 1924 Cal 642 (643) : 23 Cr. L. J. 733, *Ram Hari v. Santosh Kumar*.
 (‘33) AIR 1933 Cal 515 (515, 516) : 34 Cr. L. J. 812, *Abdul Latif v. Ahamad*.
 (‘93) 6 C P L R Cr 24 (26), *Empress v. Patiram*.
 (‘17) AIR 1917 Nag 203 (204, 205) : 13 Nag L R 169 : 18 Cr. L. J. 993, *Ram Rao v. Emperor*.
 (‘04) 32 Cal 178 (179) : 2 Cr. L. J. 170, *Ekcowri Mukerji v. Emperor*.
 (‘16) AIR 1916 All 197 (197) : 17 Cr. L. J. 309 : 38 All 393 (394), *Lal Behari v. Emperor*.
 (‘27) AIR 1927 Nag 88 (88, 89) : 27 Cr. L. J. 1404, *Maroti v. Mt. Kasabai*.
 (‘29) AIR 1929 Nag 150 (151, 152) : 30 Cr. L. J. 791, *Chandra Sekhar v. Rajaram*.
 (Judgment dismissing appeal summarily need not be elaborate but must be such as to show that the Court has applied its mind to consideration of evidence on record and the pleas raised by the accused.)
 (‘25) AIR 1925 Oudh 290 (291) : 26 Cr. L. J. 4, *Brij Mohan Lal v. Emperor*.
 (‘18) AIR 1918 Pat 597 (597) : 19 Cr. L. J. 151 : 2 Pat L J 695, *Gurubari Behara v. Emperor*.
 (‘18) AIR 1918 Pat 660 (660) : 19 Cr. L. J. 304, *Ramkant Pandit v. Emperor*.
 (‘19) AIR 1919 Pat 54 (56) : 20 Cr. L. J. 271, *Shambhari Singh v. Emperor*. (Order should show on the face of it that the Court has perused the petition of appeal and the judgment appealed against.)
 (‘20) AIR 1920 Pat 522 (523) : 21 Cr. L. J. 139, *Ganesh Ram v. Gyan Chand*. (Judgment should show that the Court has considered all the arguments advanced before it and the evidence in the case.)
 (‘22) AIR 1922 Pat 552 (552) : 24 Cr. L. J. 477, *Padarath Kurmi v. Emperor*.
 (‘25) AIR 1925 Pat 183 (184) : 25 Cr. L. J. 1237, *Jagarnath Singh v. Emperor*.
 (‘35) AIR 1935 Pat 32 (33) : 36 Cr. L. J. 191, *Jagnarain Dubey v. Ghinhu Dubey*.
 (‘35) AIR 1935 Pat 37 (38) : 36 Cr. L. J. 261, *Barjoo Mahto v. Emperor*.
 4. (‘30) AIR 1930 Pat 520 (520) : 32 Cr. L. J. 86, *Krishna Pati v. Emperor*.
 (‘35) AIR 1935 Pat 37 (38) : 36 Cr. L. J. 261, *Barjoo Mahto v. Emperor*.
 (‘35) AIR 1935 Pat 32 (33) : 36 Cr. L. J. 191, *Jagnarain Dubey v. Ghinhu Dubey*.
 (‘05) 9 Cal W N cexxix (cexxix), *Kalha Khan v. Emperor*.
 (‘18) AIR 1918 Pat 660 (660) : 19 Cr. L. J. 304, *Ram Kant Pandit v. Emperor*.
 (‘18) AIR 1918 Pat 597 (597) : 19 Cr. L. J. 151 : 2 Pat L J 695, *Gurubari Behara v. Emperor*.
 [See (‘38) AIR 1938 Pat 176 (176) : 39 Cr. L. J. 380, *Chhatu Gope v. Emperor*. (Order not showing that records were examined or evidence appreciated—Order set aside—It is to be noted however that under this section the appellate Court is not bound to send for record of case.)]

Note 10

1. (‘36) 37 Cr. L. J. 904 (905) : 164 I. C. 270 (Cal), *Manmatha Nath v. Union Board of Dhatrigram*.
 (‘18) AIR 1918 Pat 660 (660) : 19 Cr. L. J. 304, *Ram Kant Pandit v. Emperor*.
 (‘18) AIR 1918 Pat 597 (597) : 19 Cr. L. J. 151 : 2 P L J 695, *Gurubari v. Emperor*.

and dispose of it.²

11. Appeal. — A judgment by a Judge of a High Court dismissing an appeal under this section is an order made in a criminal trial in appeal, and therefore no appeal lies from such an order.¹

Section 421
Notes 10-11

422.* If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the *Provincial Government*^a may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

Section 422

and, in cases of appeals under section 417, the Appellate Court shall cause a like notice to be given to the accused.

a. Substituted by A. O. for "Local Government."

Synopsis

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Notice — General. 2. Notice to appellant or pleader. 3. Notice to accused. 4. Notice to complainant-respondent. | <ol style="list-style-type: none"> 5. Officer appointed by the Provincial Government. 6. Time and place of hearing. 7. Burden of proof in criminal appeals. |
|---|--|

Other Topics (miscellaneous)

- | | |
|---|--|
| <p>Change of time or place of hearing. See Note 6.</p> <p>Dismissal without fixing date or place. See Note 6.</p> <p>Legislative changes. See Note 2.</p> <p>No admission of appeal for limited purposes only. See S. 421 Note 1.</p> <p>No dismissal of appeal for default of appearance. See S. 421 Note 2.</p> | <p>Notice to accused to whom compensation awarded under S. 250. See Note 3.</p> <p>Notice to appellant in spite of presence of his pleader. See Note 2.</p> <p>Notice to complainant in appeal against order under S. 545. See Note 4.</p> <p>Officers appointed in several provinces. See Note 5.</p> |
|---|--|

1. Notice — General. — Where an appeal has been admitted, notice under this section must be served on the persons mentioned therein, before the appeal could be finally disposed of under S. 423.¹

* 1882 : S. 422; 1872 : Ss. 62, 269, 279; 1861 — Nil.

- ('19) AIR 1919 Low Bur 154 (156) : 19 Cri L Jour 316, *Nga Ba Myit v. Emperor*.
 ('81) 1881 Pun Re No. 31 Cr, p. 81 (82), *Budruddin v. Empress*.
 ('82) 1882 Pun Re No. 35 Cr, p. 42 (46, 49), *Lal Khan v. Empress*.
 2. ('18) AIR 1918 Pat 660 (660) : 19 Cr. L. J. 304, *Ram Kant Pandit v. Emperor*.
 ('06) 3 Cri L Jour 385 (387) : 10 C W N 446, *Isswar Chandra Das v. Emperor*.
 ('18) AIR 1918 Pat 597 (597) : 19 Cr. L. J. 151 : 2 P L J 695, *Gurubari v. Emperor*.
 ('10) 11 Cr. L. J. 631 (632) : 13 Oudh Cas 309 : 8 I. C. 379, *Aman Ali v. Emperor*.

Note 11

1. ('03) 1 Weir 788a (788a), *In re Chinna Karuppan*.

Section 422 — Note 1

1. ('35) AIR 1935 P C 89 (92) : 36 Cr. L. J. 838 : 62 Ind App 129 : 62 Cal 983 (P C), *Emperor v. Dahu Raut*.

Section 422
Notes 1-3

The notice must be served personally on the person to be served and only if after due diligence it cannot be served personally, can it be served on any adult male member of the family. (See ss. 69 and 70). So, where the notice of an appeal was served on an accused person's father, it was held that the officer who was entrusted with the service should swear to an affidavit that he made his best endeavours to effect personal service but that he could not do so.^{1a}

Where it is not possible to serve the notice as under ss. 69 and 70, the notice or a copy of it should under s. 71 be left at the address given in the appeal. It is not competent to an appellate Court to hear and decide an appeal in the appellant's absence simply because he cannot be found at the address given by him.²

Where in spite of due notice having been given the parties or their pleaders fail to appear at the hearing of the appeal, but only appear on the date fixed for delivery of the judgment, the appellate Court is not bound to hear them.³

2. Notice to appellant or pleader. — Notice under this section must be given to the appellant or his pleader. Under s. 279, the corresponding section of the Code of 1872, notice had to be given only to the appellant, the words "or his pleader" being absent. It was, therefore, held that the fact that the pleader of the accused was present in Court when an order was made admitting an appeal did not relieve the Court from the necessity of giving notice to the appellant of the day fixed for the hearing of the appeal.¹ Under the present section, it is enough if notice is given to the appellant or his pleader.

3. Notice to accused. — Under this section notice is necessary to the accused only in cases where there is an appeal against acquittal under section 417. A notice to the accused person, therefore, to whom compensation is ordered to be paid under s. 250 is unnecessary.¹ But seeing that he is the only person interested in upholding the order, it is desirable that notice should be given to him.^{1a} But the High Court

1a. ('82) 1882 All W N 170 (170, 171), *Empress v. Sundar*.

See also S. 70 Note 1.

2. ('96) 1896 Rat 869 (869), *Empress v. Hari Narayan*.

3. ('23) AIR 1923 Nag 208 (208) : 23 Cri L Jour 752, *Nyajakhan v. Emperor*.

See also S. 340 Note 7.

Note 2

1. ('81) 10 Cal L Rep 57 (60), *In re Gopal Chandra Mundle*.

('83) 1883 Pun Re No. 7 Cr, p. 9 (9), *Miran Baksh v. Empress*.

Note 3

1. ('27) AIR 1927 Lah 357 (357) : 8 Lah 568 : 28 Cr. L. J. 416, *Rashid Md. Khan v. Emperor*.

('88) 1888 Pun Re No. 14 Cr, p. 24 (25, 26), *Empress v. Lal*.

1a. ('32) AIR 1932 Bom 177 (178) : 33 Cr. L. J. 392, *In re Dinshahji Hirji Bhai*.

('26) AIR 1926 Cal 1054 (1055) : 53 Cal 969 : 27 Cr. L. J. 1086, *Bharasa Now v. Sukdeo*.

('24) AIR 1924 Lah 675 (676) : 25 Cri L Jour 209, *Ramchand v. Jesa Ram*.

('06) 3 Cri L Jour 459 (459) : 29 Mad 187, *Emperor v. Palaniappavelan*.

('15) AIR 1915 Mad 940 (940, 942) : 38 Mad 1091 : 16 Cr. L. J. 128, *Venkatarama Iyer v. Krishna Iyer*.

('26) AIR 1926 Sind 143 (144) : 20 Sind L R 41 : 27 Cr. L. J. 248, *Momoom v. Ibrahim*.

will not interfere in revision on the ground of want of notice, unless there is some illegality in the order.²

Section 422
Notes 3-5

4. Notice to complainant-respondent. — Under this section a complainant-respondent cannot claim as of right to be heard in the appeal. The matter is one which is left in each case to the discretion of the Court.¹

Though there is no provision in case of an order under S. 545 of the Code, with regard to notice to the *complainant* to whom compensation has been awarded, one of the fundamental principles of law is that no order should be passed to the detriment or prejudice of a party without giving him an opportunity of being heard in defence. In that view notice should, in the exercise of the appellate Court's discretion, be given to a complainant of the hearing of an appeal against a conviction in a case in which the complainant has been awarded compensation.² But the fact that notice of appeal was not served on the complainant-respondent is no ground for interference where no injustice has been occasioned thereby.³ See also section 545 Note 16.

5. Officer appointed by the Provincial Government. — Under this section notice should go to the officer appointed by the Provincial Government in this behalf.

The officer appointed by the Provincial Government in Bombay is the District Magistrate.¹ In Bengal the officer appointed by the Provincial Government is the District Magistrate except where the

(1909) 9 Cr. L. J. 150 (150) : 33 Mad 89 : 1 I. C. 79, *Ambakkagari Nagi v. Basappa*.
2. (1909) 9 Cr. L. J. 150 (150, 151) : 33 Mad 89 : 1 I. C. 79, *Ambakkagari Nagi v. Basappa*.

(1921) AIR 1921 Mad 281 (281) : 22 Cr. L. J. 583, *Krishna Kone v. Narayana Dass*.

Note 4

1. (1940) AIR 1940 Bom 14 (15) : 41 Cr. L. J. 245, *Paragji Bhulabhai v. Bhagwanji Bawabhai*. (In private prosecutions the Court in its discretion may allow the complainant to appear by an advocate, but it is not in any case bound to do so.)

(1937) AIR 1937 Nag 123 (124) : 38 Cr. L. J. 433, *Kartikram v. Emperor*. (Notice to complainant—Absence of, not illegal though it is desirable to issue notice if he is likely to be prejudiced otherwise.)

(1937) AIR 1937 Nag 394 (396) : 39 Cr. L. J. 75 : ILR (1938) Nag 157, *Raghunath Mal v. Patiram*. (It is open to appellate Court in exercise of its discretion to hear the complainant in suitable cases.)

(1936) AIR 1936 Rang 247 (248) : 37 Cr. L. J. 832 : 14 Rang 744, *Htanda Meah v. Anamale Chettyar*.

(1974) 7 Mad H C R App xlii (xlii) : 2 Weir 476.

See also S. 423 Note 9.

2. (1936) AIR 1936 Nag 144 (144, 145) : 38 Cr. L. J. 76 : ILR (1936) Nag 147, *Balwant Ganesh v. Motilal Nathuram*.

(1936) AIR 1936 Rang 247 (248) : 37 Cr. L. J. 832, *Htanda Meah v. Anamale Chettyar*. (Failure to give notice is not however an illegality.)

(1926) AIR 1926 Cal 1054 (1055, 1056) : 53 Cal 969 : 27 Cr. L. J. 1086, *Bharasa Now v. Sukdeo*.

3. (1937) AIR 1937 Nag 123 (124) : 38 Cr. L. J. 433, *Kartikram v. Emperor*.

(1917) AIR 1917 Nag 122 (123) : 14 Nag L R 131 : 19 Cr. L. J. 927, *Mangal Chand v. Mohan*.

[See (1933) AIR 1933 Mad 277 (277, 278) : 33 Cr. L. J. 596, *Kalathi Mudali v. Venkatesa Mudali*.]

Note 5

1. (1923) AIR 1923 Bom 74 (74) : 24 Cr. L. J. 700, *Emperor v. Shivlingappa*.

Section 422
Note 5

order of a Sessions Judge is in appeal, in which case the Sessions Judge is such officer.² In the Punjab also, it is the District Magistrate.³ In Madras the officer is the District Magistrate in cases other than sessions cases and the Public Prosecutor in the case of the High Court and in sessions cases.⁴

2. ('03) 7 Cal W N 80 (81), *Bepin Behari De v. Nendi Hariani*.

3. ('24) AIR 1924 Lah 675 (675) : 25 Cri L Jour 209, *Ramchand v. Jesa Ram*.

See also *Rules and Orders of the High Court of Judicature at Lahore (1931)*:

PART D — NOTICE OF APPEAL.

The following Notifications under S. 422 of the Code of Criminal Procedure, prescribing the officers to whom notice is to be given of an appeal which is not summarily rejected, are re-printed for information and guidance.

I. Punjab Government Notification No. 172 dated the 28th January 1891.

With reference to S. 422 of the Code of Criminal Procedure, 1882, prescribing that any Appellate Court which does not reject an appeal summarily shall cause notice to be given to such officer as the Local Government may appoint in this behalf, the Hon'ble the Lieutenant-Governor is pleased to direct that, in the case of an appeal preferred by a Railway employee in a case in which he has been convicted of an offence committed in his capacity of Railway servant, the Appellate Court shall cause notice to be given of the time and place of hearing of such appeal to the Head of the Railway Administration concerned as well as to the District Magistrate, as directed in Punjab Government Notification No. 108-597 dated 8th February 1883.

II. Punjab Government Notification No. 1764, dated the 7th December 1898.

With reference to S. 422 of Act V of 1898, the Code of Criminal Procedure, prescribing that any Appellate Court which does not reject an appeal summarily shall cause notice to be given to such officer as the Local Government may appoint in this behalf of the time and place at which such appeal will be heard, the Hon'ble the Lieutenant-Governor is pleased to direct, in supersession of notification No. 108, dated 8th February 1883, that in the case of appeals other than those which lie to the District, or specially empowered Magistrate, the Appellate Court shall cause notice of the time and place of the hearing of such appeal to be given :

(1) to the Government Advocate, in all cases in which the sentence is one of death, transportation for a life or transportation or imprisonment for a term of not less than ten years ;

(2) to the Magistrate of the District, in other cases.

III. Punjab Government Notification No. 206, dated the 10th February 1905.

With reference to S. 422 of the Code of Criminal Procedure, 1898, prescribing that any Appellate Court which does not reject an appeal summarily shall cause notice to be given to such officer as the Local Government may appoint in this behalf, the Hon'ble the Lieutenant-Governor is pleased to direct that in the case of an appeal preferred by a postal employee in a case in which he has been convicted of an offence committed in his capacity of postal servant, the Appellate Court shall cause notice to be given of the time and place of hearing of such appeal to the Postmaster-General, Punjab and North-West Frontier Province, as well as the District Magistrate concerned as directed in Punjab Government Notification No. 108-597, dated 8th February 1883.

4. ('15) AIR 1915 Mad 236 (237) : 15 Cr. L. J. 648, *Guruswami Naiken v. Tirumurthi Chetti*.

('21) AIR 1921 Mad 281 (282) : 22 Cr. L. J. 583, *Krishna Kone v. Narayana Dass*.

('25) AIR 1925 Mad 375 (376) : 25 Cr. L. J. 1389, *Mustafa Rowther v. Shanmuga Thevan*.

See also the *Criminal Rules of Practice and Orders of High Court of Judicature, Madras (1931)* :

Rule 240. The following officers are the officers to whom notices of appeal shall be given under S. 422, Code of Criminal Procedure :

- (1) District Magistrates in appeals other than appeals to Court of Session ;
- (2) The Public Prosecutor in appeals to Court of Session ;
- (3) The Prosecuting Inspector of Police in mofussil districts other than the Nilgiris in appeals against convictions in cognizable cases in the appellate Courts in those districts other than the Court of Session ;
- (4) The Agent and Manager of the Madras and Southern Mahratta Railway and the Agent of the South Indian Railway in appeals against convictions for Railway offences in connexion with those railways respectively ;

As to Oudh and Central Provinces, see below.⁵

Section 422
Notes 5-6

Where the District Magistrate is the officer who is to receive the notice and the appeal is filed in his Court and heard by himself, no notice to him is necessary.⁶ But where the appeal is transferred to a joint Magistrate for hearing, the fact that it was originally filed before the District Magistrate does not relieve the joint Magistrate of his duty of giving notice to the District Magistrate.⁷

6. Time and place of hearing. — Under this section, the notice should specify the time and place at which the appeal will be heard. The Court of appeal should fix a date for hearing and determine it on that day. Where the appeal was directed to be heard "in January" without fixing a date and the appeal was taken up and dismissed on a particular day, without any information to the appellant as to the time of hearing, it was held that the dismissal was improper.¹ So also, a notice to an appellant's pleader that his appeal would be heard next day wherever the Court happened to be encamped is not sufficient.² An appeal posted for hearing at one place cannot be heard and dismissed at another place, without giving notice to the appellant or his pleader of the change of place.³ So also, an appeal posted for hearing on a particular date cannot be heard on a date previous to that fixed.⁴

(5) The District Forest Officer in appeals against convictions for forest offences, except in cases of offences relating to unreserved lands. In such cases notice shall be given to the Revenue Divisional Officer who ordered the prosecution ;

(6) Officers of the Salt and Excise Department in charge of circles in appeals against convictions for Salt and Excise offences in their circles ; and in appeals to the High Court in Abkari cases, to the Inspector of Excise, Madras Town Circle ;

(7) The Crown Prosecutor for the Town of Madras in appeals to the High Court from the judgments or orders of the Presidency Magistrate and the Public Prosecutor in other appeals to the High Court.

5. The Oudh Criminal Rules (1928) :

Rule 3. As soon as the date is fixed, the appellate Court shall cause notice to be given to the appellant as well as to the District Magistrate who shall inform the appellate Court whether any one will appear to support the conviction.

Rule 4. In all criminal appeals before Sessions Judges, notice shall be given to Government Pleaders, whether such appeals be presented by pleaders or agents or received through the Superintendent of jails.

Criminal Circulars of the Judicial Commissioner, Central Provinces (1929) :
Rule 10. The following are the officers to whom notices of appeal shall be given under S. 422 of the Code :

(1) The District Magistrate in all appeals filed before the Court of Session of Judicial Commissioner ;

(2) The Prosecuting Inspector of Sub-Inspector of Police in appeals to the District Magistrate's Court or to Courts of Magistrates subordinate to the District Magistrate.

6. ('23) AIR 1923 Bom 74 (74):24 Cr.L.J. 700, *Emperor v. Shivlingappa Basappa*.

('24) AIR 1924 Lah 675 (675) : 25 Cr L Jour 209, *Ramchand v. Jesa Ram*.

('21) AIR 1921 Mad 281 (283):22 Cr. L. J. 583, *Krishna Kone v. Narayana Dass*.

7. ('25) AIR 1925 Mad 375 (376) : 25 Cr. L. J. 1389, *Mustafa Rowther v. Shanmuga Thevan*.

Note 6

1. ('81) 1881 All W N 46 (46), *Empress v. Wazir Khan*.

2. ('20) AIR 1920 Bom 318 (318) : 21 Cr L Jour 373, *In re Arjun Tathoo*.

3. ('91) 1891 Pun Re No. 7 Cr, p. 16 (17), *Bahawal v. Queen-Empress*.

('05) 2 Cr L Jour 66 (66) : 1905 Pun Re No. 11 Cr, *Nihal Singh v. Emperor*.

4. ('82) 2 Weir 475 (475), *Shanmugam Chettiar v. Alagia Numbia Pillai*.

Section 422
Notes 6-7

Where a pleader appeared at 10 A. M. to argue the criminal appeal on the day notified for hearing, and was informed that the appeal was disposed of on merits at 7-30 A. M., the appeal was ordered to be restored and re-heard by some other Magistrate as the pleader did not appear to have wilfully absented himself.⁵

7. **Burden of proof in criminal appeals.** — See Note 14 to Section 423 and the undermentioned cases.¹

Section 423

423.* (1) The Appellate Court shall then send Powers of Appellate Court in disposing of appeal. for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may —

- (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
- (b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same;

* Code of 1882 : S. 423.

The words "subject to the provisions of S. 106 sub-section (3)" were added in cl. (b) (3) and cl. (d) was newly inserted ; otherwise the section was the same.

5. ('37) 1937 Mad W N 91 (91, 92), *Venkatakrishnayya v. Emperor*.

Note 7

1. ('95) 23 Cal 347 (349), *Milan Khan v. Sagai Bepari*. (Rule in civil appeals that burden lies on appellant to prove decision of lower Court is wrong does not apply to criminal appeals by convicted person—In such cases, if appellate Court feels a reasonable doubt as to the guilt of the accused, it must acquit him.)
- ('82) 11 Cal L Rep 25 (29, 30), *Protap Chunder v. Empress*. (Sound rule to apply in trying criminal appeal where questions of fact are in issue is to consider whether the conviction is right.)

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper.

Section 423.

(2) Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

Synopsis

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|---|--|
| 1. Scope of the section. | 21. "Reverse the finding and sentence." |
| 2. "Shall then send for the record." | 22. "Acquit or discharge the accused." |
| 3. "After perusing the record." | 23. "Order him to be re-tried." |
| 4. Dismissal of appeal for default can be set aside. See Notes to Section 430. | 24. "By a Court of competent jurisdiction." |
| 5. Refusal to entertain appeal on ground that conviction ought to have been under non-appealable section. | 25. Discharge and re-trial — If both can be ordered. |
| 6. Admission of appeal does not preclude objection as to its admissibility. | 26. Effect of re-trial on offences of which accused had been acquitted in trial Court. |
| 7. Appeal cannot be admitted merely for reviewing sentence. | 27. Ordering re-trial for enhancing sentence. |
| 8. Withdrawal of appeal. | 28. Remand for passing sentence or for writing proper judgment. |
| 9. Parties must be given an opportunity of being heard. | 29. Effect of order for re-trial in appeal. |
| 10. Notice of appeal. See Notes to Section 422. | 30. "Or committed for trial." |
| 11. Connected appeals—Hearing of. | 31. "Alter the finding." |
| 12. Appointment of assessors in appeal. | 32. Reduction of sentence. |
| 13. New plea. | 33. "Alter the nature of the sentence but not so as to enhance the same." |
| 14. Appreciation of evidence by the appellate Court. | 34. "Appeal from any other order" — Clause (c). |
| 15. Appeal from acquittal — Clause (a). | 35. Subsequent events — Power to take notice of. |
| 16. Appeal from acquittal — Order for further enquiry. | 36. Power to direct sentences to run concurrently. |
| 17. Appeal against acquittal—Power to order re-trial. | 37. Appellate Court cannot canvass previous convictions. |
| 18. Re-trial of appeals. | 38. Appellate Court when to report to the High Court. |
| 19. "Find him guilty and pass sentence." | 39. "Any amendment or any consequential or incidental order" — Clause (d). |
| 20. Appeal from conviction — General. | 40. Verdict of jury — Sub-section (2). |

Code of 1872 : Ss. 280, 284 and 272 para. 3.

250. The appellate Court, after perusing the proceedings of the lower Court and

Section 423

Other Topics (miscellaneous)

- Abetment of offence—Conviction for, by appellate Court—When can be passed and when not. See Note 31.
- Acquittal — Interference by appellate Court. See Note 15.
- Admission—Objection as to absence of sufficient cause for delay or as to non-appealability of sentence can be taken. See Note 6.
- “Alter”—In clause (c) — Meaning. See Note 34.
- Appeal — No admission for reviewing sentence only—If admitted, appellant to be heard on merits. See Note 7.
- Appeal—No dismissal on ground of sentence being without jurisdiction. See Note 3.
- Appeal — No summary dismissal. See Note 9.
- Appeal from acquittal — Grounds not contained in objections not to be considered. See Note 15.
- Appeal from acquittal—Power to order re-trial is discretionary. See Notes 17 and 23.
- Appeal from conviction — Appellate Court cannot remand simply for examination afresh of certain witnesses. See Note 20.
- Appeal from conviction— Mere reversal is acquittal. See Note 21.
- Appeal from conviction — No further enquiry. See Notes 16 and 20.
- Appellate Court — No power to make order which would make entire proceeding infructuous and absurd. See N. 39.
- Appellate Court — No power to remit any sentence. See Note 32.
- Appellate Court—Not to report to High Court without deciding appeal. See Note 38.
- Appellate Court—Powers of. See Notes 1 and 9.
- Appellant in jail — Not represented by pleader—Entitled to appear in person. See Note 9.
- Clause (d) — No application to matters arising *pending* appeal or to matters at stage of *admission*. See Note 39.
- Clause (d)—Orders not falling within— Examples. See Note 39.
- Co-accused—Appeal by one alone—Appellate Court can reduce sentence on other in the ends of justice. See Note 32.
- Commitment—For commitment by appellate Court, offence need not be exclusively triable by Sessions Court. See Note 30.
- Commitment refused in view of considerable expense incurred already by accused and other circumstances. See Note 30.
- “Consequential or incidental”—Meaning and examples. See Note 39.
- Conviction affirmed—Sentence cannot be reversed absolutely. See Note 32.
- Conviction for two offences—Whole prosecution evidence disbelieved — Whole conviction to be set aside. See Note 14.
- Discharge on ground of misjoinder— Re-trial can be directed. See Note 25.

Appellate Court may alter or reverse finding and sentence, or enhance a sentence.

after hearing the appellant, his counsel or agent, if they appear, and the Public Prosecutor, Government Pleader or other officer empowered by Government or by the Magistrate of the district in that behalf, if he appears may alter or reverse the finding and sentence or order of such Court, and may, if it see reason to do so enhance any punishment that has been awarded :

Provided that, if the appeal is from the sentence of a Magistrate of any class, the appellate Court shall not inflict a greater punishment than might have been inflicted by a Magistrate of the first class.

284. When any Court has convicted a person of an offence not triable by such Court the appellate Court shall annul the conviction and sentence of such Court and direct the trial of the case by a Court of competent jurisdiction.

272.

The High Court may, in any case so appealed, direct a new trial by another Court, or may pass such judgment, sentence, or order as may be warranted by law.

Code of 1861 : Ss. 419 and 427.

419. The appellate Court, after perusing the proceedings of the lower Court, and after hearing the plaintiff or his counsel or agent if they appear, may alter or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded.

Appellate Court may call for the proceedings of lower Court.

Court of appeal how to proceed in case of conviction by a Court not having jurisdiction
competent jurisdiction.

427. When a Court subordinate to a Court of Session shall have convicted a person of an offence not triable by such Court, it shall be competent to the appellate Court to annul the conviction and sentence of such Court, and to direct the trial of the case by a Court of

- Duty of appellate Court to go through record. See Note 3.
- Entire record lost—Fresh trial ordered. See Note 2.
- Evidence—Objection as to admissibility —Not to be allowed in appeal for first time. See Note 13.
- Evidence — Review by appellate Court —Independent judgment to be exercised. See Note 14.
- “Finding” — Is not limited to finding on law point. See Note 31.
- “Find him guilty”—Words not limited to offences with which accused was charged in lower Court. See Note 19.
- Finding of fact of trial Court—Power of appellate Court to interfere. See Note 14.
- High Court—Power as appellate Court. See Notes 1 and 22.
- High Court— Power as revision Court. See Notes 1 and 22.
- Improper evidence admitted by lower Court — Appellate Court should see whether there still remains sufficient evidence to sustain conviction — See Note 14.
- Jury— Objection to jury trial — Not to be allowed in appeal for first time. See Note 13.
- Jury verdict and conviction—Mis-direction or error of law — Whether appellate Court can go into evidence and see whether decision is right. See Note 40.
- Lower Court decision—Presumption as to correctness. See Note 14.
- New trial — Merely for enhancing punishment — To be used sparingly. See Notes 27 and 1.
- No appeal by accused — Conviction not to be quashed on ground of loss of record. See Note 2.
- Non-appealable sentence— Illegally corrected into appealable one — Appeal lies. See Note 3.
- No summary dismissal — Records to be sent for. See Note 2.
- Pleader appearing without vakalatnama —Time may be granted for production. See Note 9.
- Power under this section—Large enough to invoke English rule that repugnancy in verdict is by itself sufficient for quashing conviction. See Note 40.
- Powers under this section — Subject to other provisions of law. See Note 1.
- Presumption of innocence of accused — Effect of lower Court's decision on it. See Note 14.
- Previous conviction — Appellate Court cannot go into legality. See Note 37.
- Question of law — New plea in appeal. See Note 13.
- Remand— No remand for passing legal sentence. See Note 28.
- “Re-tried”—Includes re-trial on appeal. See Note 18.
- Re-trial—Charges under Ss. 302 and 201, Penal Code—S. 201 charge withdrawn — Conviction under S. 302—Re-trial even for charge under S. 201 can be ordered. See Note 26.
- Re-trial order can be passed even subsequent to setting aside conviction and sentence. See Note 17.
- Re-trial—No re-trial on particular point. See Note 23.
- Re-trial—When will not be ordered. See Note 23.
- Re-trial—When can be ordered. See Notes 17 and 23.
- Re-trial—Whether can be before appellate Court. See Note 24.
- Section 106 (3)—Order as to additional security under, is not enhancement. See Note 33.
- Section 118—Appeal against order under — No re-trial or further enquiry can be ordered. See Note 34.
- Section 250—Order under, cannot be passed under clause (d) by appellate Court. See Note 39.
- Section 418 and this section. See Note 40.
- Section 439 and this section—Distinction. See Note 1.
- Sections 514, 476, 135 and 250 (3). See Note 34.
- Section 537 and this section. See Note 40.
- Self-defence — New plea in appeal— When can be raised. See Note 13.
- Sentence by appellate Court—Whether enhancement. See Note 33.
- Separate sentences in separate trials— High Court can direct them to run concurrently. See Note 36.
- Subsequent discovery of evidence—No ground for setting aside acquittal or ordering re-trial. See Note 17.
- Subsequent events—Not to be looked into. See Note 35.
- Summary rejection of appeal under S. 421—Sentence cannot be reduced. See Note 32.
- Trial Court competent to inflict maximum sentence — No new trial for enhancing sentence. See Note 27.
- Trial Court not writing judgment in conformity with S. 367 — Appellate Court to remand case for re-hearing *de novo* and not merely to call for fresh judgment. See Note 28.
- Two appeals—To be kept and dealt with separately. See Note 11.
- Two appeals—Making cross-references to evidence and judgment irregular. See Note 11.
- Two cross-charges tried separately— But one judgment — No prejudice— Conviction valid. See Note 11.
- Whipping—When may be substituted for imprisonment. See Note 33.
- Withdrawal of appeal — At any time before judgment. See Note 8.

Section 423
Note 1

1. Scope of the section.—This section prescribes the powers of the appellate Court in disposing of an appeal. The powers conferred on the appellate Court are as ample as those of the High Court on revision under S. 439 with the exception of the power to *enhance* the sentence.¹ Where the appellate Court is the High Court itself, it has not only the powers under this section, but also those under S. 439. As an *appellate Court*, it can, under this section, alter the conviction to one for an offence of which the accused was *acquitted* by the lower Court, but it has no such power in revision. As a *revision Court* it can *enhance* the sentence passed by the lower Court though as an appellate Court it has no such power. Thus, by a combination of Ss. 423 and 439, the High Court, in appeal, can convict the accused of an offence of which he had been acquitted and also enhance the sentence.² Where an appeal is before the High Court, the accused may be warned that, at the hearing of the petition, he may be called on to show cause why the sentence should not be enhanced.³ But the stage at which the revisional powers can be exercised does not arise until the peremptory provisions of Ss. 422 and 423 have been complied with; thus, the High Court cannot, if it does not dismiss the appeal summarily under S. 421, act under S. 439 without notice under S. 422 and without sending for the record under S. 423.⁴

There is another distinction between this section and S. 439. Under the latter section findings of *fact* are not ordinarily open to review and a proviso against altering an acquittal into a conviction has been expressly added therein. On the other hand, this section is concerned with the powers of a Court of Appeal when the *facts* are before the Court, and in the absence of a proviso limiting the powers as to alteration of findings, such a proviso cannot be implied.^{4a}

The powers of the Court under this section must be read subject to other provisions of law limiting the right of interference to the extent specified by such provision. See the undermentioned cases.⁵

Section 423 — Note 1

1 ('35) AIR 1935 P C 89 (92) : 36 Cr. L. J. 838 : 62 I. A. 129 : 62 Cal 983 (P C), *Emperor v. Dahu Raut*.

2. ('35) AIR 1935 P C 35 (36) : 36 Cr. L. J. 482 : 57 All 156 : 62 I. A. 36 (P C), *Chunbidiya v. Emperor*.

('14) AIR 1914 Mad 258 (260) : 37 Mad 119 : 15 Cr. L. J. 180, *Bali Reddy v. Emperor*.

('04) 1 Cri L Jour 942 (943) : 1904 Pun Re No. 12 Cr, *Bhola v. Emperor*.

('84) 6 All 622 (622) : 1884 A W N 252 (FB), *Queen-Empress v. Ram Kuria*.

('31) AIR 1931 Cal 450 (451) : 32 Cri L Jour 890, *Kitabdi v. Emperor*.

[See ('24) AIR 1924 Rang 93 (97) : 1 Rang 436 : 25 Cr. L. J. 247, *On Shwe v. Emperor*. (Appeal by convict and revision by High Court — High Court acts both under S. 423 and S. 439 — Conviction for murder in place of conviction for lesser offence is justified under S. 423.)]

3. ('35) AIR 1935 P C 89 (92) : 36 Cr. L. J. 838 : 62 I. A. 129 : 62 Cal 983 (P C), *Emperor v. Dahu Raut*.

4. ('35) AIR 1935 P C 89 (91) : 36 Cr. L. J. 838 : 62 I. A. 129 : 62 Cal 983 (P C), *Emperor v. Dahu Raut*.

4a. ('32) AIR 1932 Cal 723 (726) : 60 Cal 179 : 34 Cr. L. J. 177, *Hanuman Sarma v. Emperor*.

5. *Reformatory Schools Act, S. 16.*

('98) 20 All 159 (160) : 1897 A W N 230, *Queen-Empress v. Gobinda*. (Cannot interfere in appeal or revision with an order for detention in reformatory school,

2. "Shall then send for the record." — Where the appeal is not dismissed summarily under S. 421, the appellate Court is bound to send for the record, if such record is not already in Court.¹ Where the entire record was lost, the High Court set aside the conviction and ordered a fresh trial.² In *Kamakshamma v. Emperor*³ it was held by the High Court of Madras that in the absence of any appeal by the person convicted, the conviction cannot, in revision, be quashed merely on the ground that some of the material records were lost at the time of the lower Court's judgment.

3. "After perusing the record." — An appeal cannot be dismissed for default of appearance. The words "after perusing the record . . . if it considers that there is no sufficient ground for interfering" shows that it is the duty of the appellate Court to go

passed in substitution for an order of transposition or imprisonment.)

('07) 6 Cr.L.J. 129 (130) : 1907 Pun Re No. 18 Cr, p. 58 (59) : 1908 P L R No. 55, *Ram Singh v. Emperor*. (Do.)

('93-1900) 1893-1900 L B R 441 (442), *Queen-Empress v. Nag Nyan Wun*. (Do.)

('12) 13 Cr.L.J. 44 (44) : 5 S L R 173 : 13 I. C. 284, *Imperator v. Rajabali*. (Do.)

('99) 3 Cal W N 576 (579), *Empress v. Harisdas Mukerjee*. (Do.)

('97) 20 All 158 (159) : 1897 A W N 230, *Queen-Empress v. Himai*. (Do—Overruled on another point in 21 All 391 (F B).)

('01) 28 Cal 423 (424) : 5 C W N 211, *Reasut v. Courtney*. (S. 16 does not take away jurisdiction of High Court to alter or set aside sentence in substitution of which order for detention is made.)

('31) AIR 1931 Nag 179 (179) : 27 Nag L R 242 : 32 Cri L Jour 1268, *Muhammad Azimuddin v. Emperor*. (Sessions Judge has power to alter sentence of imprisonment though order of detention falls to the ground thereby.)

[See however ('01) 1 Low Bur Rul 68 (68), *Crown v. Dawood Sahib*. (Can interfere when order is against rules framed by Local Government under the Act.)

('99) 21 All 391 (401, 404) : 1899 A W N 138 (FB), *Queen-Empress v. Hari*. (Can interfere where the order is without jurisdiction.)]

Cantonments Act (3 of 1880), section 28.

('84) 1884 Pun Re No. 40 Cr, p. 77 (84, 87), *Charde v. Empress*. (In a case tried under S. 28 of the Cantonments Act no appeal lies from any decision thereon.)

Act XXXVII of 1855, section 4 :

('72) 17 Suth W R Cr 11 (11), *Queen v. Boydonath Mukerji*. (Under S. 4, Cl. (1) of Act 37 of 1855 all sentences passed in criminal cases are final and no appeal lies to the High Court.)

Frontier Crimes Regulation (3 of 1901), Ss. 48 and 49.

('32) AIR 1932 Lah 436 (437) : 13 Lah 585 : 33 Cri L Jour 333, *Mt. Sabhai v. Emperor*. (Ss. 48 and 49 apply only to orders passed by special tribunals—They do not affect High Court's powers.)

Borstal Schools Act (1926), S. 21.

('32) AIR 1932 Sind 175 (177) : 26 Sind L R 295 : 34 Cri L Jour 11, *Issa Angario v. Emperor*. (High Court is precluded from interfering with discretion of Magistrates in appeal.)

Bengal Suppression of Terrorists Outrages (Supplementary) Act (34 of 1932).

('36) AIR 1936 Cal 529 (532) : 37 Cri L Jour 1092 : I L R (1937) 1 Cal 169, *Netai Chandra v. Emperor*. (Appeals from convictions under Bengal Suppression of Terrorists Outrages Supplementary Act—High Court retains its ordinary powers as provided in Ch. 31, Cr. P. C., in dealing with appeals.)

Note 2

1. ('35) AIR 1935 P C 89 (92) : 36 Cri L Jour 838 : 62 Ind App 129 : 62 Cal 983 (PC), *Emperor v. Dahu Raut*. (Court should also comply with provisions of S. 422.) See also S. 421 Note 1

2. ('89) 1889 All W N 55 (55), *Queen-Empress v. Khimat Singh*.

3. ('15) AIR 1915 Mad 1038 (1039) : 38 Mad 498 : 14 Cr.L.J. 497.

Section 423
Notes 3-5

through the record and dispose of the appeal on the *merits*.¹ This duty is irrespective of the question whether the appellant appears or does not appear; if he appears he is bound to be heard; if not, the record should be perused and the appeal disposed of on the merits.²

The whole record must be perused; it is not enough to merely go through the judgment.³ But documents and evidence not forming part of the record of the proceedings of the lower Court cannot be referred to or considered in appeal.⁴

An appeal cannot be dismissed on the ground that the sentence of the lower Court is without jurisdiction. Where a Magistrate first passed a non-appealable sentence and then illegally corrected it into an appealable sentence, it was held that an appeal lay against the latter and could not be dismissed on the ground that the original sentence was non-appealable.⁵

4. Dismissal of appeal for default, if can be set aside.—See Notes to Section 430.

5. Refusal to entertain appeal on ground that conviction ought to have been under non-appealable section.—Where a conviction is given under an appealable section, the appeal cannot be refused to be entertained because the conviction, in the appellate Court's opinion, ought to have been under a non-appealable section.¹

Note 3

1. ('11) 12 Cri L Jour 481 (481) : 12 I C 89 (All), *Sheoji v. Emperor*.
(09) 9 Cr.L.J. 553 (554, 555) : 5 Nag L R 76: 2 I.C. 247, *Ratanchand v. Emperor*.
(29) AIR 1929 Lah 849 (849) : 30 Cri L Jour 902, *Nihal v. Emperor*.
(30) AIR 1930 Lah 659 (659) : 11 Lah 242 : 31 Cr. L. J. 979, *Roora v. Emperor*.
(19) AIR 1919 Oudh 323 (324) : 20 Cri L Jour 744, *Balkaran Singh v. Emperor*.
(30) AIR 1930 Oudh 334 (334) : 31 Cri L Jour 939, *Taen v. Emperor*.
(27) AIR 1927 Pat 176 (176) : 6 Pat 16: 28 Cr.L.J. 351, *Kuldip Singh v. Emperor*.
(34) AIR 1934 Pesh 21 (21) : 35 Cri L Jour 963, *Din Mohammad v. Emperor*.
(95) 1895 Pun Re No. 21 Cr, p. 59 (59), *Koura v. Empress*.
(05) 2 Cri L Jour 66 (66) : 1905 Pun Re No. 11 Cr, *Nihal Singh v. King-Emperor*.
(24) AIR 1924 Pat 376 (376) : 24 Cr. L. J. 475, *Baldeo Dubey v. Emperor*.
(23) AIR 1923 All 175 (176) : 24 Cri L Jour 662, *Ramchandrar v. Emperor*.
(26) AIR 1926 Bom 548 (548) : 50 Bom 673: 27 Cr.L.J. 1167, *Trimbak v. Emperor*.
(24) AIR 1924 Cal 95(95):50 Cal 972:25 Cr.L.J. 1150, *Banshi Mirdha v. Brojeswar*.
(07) 11 Cal W N cxxxv (cxxxvi), *Noai Sheikh v. Emperor*.
(92) 1892 Rat 593 (594), *Queen-Empress v. Deoshanker*.
See also S. 421 Note 2.
2. ('19) AIR 1919 Pat 54 (56) : 20 Cr. L. J. 271, *Sham Behari Singh v. Emperor*.
(An appellant must be given a notice of the adjourned hearing.)
(27) AIR 1927 Pat 176 (176) : 6 Pat 16: 28 Cr.L.J. 351, *Kuldip Singh v. Emperor*.
3. ('13) 14 Cri L Jour 182 (183) : 19 Ind Cas 182 (Cal), *Abbash Ali v. Emperor*.
[See ('23) AIR 1923 Pat 368 (368) : 24 Cr. L. J. 453, *Newa Lal Rai v. Emperor*.
(Appeal cannot be disposed of summarily without considering whole evidence and writing out judgment.)]
4. ('10) 11 Cri L Jour 221 (221) : 6 Ind Cas 12 (Mad), *In re Muthu Goundan*.
(10) 11 Cri L Jour 734 (734) : 8 I. C. 943 (Mad), *In re Chinthalapudi Kotiah*.
(72) 17 Suth W R Cr 5 (5) : 8 Beng L R App 63, *Queen v. Wazira*. (Evidence taken before a Magistrate but not used at the trial, cannot be referred to on appeal.)
5. ('11) 12 Cr. L. J. 431 (431) : 11 I. C. 615 (Bom), *Emperor v. Keshavlal Virchand*.
(11) 12 Cri L Jour 402 (402, 403) : 11 Ind Cas 586 : 35 Bom 418, *Emperor v. Keshavlal Virchand*.
See also S. 413 Note 5.

Note 5

1. ('88) 1888 Rat 363 (364), *In re Karunaram*.

6. Admission of appeal does not preclude objection as to its admissibility. — The mere fact that an appeal was admitted in the absence of the respondent does not preclude the appellate Court from entertaining and giving effect, at the hearing, to an objection as to the maintainability of the appeal. Thus, the appellate Court can entertain an objection that there was no sufficient cause under S. 5 of the Limitation Act for excusing the delay in filing the appeal,¹ or an objection that no appeal lies against the particular sentence.² See also section 421 Note 1.

7. Appeal cannot be admitted merely for reviewing sentence. — An appeal cannot be admitted merely for the purpose of reviewing the *sentence* only. If the appeal is admitted the appellant is entitled to be heard on the merits of the whole case. Where this is not done the High Court will order a re-hearing of the appeal.¹ See also S. 421 Note 1.

8. Withdrawal of appeal. — A petition of appeal presented for admission may be withdrawn by the appellant. The reason is that a right of appeal is a privilege and the party concerned is at liberty to insist upon or abstain from the exercise of that right in accordance with the principle that every privilege given to a party by law may be waived at the option of that party.¹ According to the undermentioned case,² a party can withdraw his appeal at any time before judgment. According to the High Court of Calcutta,³ it is doubtful if an appeal can be withdrawn as of right, after the appellate Court has perused the evidence.

9. Parties must be given an opportunity of being heard. — An appeal cannot be dismissed summarily under this section.¹ The stage at which the powers under this section are to be exercised arises after the notice referred to in S. 422 has been given to the parties specified therein. The appellate Court must give the appellant or his pleader an opportunity of being heard.² It cannot dispose of the appeal

Note 6

1. ('14) AIR 1914 Bom 111 (111) : 38 Bom 613, *Raoji Keshav v. Krishnarao Anandrao*.
2. ('13) 14 Cri L Jour 254 (254) : 40 Cal 631; 19 I C 510, *Aziz Sheikh v. Emperor*.

Note 7

1. ('39) AIR 1939 Lah 295 (296) : I L R (1939) Lah 148; 40 Cr.L.J. 760, *Harnam Singh v. Emperor*.
 - ('95) 1895 Rat 826 (827), *Queen-Empress v. Dagdu Gangaram*.
 - ('31) AIR 1931 Pat 351 (351) : 32 Cri L Jour 1017, *Sheikh Rijhu v. Emperor*.
 - ('14) AIR 1914 Cal 276 (277) : 41 Cal 406; 14 Cr.L.J. 485, *Nafar Sheikh v. Emperor*.
 - ('25) AIR 1925 Pat 453 (455) : 4 Pat 254; 26 Cr.L.J. 862, *Gaya Singh v. Emperor*.
 - ('33) AIR 1933 Cal 124 (125) : 60 Cal 571; 34 Cr.L.J. 633, *Nil Ratan v. Emperor*.
- See also S. 407 Note 1; S. 412 Note 1 and S. 421 Note 1.

Note 8

1. ('79) 5 Cal L Rep 372 (373), *In the matter of Chunder Nath Deb*.
2. ('04) 1 Cri L Jour 751 (752, 753) : 17 C P L R 97, *Emperor v. Sheikh Rasul*.
3. ('80) 6 Cal L Rep 427 (428), *In re Dwarka Manjhee*.

Note 9

1. ('99) 1 Bom L R 225 (225), *Queen-Empress v. Gopala Rama*.
- ('01) 2 Weir 474 (475), *In re Viraswami Naickan*.
2. ('70) 1870 Pun Re No. 31 Cr, p. 48 (49), *Fuzl v. Crown*. (Time so fixed for appearance that it was physically impossible for the appellant to be present.)

Section 423
Note 9

immediately after sending for the record without giving any such opportunity.³ Thus, it cannot dismiss the appeal without a hearing on the ground that "the matter is a mere trifle."⁴

On the other hand, where an opportunity has been given, but the appellant or his pleader is absent at the hearing,⁵ or is not prepared to argue,⁶ the Court is not bound to wait further but is competent to dispose of the appeal on the merits after perusing the record. Thus, the only limitation on the powers of the appellate Court is that, before disposing of the appeal, it must peruse the record and, if the appellant, having been given an opportunity of being heard, is present or is represented by a pleader, he must be heard.⁷

Where a pleader appears on behalf of the appellant but files no *vakalatnama*, the appellate Court may grant him some time for producing the *vakalatnama* and then hear him; but the refusal to grant time cannot be said to be wrong.⁸ If the appellant is in jail and is unrepresented by a pleader, he is entitled to appear and be heard in person⁹ and, for this purpose, the appellate Court has power to direct him to be brought before it.^{9a} A contrary view has, however, been taken by the Chief Court of Oudh,^{9b} namely that an appellant in jail cannot appear in person in Court.

The only persons that are entitled to be heard are those mentioned in the section. A mukhtear is a pleader, and if he represents the appellant, he must be heard.¹⁰ A complainant or a *private prosecutor*

(197) 1897 Rat 914 (914), *Queen-Empress v. Chunia*. (Appeal disposed of in chambers without being aware of the fact that accused was represented by pleader — Judgment was set aside.)

[See however (1923) AIR 1923 Pat 297 (298) : 26 Cri L Jour 419, *Kabir Shah v. Emperor*. (Appeal transferred — Appellant not aware of transfer — Transferee Court disposing of appeal on merits does not commit any mistake.)]
See also S. 421 Note 5.

3. (1919) AIR 1919 Pat 54 (56) : 20 Cr. L. J. 271, *Sham Behari Singh v. Emperor*. (When appeal is adjourned to another date, notice of it should be given to appellant.)

(1924) AIR 1924 Rang 294 (295) : 25 Cr. L. J. 933, *Ta Pu v. Emperor*. (Appellant's advocate not given notice of date fixed for hearing appeal.)

(1982) 2 Weir 475 (475), *Shanmugam Chettiar v. Alagia Numbiya Pillai*. (Illegal disposal of appeal on a date of which no notice was given.)

4. (1988) 1898 Rat 978 (978), *Queen-Empress v. Jivacharam Keshavram*.
See also S. 486 Note 1.

5. (1911) 13 All 171 (187) : 1891 A W N 48 (FB), *Queen-Empress v. Pohpi*. (Overruled on another point in AIR 1928 All 84 (FB).)

6. (1935) AIR 1935 Pat 515 (518) : 36 Cr. L. J. 1354 (1356, 1357), *Kewalram v. Emperor*.

7. (1911) 13 All 171 (187) : 1891 A W N 48 (FB), *Queen-Empress v. Pohpi*. (Mahmood, J. *contra*.)

8. (1920) AIR 1920 Cal 175 (175) : 21 Cri L Jour 413, *Jasir Khan v. Emperor*.

9. (1928) AIR 1928 All 84 (86) : 50 All 543 : 29 Cr. L. J. 334 (FB), *Lal Bahadur v. Emperor*. (Overruling 13 All 171 and dissenting from AIR 1927 Oudh 312.)
(1983) 2 Weir 472 (473), *In re Kotina Butchaiya*.

(1983) 2 Weir 473 (473).

9a. (1983) 2 Weir 473 (473).

9b. (1927) AIR 1927 Oudh 312 (313) : 28 Cri L Jour 679, *Ram Prasad v. Emperor*.

10. (1981) 6 Bom 14 (15), *Imperatrix v. Shivram Gundo*. (Disposal without hearing mukhtiar of accused set aside.)

cannot claim, as of right, to be heard in appeal, though the Court may, in its discretion hear him.¹¹

Section 423
Notes 9-11

The parties who are to be heard, must be heard in each other's presence.¹² The Court cannot cut short the arguments so long as the parties are not guilty of unnecessary repetition or of irrelevant arguments; nor can it decline to hear them or cut short their arguments because it is expected by the superior Courts to turn out a certain amount of work within a certain time.

There is a difference of opinion as to whether, if the respondent is heard, the appellant has a *right of reply*. According to the High Court of Calcutta¹³ the practice of the Court is to allow the appellant a right of reply. According to the High Court of Lahore¹⁴ there is nothing in the language of the section to preclude the appellant or his pleader from replying, and as a matter of principle such right must be conceded to him. The Chief Court of Oudh¹⁵ has, on the other hand, held that the appellant's pleader has no *right* of reply but that it is a *privilege* which should not ordinarily be refused by the Court.

10. Notice of appeal. — See Notes to Section 422.

11. Connected appeals — Hearing of. — An appellate Court should not hear two appeals together; each appeal must be kept absolutely separate and dealt with on the merits.¹ Further, it is irregular for the Court, while dealing with connected criminal appeals, to make cross-references to the evidence and judgments in the several cases.² Where two parties were charged for their attacks against each other in the same occurrence, and the High Court, though trying the two charges separately, gave a single judgment, it was held by the Privy Council, that although technically it would have been better to have kept the evidence entirely distinct and to have given two separate judgments, the irregularity was one which, in the absence of prejudice

11. ('32) AIR 1932 Cal 61 (61, 62): 33 Cr.L.J. 305, *Behari Majhi v. Hari Majhi*. (No right to be heard but can be heard.)

('40) AIR 1940 Bom 14 (15): 41 Cri L Jour 245, *Paragji v. Bhagwanji*. (Court in its discretion may allow the complainant to appear by an advocate, but is not bound to do so.)

('37) AIR 1937 Nag 394 (396): 39 Cr. L. J. 75: 1 L R (1938) Nag 157, *Raghunath Mal v. Patiram*.

('04) 9 Cal W N 1x (1x), *In re Dowlatram*. (Was heard.)

('86) 1886 Pun Re No. 29 Cr, p. 71 (72), *Akbar v. Empress*. (No right to be heard except by permission.)

('71) 7 Mad H C R App xlii (xlii): 2 Weir 476.

See also S. 422 Note 4.

12. ('32) AIR 1932 Cal 856 (856, 857): 33 Cri L Jour 775, *Shaikh Bhotali v. Shaikh Kalu*.

13. ('32) AIR 1932 Cal 856 (857): 33 Cr.L.J. 775, *Shaikh Bhotali v. Shaikh Kalu*.

14. ('16) AIR 1916 Lah 74 (74, 75): 1917 Pun Re No. 21 Cr: 18 Cri L Jour 3, *Buta Singh v. Emperor*.

15. ('25) AIR 1925 Oudh 65 (66): 25 Cri L Jour 1169, *Prag v. King-Emperor*.

('25) AIR 1925 Oudh 50 (50): 25 Cri L Jour 1173, *Bakra v. Emperor*. (Privilege should never be refused.)

Note 11

1. ('28) AIR 1928 Cal 230 (230, 231): 29 Cr. L. J. 512, *Doat Ali v. Emperor*.

2. ('16) AIR 1916 Cal 912 (913): 17 Cri L Jour 439, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy*.

('16) AIR 1916 Mad 1021 (1022): 16 Cr.L.J. 542, *Indra Talavar v. Narasimha Rau*.

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would not affect the validity of the convictions.³ Where the Sessions Court reversed the finding of the lower Court on a question of fact, without discussing the evidence in the case but referring to his finding in the appeal in a counter-case, it was held that the procedure, though convenient for the Sessions Judge, raised difficulties when the case came before the High Court in revision for want of material for High Court and hence the case should be remanded.⁴

12. Appointment of assessors in appeal. — The appointment of assessors in appeal is not authorized by law.¹

13. New plea. — A plea of self-defence can be raised for the first time in appeal and the appellate Court should examine the plea so raised,¹ if the facts on the record justify such plea.² Similarly, a question of law such as that the prosecution is barred by limitation,³ or that the trial is vitiated by an illegality⁴ (*e. g.*, a misjoinder of charges,⁵ or the constitution of the Court being illegal or irregular^{5a}) may be raised for the first time in appeal. As a general rule, however, an objection as to the admissibility of evidence will not be entertained for the first time in appeal.⁶ Similarly, an objection that the trial ought to have been with the aid of assessors and not by jury will not be entertained for the first time in appeal.⁷

14. Appreciation of evidence by the appellate Court. — The appellate Court should exercise its own independent judgment in reviewing the evidence¹ and must form its own conclusions on the

3. ('27) AIR 1927 P C 26 (26, 27) : 8 Lah 193 : 28 Cr. L. J. 254 (P C), *Madat Khan v. Emperor*.

4. ('35) AIR 1935 Pat 494 (494) : 36 Cr. L. J. 1349, *Heta Singh v. Emperor*.
See also S. 353 Note 4 and S. 537 Note 30.

Note 12

1. ('68) 1868 Pun Re No. 17 Cr, p. 42 (42), *Crown v. Syud Ahmud*.
See also S. 284 Note 8.

Note 13

1. ('25) AIR 1925 All 664 (666) : 26 Cri L Jour 997, *Ajudhia Prasad v. Emperor*;
(26) AIR 1926 Nag 202 (202) : 26 Cri L Jour 1552, *Rahimanshah v. Emperor*.

2. ('32) AIR 1932 Lah 606 (607) : 34 Cri L Jour 462, *Nur Dad v. Emperor*.

(34) AIR 1934 Oudh 251 (254) : 35 Cr. L. J. 943, *Id. Nabi Khan v. Emperor*.

3. ('03) 7 Cal W N 883 (888), *Bijoyendra Lall v. Emperor*.

4. ('39) AIR 1939 Bom 457 (459) : 41 Cr. L. J. 176 : I L R (1939) Bom 648, *Emperor v. Jhina Soma*. (Prosecution is not debarred from taking ground in appeal that Sessions Judge omitted to explain law to jury.)

(31) AIR 1931 Oudh 113 (113) : 32 Cri L Jour 91 : 6 Luck 386, *Ram Loutan v. Emperor*. (Approver on turning against prosecution tried jointly with other accused and his confession relied on as basis for conviction of all accused.)

5. ('02) 26 Mad 125 (126, 127) : 2 Weir 295, *Krishnasami Pillai v. Emperor*.

5a. ('29) AIR 1929 Cal 92 (93) : 30 Cri L Jour 484, *Intaz Mandal v. Emperor*.

[But see ('30) AIR 1930 Cal 291 (291, 294) : 57 Cal 1062, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhajoo Majhi*. (Not entertained as there was no prejudice.)]

6. ('36) AIR 1936 Cal 101 (103) : 37 Cr. L. J. 445, *Narain Chandra v. Emperor*.

(33) AIR 1933 Cal 190 (192) : 34 Cri L Jour 430, *Eusuf Ali v. Emperor*.

7. ('30) 1930 Mad W N 776 (776), *Karuppa Thevan v. Emperor*.

Note 14

1. ('38) AIR 1938 Rang 45 (47) : 39 Cr. L. J. 248, *Nga Kyaw Hla v. The King*. (Appellate Court must independently scrutinize evidence and be convinced that no reasonable man can come to any other conclusion than that the accused was guilty.)

(90) 1890 All W N 148 (148), *Queen-Empress v. Bishan*.

evidence.² A general agreement with the lower Court is not enough.³

A trial Court may give a finding of fact in two ways :

- (a) by drawing *inferences* from proved and admitted facts, or
- (b) by relying on the *credibility of the evidence*.

This credibility may again depend upon the demeanour of the witnesses or upon other factors. In case (a), the appellate Court is in as good a position as the first Court. Even in case (b), where the credibility of the evidence depends upon factors other than the *demeanour* of witnesses, the appellate Court is free to come to its own conclusions as to the credibility of the evidence.^{3a} Similarly, when the trial Court convicts and the appellate Court acquits the accused, the High Court, on appeal by the Government against the acquittal, is not in any worse position than the first appellate Court, in the matter of weighing the evidence.⁴ Where, however, a finding of fact is based upon the credibility of evidence involving the appreciation of the demeanour of witnesses, the view of the trial Court which has seen and heard the witnesses is entitled to great weight and should not be lightly discarded.⁵ In such cases the appellate Court will not interfere unless

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- (172-92) 1872-92 Low Bur Rul 516 (516, 517), *Kyan Zan v. Queen-Empress*.
 2. ('68) 1868 Pun Re No. 8 Cr, p. 17 (23), *Sher Ali v. Crown*.
 ('96) 23 Cal 347 (349), *Milan Khan v. Sagai Bepari*.
 ('33) AIR 1933 Pat 100 (102) : 11 Pat 807 : 34 Cri L Jour 427, *Mosaddi Rai v. Emperor*. (Admission of counsel does not relieve the appellate Court of this duty.)
 ('13) 14 Cr. L. J. 419 (420) : 40 Cal 376 : 20 I. C. 403, *Fidoi Hossein v. Emperor*. (The fact that counsel did not refer to evidence does not absolve the Court from looking into it.)
 ('13) 14 Cr. L. J. 182 (183) : 19 I. C. 182 (Cal), *Abbash Ali v. Emperor*. (Where in a criminal appeal, no one appears on behalf of the appellant, the Court ought to peruse the evidence and come to a finding upon facts independently of the judgment. A decision on perusal of the judgment only is not legal.)
 ('21) 22 Cr. L. J. 414 (414) : 61 I. C. 654 (Cal), *Nogendra Nath v. Emperor*. (Conviction under S. 324, I. P. C.—Appellate Court is bound to come to definite finding of its own as to how, where and by whom injuries were caused to complainant.)
 ('24) AIR 1924 Cal 618 (619) : 25 Cri L Jour 1044, *Inatulla Sircar v. Emperor*. (Appellate Court is bound to give explicit opinion on question of fact involved in the case.)
 ('34) AIR 1934 All 842 (843) : 35 Cri L Jour 1229, *Emperor v. Noor Ahmed*. (It must review the entire evidence.)
 ('76) 1876 Pun Re No. 5 Cr, p. 6 (7), *Turin v. Crown*. (The law of appeal constitutes the appellate Court a Judge of the facts as completely as the Court of first instance, and the former Court should give 'the benefit of the doubt to the accused, if it feels any doubt about the guilt of the accused.)
 3. ('11) 12 Cr. L. J. 43 (43) : 9 I. C. 261 (Cal), *Jatra Mohan v. Akhil Chandra*. See the following cases :
 ('21) AIR 1921 Pat 496 (497) : 22 Cr. L. J. 485, *Mayadhar Mahanty v. Danardan Kund*. (Where a prosecution case is disbelieved in essential particulars, it is not safe to convict the accused on the residue of the evidence that may be acceptable.)
 ('27) AIR 1927 Mad 410 (411) : 28 Cri L Jour 238, *In re Venkataswami*. (Rejecting part of prosecution story—Conviction can be based on rest of evidence.)
 ('19) AIR 1919 Pat 534 (536) : 20 Cri L Jour 375 : 4 Pat L Jour 289, *Ram Prasad Mahton v. Emperor*. (Appellate Court finding part of evidence to be untrue—He should examine residue with care and scrutinize same with caution.)
 3a. ('36) AIR 1936 Cal 73 (80) : 37 Cri L Jour 394 : 63 Cal 929, *Benoyendra Chandra v. Emperor*. (Decision of case turning upon question as to what inference is to be drawn from well-established facts about which there is no doubt — High Court is entitled to draw necessary inference.)
 ('26) AIR 1926 Oudh 120 (124) : 27 Cri L Jour 529, *Sitla Baksh v. Emperor*.
 4. ('30) AIR 1930 Lah 403 (405) : 32 Cr. L. J. 348, *Emperor v. Mohammad Khan*.
 5. ('40) AIR 1940 Lah 329 (331), *Bharpura v. Dewan Chand*.

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the indications of mistake are obvious or the evidence too strong to be rejected especially where the lower Court's finding is in favour of the accused's innocence.⁶ Except in this respect there is no difference in

- ('38) AIR 1938 Pat 49 (51):39 Cr. L. J. 281:16 Pat 116, *Emperor v. Baharuddin*.
('38) AIR 1938 Rang 45 (47): 39 Cr. L. J. 248, *Nga Kyaw Hla v. The King*.
('15) AIR 1915 P C 1 (2) : 39 Bom 386 : 42 Ind App 110 (P C), *Bombay Cotton Manufacturing Company v. Motilal Shivalal*.
('74) 21 Suth W R Cr 13 (14), *Queen v. Madhub Chunder Giri*.
('25) AIR 1925 Oudh 715 (717): 26 Cri L Jour 1317, *Sheo Narain Singh v. King-Emperor*. (The High Court must be guided as regards the credibility of oral evidence mainly by the Court that heard it.)
('35) AIR 1935 Pat 95 (97) : 36 Cri L Jour 348, *Ibrahim v. Emperor*. (Lower Court's opinion should be treated as almost conclusive.)
('32) 33 Cri L Jour 929 (930) : 139 Ind Cas 756 (Oudh), *Emperor v. Paragi*. (The appellate Court must be slow to differ from the opinion of the trial Judge as regards the value of the testimony of witnesses unless there are good grounds.)
('29) AIR 1929 Mad 846 (847) : 31 Cri L Jour 449, *Public Prosecutor v. Pakiriswami*. (It is only in very exceptional circumstances that a Court dealing with an appeal against an acquittal should reverse that finding by accepting oral evidence which the trial Court after enjoying the advantage of hearing the witnesses has disbelieved.)
('31) AIR 1931 Rang 86 (87) : 8 Rang 671 : 32 Cr. L. J. 929, *Emperor v. Maung Tun Nyan*.
('33) AIR 1933 Oudh 372 (373) : 35 Cr. L. J. 66, *Emperor v. Parameshwar Din*. (Judge trying case with marked care and intelligence—His opinion as to credibility of witnesses should ordinarily be accepted.)
('26) AIR 1926 Oudh 245 (246): 27 Cri L Jour 57, *Bhulan v. Emperor*. (Question of credibility of witness is one for trial Court, not for appellate Court.)
('09) 10 Cri L Jour 160 (163) : 2 Ind Cas 825 (Bom), *Mustafa Rahim v. Motilal*.
('29) AIR 1929 Pat 491 (496):8 Pat 496:31 Cr. L. J. 148, *Emperor v. Deboo Singh*.
[See ('33) AIR 1933 Lah 232 (233): 34 Cri L Jour 318, *Banta Singh v. Emperor*. (It is not desirable in most cases to rely upon the evidence which has been definitely disbelieved by the trial Judge for good reasons and to try to support the conviction of an accused person on such evidence.)
('33) AIR 1933 Sind-325 (326) : 35 Cri L Jour 129, *Emperor v. Mohammad Osman*.]
[See also ('82) 11 Cal L Rep 25 (29, 30), *Protap Chunder Mukerjee v. Empress*. (The sound rule to apply in trying a criminal appeal where questions of facts are in issue is to consider whether the conviction is right and in this respect a criminal appeal differs from a civil one.)
('74) 20 Suth W R Cr 13 (13) : 11 Beng L R 33, *Queen v. Kheraj Mullah*.]
6. ('37) AIR 1937 Sind 22 (25) : 38 Cr. L. J. 350:30 S L R 456, *Jalal v. Emperor*. (Judicial Commissioner's Court will interfere if strong grounds exist.)
('04) 1 Cr. L. J. 781 (789) : 1904 Pun Re No. 7 Cr, *King-Emperor v. Chattar Singh*.
('14) AIR 1914 Lah 427 (431) : 15 Cri L Jour 203, *Emperor v. Bishen Singh*.
('20) AIR 1920 Lah 244 (245) : 22 Cri L Jour 172, *Emperor v. Samand*.
('18) AIR 1918 Lah 54 (55) : 19 Cri L Jour 275, *Emperor v. Mt. Jawai*.
('18) AIR 1918 Lah 105 (107) : 19 Cr. L. J. 723 : 1918 Pun Re No. 25 Cr, *Emperor v. Muhammad Shafi*.
('18) AIR 1918 Lah 286 (286) : 19 Cri L Jour 710, *Emperor v. Lachmandas*. (Culpability of accused must be very clear and indubitable before appellate Court would interfere.)
('19) AIR 1919 Lah 356 (359) : 20 Cri L Jour 188, *Pallia v. Emperor*.
('19) AIR 1919 Lah 440 (442) : 19 Cri L Jour 187, *Emperor v. Jagat Ram*.
('34) AIR 1934 Lah 710 (715) : 36 Cri L Jour 419, *Emperor v. Muhammad Khan*.
('33) AIR 1933 Lah 871 (874) : 35 Cr. L. J. 137, *Emperor v. Rai Singh*.
('33) AIR 1933 Lah 388 (390) : 34 Cri L Jour 598, *Emperor v. Sher Singh*.
('33) AIR 1933 Lah 296 (298) : 35 Cri L Jour 626, *Muzaffar v. Emperor*.
('27) AIR 1927 Lah 549 (554) : 28 Cri L Jour 556, *Emperor v. Bakhtarwar Lal*.
[See ('32) AIR 1932 Sind 143 (143) : 33 Cri L Jour 900, *Udharam v. Emperor*. (Courts are always reluctant to interfere with the findings of a trial Court unless strong grounds are made out for so doing.)
('33) AIR 1933 Oudh 254 (255) : 34 Cri L Jour 858, *Emperor v. Hub Lal*. (Judgment of acquittal will not be interfered with in absence of strong and cogent grounds.)]

the manner of appreciating evidence, between an appellate Court and the trial Court.⁷ Where the evidence has been properly appreciated by the lower Court and its view cannot be said to be wrong, the appellate Court cannot interfere.⁸

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There is a difference of opinion as to whether the appellant is bound to show that the decision of the lower Court is wrong. On the one hand, it has been held that there is no such burden on the appellant. It is for the appellate Court, as for the first Court, to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the accused has been established beyond all reasonable doubt.⁹ According to this view, the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of Appeal; this presumption is not strengthened by an acquittal or weakened by a conviction in the trial Court: the onus of proof is neither increased nor lightened by an order of conviction or acquittal.¹⁰

On the other hand it has been held in the undermentioned case¹¹ that the *presumption* is that the lower Court's decision is correct. According to this view, an appellant is not in the same position before an appellate Court as he is before the Court trying him, but must satisfy the appellate Court that there is sufficient ground for interfering.¹² It is submitted that the former view is to be preferred to the latter.

Where the whole of the prosecution evidence is disbelieved, a conviction by the lower Court in respect of two offences cannot be set aside as regards one offence and confirmed as regards the other; the whole of the conviction should be set aside.¹³ Where improper evidence is admitted the appellate Court should see whether, excluding it, there still remains sufficient evidence to sustain the conviction of the lower Court and, if so, it should not interfere.¹⁴ See also section 167 of the Evidence Act.

15. Appeal from acquittal — Clause (a).—Section 407 of the Code of 1861 specifically provided, that "there shall be no appeal from

7. ('72) 17 Suth W R Cr 59 (59), *In re Goomanee*. (Appellate Court is bound precisely in the same way as trial Court to test evidence extrinsically as well as intrinsically.)

8. ('39) AIR 1939 All 457 (458, 461) : 40 Cri L Jour 772, *Emperor v. Sheo Sewak Singh*.

('33) AIR 1933 Oudh 62 (63) : 34 Cri L Jour 377, *Rameshwar Tewari v. Emperor*. (Conclusion of trial Court supported by probabilities of case should be upheld.)

('33) AIR 1933 Oudh 269 (271, 272) : 35 Cri L Jour 58, *Chhotte Lal v. Emperor*. [See ('31) AIR 1931 Oudh 83 (84, 85) : 6 Luck 582 : 32 Cri L Jour 630, *Emperor v. Narain*.]

9. ('38) AIR 1938 Rang 45 (47) : 39 Cri L Jour 248, *Nga Kyaw Hla v. The King*.

('96) 23 Cal 347 (349), *Milan Khan v. Sagai Bepari*.

('15) AIR 1915 Cal 187 (187) : 15 Cri L Jour 686 : 42 Cal 374, *Kanchan Mallik v. Emperor*.

10. ('34) AIR 1934 All 842 (843) : 35 Cri L Jour 1229, *Emperor v. Nur Ahmad*.

11. ('72) 18 Suth W R Cr 15 (16), *Queen v. Ramlochan Singh*.

12. ('83) 5 All 386 (387) : 1883 A W N 72, *Empress v. Sajiwan Lal*.

('98) 20 All 459 (464) : 1898 A W N 117, *Queen-Empress v. Prag Dut*.

13. ('18) AIR 1918 All 355 (355) : 19 Cri L Jour 37, *Sheobans Singh v. Emperor*. [See also ('02) 6 Cal W N 380 (382), *Motijan Bibi v. Crown*.]

14. ('74) 11 Bom H C R 90 (98), *Reg. v. Parbhudas*.

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a judgment of acquittal passed in any criminal Court." This was in accordance with the old established principle of English law that a man once tried and acquitted for an offence is *ipso facto* protected from any subsequent proceeding for that offence, whether the subsequent proceeding is by the appellate or revisional Court.

On grounds of public policy,¹ however, a right of appeal against an acquittal, subject to certain limitations, was for the first time recognised in this country by the Code of 1872.² An appellate Court will, however, hesitate and feel great reluctance in interfering with the finding of the Court below and coming to a different conclusion.³ Where two views are possible on the evidence, an appellate Court will not interfere merely because it would, sitting as a trial Court, have taken the other view,⁴ unless it is shown that there has been some irregularity in procedure or some other serious defect which necessitates the re-examination of the entire evidence and a fresh conclusion.⁵ Again, where the evidence against the accused is too scanty or insuffi-

Note 15

1. ('34) AIR 1934 All 27 (31) : 56 All 354 : 35 Cri L Jour 364 (FB), *Emperor v. Sheo Janak Pande*.
2. ('31) A I R 1931 All 439 (441), *Emperor v. Ram Adhin Singh*.
[See ('81) 4 All 148 (148) : 1881 A W N 159, *Empress of India v. Gayadin*. ('74) 7 Mad H C R 339 (341) : 2 Weir 476, *In re Government Pleader*.]
See also S. 417 Note 1.
3. ('37) AIR 1937 Cal 156 (157) : 38 Cri L Jour 638, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Jatindra Mohan*. (Appeals by the Crown against acquittals purely on questions of fact are not often encouraged by appellate Courts.)
('37) 39 P L R 776 (777), *Emperor v. Sardara Singh*. (The High Court will not interfere unless, in view of all the circumstances, the view taken by the Sessions Judge is clearly erroneous.)
('34) AIR 1934 All 27 (35) : 56 All 354 : 35 Cri L Jour 364 (FB), *Emperor v. Sheo Janak Pande*.
('25) AIR 1925 Sind 295 (295) : 19 Sind L R 111 : 26 Cri L Jour 1028, *Emperor v. Sundardas*.
('23) AIR 1923 Oudh 217 (224) : 24 Cri L Jour 770, *Emperor v. Natoram*.
('16) AIR 1916 Oudh 112 (114) : 17 Cri L Jour 540, *Emperor v. Durga Prasad*. (Lower Court's decision should not be lightly set aside.)
[See also ('27) 28 Cri L Jour 212 (212, 213) : 99 Ind Cas 1012 (Lah), *Emperor v. Ibrahim*.]
4. ('39) AIR 1939 All 457 (461) : 40 Cr. L. J. 772, *Emperor v. Sheo Sewak Singh*.
('34) AIR 1934 All 27 (36) : 56 All 354 : 35 Cr. L. J. 364 (FB), *Emperor v. Sheo Janak Pande*. (But even this is mere rule of caution and sound practice, and not any rule of law.)
('31) AIR 1931 All 712 (716) : 32 Cr. L. J. 1073, *Emperor v. Baldeo Koeri*.
('31) AIR 1931 All 439 (442), *Emperor v. Ram Adhin Singh*.
('18) AIR 1918 Lah 54 (58) : 19 Cr. L. J. 275, *Emperor v. Mt. Jawai*.
('16) AIR 1916 Lah 380 (382) : 17 Cr. L. J. 97, *Bachinta v. Emperor*. (High Court will not interfere where appeal is based on doubtful weighing of facts.)
('14) AIR 1914 Lah 427 (431) : 15 Cr. L. J. 203, *Emperor v. Bishen Singh*.
('03) 1903 Pun Re No. 11 Cr, p. 31(32):1903 P. L. R. No. 142, *Emperor v. Mangat*.
('34) AIR 1934 Lah 212 (215) : 35 Cr. L. J. 349, *Emperor v. Natha Singh*.
('34) AIR 1934 Lah 523 (524) : 36 Cr. L. J. 635, *Emperor v. Kura*.
('16) AIR 1916 Oudh 112 (114) : 17 Cr. L. J. 540, *Emperor v. Durga Prasad*.
('94) 16 All 212 (214) : 1894 A W N 49, *Queen-Empress v. Robinson*.
('81) 4 All 148 (149) : 1881 A W N 159, *Empress of India v. Gayadin*.
('82) 1882 All W N 64 (64), *Empress v. Wali Mohammad*. (Following 4 All 148.)
('31) 1931 Mad W N 729 (730), *Public Prosecutor v. Ramudu*.
5. ('34) AIR 1934 All 27 (36) : 56 All 354 : 35 Cri L Jour 364 (F B), *Emperor v. Sheo Janak Pande*.

cient,⁶ or where it is not established beyond all reasonable doubt that the respondent is guilty of the offence charged,⁷ the appellate Court will not interfere with the acquittal. Nor will the finding of the trial Court be displaced merely because the Government's view of the case does not coincide with that of the trial Court.⁸

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Note 15

Except in regard to the points stated above, there is no distinction drawn, so far as the sections of the Code themselves are concerned, between appeals from convictions and appeals from acquittals in regard to the rules and limitations applicable to them. It was, however, held in several decisions, that a distinction must be drawn as regards the powers of the appellate Court in dealing with an appeal from an acquittal and an appeal from a conviction.⁹ Thus, it was held that the appellate Court had no jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower Court had "obstinately blundered"¹⁰ or had, through incompetence, stupidity or perversity reached distorted conclusions as to produce a positive miscarriage of justice,¹¹ or had, in some other way, so conducted itself as to produce a miscarriage of justice,¹² or had

6. ('31) AIR 1931 All 439 (442), *Emperor v. Ram Adhin Singh*.

('31) AIR 1931 All 712 (715) : 32 Cri L Jour 1073, *Emperor v. Baldeo Keeri*.

[See also ('77) 1 Bom 610 (623), *Reg. v. Hanmanta*. (To reverse judgment of acquittal, evidence stronger than statement of accomplice and of witness who is entirely disbelieved by lower Court must be shown.)]

7. ('38) AIR 1938 Sind 80 (81) : 39 Cri L Jour 504 : 32 S L R 689, *Emperor v. Gulab Shah*.

('31) AIR 1931 Rang 86 (87) : 8 Rang 671 : 32 Cr. L. J. 929, *Emperor v. Maung Tun Nyan*.

8. ('81) 4 All 148 (150) : 1881 A W N 159, *Empress of India v. Gayadin*.

('94) 16 All 212 (214) : 1894 A W N 49, *Queen-Empress v. Robinson*.

9. ('31) AIR 1931 Lah 465 (466) : 32 Cri L Jour 1079, *Emperor v. Muza ffar*.

10. ('81) 4 All 148 (150) : 1881 A W N 159, *Empress of India v. Gayadin*.

('94) 16 All 212 (214) : 1894 A W N 49, *Queen-Empress v. Robinson*.

('23) AIR 1923 Pat 119 (121) : 23 Cr. L. J. 410, *Emperor v. Kunja Dusadh*.

11. ('29) AIR 1929 Pat 491 (496) : 8 Pat 496 : 31 Cr. L. J. 148, *Emperor v. Deboo Singh*.

('82) 4 All 148 (149, 150) : 1881 A W N 159, *Empress of India v. Gayadin*.

('94) 16 All 212 (214) : 1894 A W N 49, *Queen-Empress v. Robinson*.

[See ('33) AIR 1933 Rang 387 (388) : 35 Cr. L. J. 786, *Emperor v. Nga Po Yin*.

('29) AIR 1929 Pat 503 (508) : 30 Cri L Jour 1116, *Emperor v. Ram Prasad*. (In order to interfere, the judgment must be such as no body of sensible men could arrive at.)]

12. ('33) AIR 1933 Pesh 27 (28) : 34 Cr. L. J. 384, *Emperor v. Chattar Singh*.

('97) 1897 Pun Re No. 10 Cr, p. 25 (26), *Queen-Empress v. Ghulam Muhammad*.

('16) AIR 1916 Lah 143 (144) : 17 Cr. L. J. 194 : 1916 Pun Re No. 15 Cr, *Emperor v. Nawab*.

('34) AIR 1934 Lah 523 (524) : 36 Cr. L. J. 635, *Emperor v. Kara*.

('34) AIR 1934 Lah 212 (215) : 35 Cr. L. J. 349, *Emperor v. Natha Singh*.

('34) AIR 1934 Rang 44 (47) : 35 Cr. L. J. 855, *Emperor v. U Ba U*.

('24) AIR 1924 Cal 611 (614) : 26 Cr. L. J. 71, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Purna Chandra Ghose*.

('11) 12 Cri L Jour 364 (370) : 11 Ind Cas 132 : 1911 Pun Re No. 10 Cr (FB), *Emperor v. Kiru*. (Not merely on the ground that the correctness of the judgment is open to doubt.)

[See also ('75) 7 N W P H C R 196 (199), *Queen v. Dukaran*. (Powers under this section should be exceptionally used.)]

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Note 15

obviously blundered,¹³ or its judgment was wrong and perverse,¹⁴ or was unreasonable.¹⁵ A contrary view was also expressed in other decisions, namely, that there was no distinction as regards the powers of the appellate Court between an appeal from an acquittal and an appeal from a conviction, and that the only question in each case was whether the conclusions upon the evidence were proper and correct.¹⁶

13. ('31) AIR 1931 All 439 (442), *Emperor v. Ram Adhin Singh*.
- ('31) AIR 1931 All 712 (715) : 32 Cri L Jour 1073, *Emperor v. Baldeo Koeri*.
- ('31) 1931 Mad W N 729 (730), *Public Prosecutor v. Ramudu*. (Judgment must be manifestly wrong.)
- ('30) AIR 1930 Lah 84 (85) : 31 Cri L Jour 141, *Emperor v. Soopi*. (In an appeal from an acquittal the order of the Magistrate will be reversed only if it is palpably wrong or foolish.)
- ('27) AIR 1927 Lah 178 (179) : 28 Cri L Jour 55, *Emperor v. Abdul Latif*. (Unless manifestly wrong or perverse appellate Court cannot weigh evidence.)
- ('31) AIR 1931 Oudh 116 (119) : 6 Luck 539 : 32 Cri L Jour 694, *Gafoor Khan v. Emperor*. (Judgment must be manifestly wrong—4 All 148, dissented from.)
- ('33) AIR 1933 Oudh 372 (373) : 35 Cri L Jour 66, *Emperor v. Parmeshwar Din*. (Do.)
14. ('15) AIR 1915 Cal 287 (288) : 15 Cr. L. J. 160, *Deputy Superintendent and Remembrancer of Legal Affairs, Bengal v. Amulya Charan Awan*.
- ('16) AIR 1916 Mad 711 (712) : 16 Cr. L. J. 529, *Public Prosecutor v. Narayana Naidu*.
- ('30) AIR 1930 Mad 704 (704, 705) : 31 Cr. L. J. 897, *Public Prosecutor v. Lakshamma*.
- ('87) 1887 Rat 344 (347), *Queen-Empress v. Sayad Surfuddin*. (Decision of assessors.)
- ('33) AIR 1933 Oudh 85 (85) : 34 Cri L Jour 545, *Emperor v. Sangaram*.
- ('25) AIR 1925 Lah 600 (602) : 26 Cri L Jour 1141, *Emperor v. Ram Karan*.
- ('13) 14 Cr. L. J. 525 (526) : 20 Ind Cas 1005 (Lah), *Emperor v. Mt. Bakhtawari*.
15. ('32) 33 Cr. L. J. 932 (933) : 139 Ind Cas 740 (Oudh), *Emperor v. Bharat Singh*.
- ('34) AIR 1934 Rang 44 (45) : 35 Cri L Jour 855, *Emperor v. U Ba U*.
- ('04) 1 Cr.L.J. 781 (789) : 1904 Pun Re No. 7 Cr, *King-Emperor v. Chattar Singh*.
- ('14) AIR 1914 Lah 427 (431) : 15 Cri L Jour 203, *Emperor v. Bishen Singh*.
- ('20) AIR 1920 Lah 21 (23) : 21 Cri L Jour 349, *Emperor v. Turczi*.
16. ('34) AIR 1934 All 27 (35) : 56 All 354 : 35 Cr.L.J. 364 (FB), *Emperor v. Sheo Janak Pande*.
- ('24) AIR 1924 Bom 335 (337) : 25 Cri L Jour 786, *Emperor v. Moti Khoda*.
- ('94) 19 Bom 51 (68), *Queen-Empress v. Kari Gowda*. (17 Cal 485, followed.)
- ('04) 1 Cri L Jour 781 (789) : 1904 Pun Re No. 7 Cr, *King-Emperor v. Chattar Singh*. (Wrong and unreasonable finding can be reversed whether or not the unreasonableness amounts to perversity, stupidity or incompetence or whether the Court below can or cannot be said to have obstinately blundered.)
- ('31) AIR 1931 Rang 86 (86, 87) : 8 Rang 671 : 32 Cr. L J 929, *Emperor v. Maung Tun Nyan*.
- ('04) 17 C P L R 75 (93), *Emperor v. Mt. Gulbi*.
- ('15) AIR 1915 Sind 8 (9) : 9 Sind LR 17 : 16 Cr.L.J. 604, *Emperor v. Kadir Bux*.
- ('14) AIR 1914 Mad 628 (631) : 38 Mad 1028 : 15 Cri L Jour 236, *In re Sinnu Goundan*.
- ('17) AIR 1917 Cal 687 (687) : 17 Cr.L.J. 9, *Deputy Legal Remembrancer, Bihar & Orissa v. Mutukdhari Singh*. (No special rules for dealing with evidence in appeal from acquittal.)
- ('34) AIR 1934 All 842 (843) : 35 Cri L Jour 1229, *Emperor v. Nur Ahmad*.
- ('85) 1885 Pun Re No. 29 Cr, p. 66 (67), *Empress v. Uttam*.
- ('90) 17 Cal 485 (487), *Queen-Empress v. Bibhuti Bhusan*. (There is no distinction made in the Code as to mode of procedure which governs the two sorts of appeals, or as to principles upon which they are to be decided.)
- ('20) AIR 1920 Bom 217 (219) : 21 Cr. L. J. 17, *Emperor v. Sakaram Manaji*.
- ('32) AIR 1932 Lah 12 (13) : 32 Cri L Jour 1130, *Emperor v. Ramzan*.
- ('31) AIR 1931 Lah 18 (23) : 32 Cri L Jour 485, *Bhai Khan v. Emperor*. (There is no difference between the treatment by High Court of an appeal against a verdict of acquittal and that of an appeal from a conviction according to all High Courts, the inclination of the Lahore High Court being perhaps in the interest of the accused to attach more value and give greater prominence to judgment of lower Court.)

The question has now been settled by the Privy Council in *Sheo Swarup v. King-Emperor*.¹⁷ Lord Russel of Killowen, in delivering the judgment of the Board upholding the latter view, observed as follows :

"There is in their opinion no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has 'obstinately blundered' or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice', or has in some other way so conducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result. Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;¹⁸ (3) the right of the accused to the

('34) AIR 1934 Lah 710 (715): 36 Cr. L. J. 419, *Emperor v. Mohammad Khan*.

('90) 2 Weir 462 (462,463), *Government Pleader v. Lakshmi Narasimham Chetty*. (4 All 148, dissented from.)

('10) 11 Cri L Jour 66 (66) : 4 I C 864 : 1909 Pun Re No. 15 Cr, *Emperor v. Harinama*. (But when an accused person has been acquitted by a Magistrate after hearing all the evidence against him the presumption is that there was at least reasonable doubt and the appellate Court must be positively convinced that there was no reasonable doubt, the benefit of all doubt shown to exist being against the appellant, whereas in an appeal from a conviction, the benefit of all reasonable doubt has been given in favour of the appellant—This appears to constitute the only distinction between an appeal from an acquittal and one from conviction.)

('34) AIR 1934 Sind 84 (88) : 35 Cri L Jour 1142, *Emperor v. Mt. Bhuro*.

('98) 20 All 459 (464) : 1898 A W N 117, *Queen-Empress v. Prag Dat*.

('93-1900) 1893-1900 Low Bur Rul 42 (46), *Queen-Empress v. Maung Baw*.

('27) AIR 1927 Sind 92 (94) : 27 Cr.L.J.1347:21 Sind L R 141, *Emperor v. Suleman*.

('04) 1 Cr. L. J. 1022 (1025) : 2 Low Bur Rul 303, *Emperor v. Po Saing Aung Pe*.

[See ('25) AIR 1925 All 315 (315) : 47 All 306 : 26 Cr.L.J. 676, *Emperor v. Autar*. (Appeal by Government must be considered on its merits just as any other appeal always must be.)

('34) AIR 1934 Oudh 229 (231): 35 Cri L Jour 843, *Emperor v. Sital*.]

[See also ('33) AIR 1933 All 574 (578): 34 Cri L Jour 1232, *Emperor v. Basant Rai*. (Perversity not necessary.)]

17. ('34) AIR 1934 P C 227 (229, 230): 56 All 645 : 61 I. A. 398: 36 Cr.L.J. 786 (P C).

18. ('40) AIR 1940 All 291 (298) : 41 Cri L Jour 647, *Emperor v. Aftab Mahomed*.

('39) AIR 1939 All 457 (458, 461) : 40 Cr.L.J. 772, *Emperor v. Sheo Sewak Singh*.

('88) AIR 1938 Sind 80 (81) : 39 Cr.L.J. 504 : 32 S L R 689, *Emperor v. Gulab Shah*.

('36) AIR 1936 Pat 350 (353) : 15 Pat 108: 37 Cr.L.J. 877, *Emperor v. Chaturbhuj*.

('36) AIR 1936 Rang 90 (94) : 38 Cri L Jour 927, *Emperor v. Nga Mya Maung*.

[See ('25) AIR 1925 All 315 (315, 316) : 47 All 306 : 26 Cr.L.J. 676, *Emperor v. Autar*. (Onus on the Crown of establishing judgment to be erroneous.)

('31) AIR 1931 All 712 (715) : 32 Cr. L. J. 1073, *Emperor v. Baldeo Koeri*. (Do.)

('33) AIR 1933 Oudh 340 (342) : 34 Cr. L. J. 538, *Emperor v. Ram Dat*. (Crown must show that guilt of accused is proved beyond any reasonable doubt.)

('30) AIR 1930 All 490 (493) : 31 Cri L Jour 954 : 52 All 856, *Emperor v. Padam Singh*. (In an appeal against an acquittal although the accused was not acquitted on the merits it is for the Crown to establish and to establish beyond reasonable doubt that the conviction of accused on the merits ought to have been sustained.)

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benefit of any doubt;¹⁹ and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.^{19a} To state this, however, is only to say that the High Court, in its conduct of the appeal should, and will act in accordance with the rules and principles well-known and recognized in the administration of justice.”

Where the lower Court, thinking whole trial illegal because of wrong joinder of charges, acquitted the accused, it was held that the order of acquittal should be set aside, the reason being that if the whole trial be illegal, there can be neither conviction nor acquittal.^{19b}

In exercising its jurisdiction in the matter of appeals against acquittals, the High Court should confine its exercise to the particular acquittal complained of by the Government.²⁰

Where an accused is charged with a major offence but is convicted of a minor offence, he should be held to be acquitted of the major offence.²¹ In such a case, if the Government appeal against the

- (‘28) AIR 1928 Pat 146 (150) : 6 Pat 768 : 29 Cri L Jour 301, *Emperor v. Gulam Nabi*. (Crown must show conclusively that inference of guilt is irresistible.)
- (‘33) AIR 1933 Pat 500 (503), *Emperor v. Wajid Sheikh*. (The Crown coming in appeal ought to show that the view taken by the first Court as to the reliability of the approvers is erroneous.)
- (‘33) AIR 1933 Oudh 254 (255) : 34 Cri L Jour 858, *Emperor v. Hub Lal*. (Public Prosecutor must make out strong and cogent grounds to justify interference with the judgment of acquittal.)
- (‘32) 33 Cri L Jour 932 (932) : 139 Ind Cas 740 (Oudh), *Emperor v. Bharat Singh*. (Do.)
- (‘32) AIR 1932 Oudh 317 (320) : 7 Luck 511 : 33 Cri L Jour 920, *Emperor v. Maqbool Ahmad Khan*. (Do.)
- (‘33) AIR 1933 Pesh 27 (28) : 34 Cri L Jour 384, *Emperor v. Chattar Singh*.
- (‘34) AIR 1934 All 27 (35) : 56 All 354 : 35 Cri L Jour 364 (F B), *Emperor v. Sheo Janak Pandey*.
- (‘31) AIR 1931 All 439 (441), *Emperor v. Ram Adhin Singh*.
- (‘17) AIR 1917 Cal 687 (687) : 17 Cri L Jour 9, *Deputy Legal Remembrancer, Bihar & Orissa v. Mutukhadari Singh*.]
19. (‘38) AIR 1938 Sind 67 (68) : 39 Cri L Jour 462 : 32 S L R 694, *Emperor v. Ghulamali Bahawal*.
- (‘36) AIR 1936 Pat 350 (353) : 15 Pat 108 : 37 Cr. L. J. 877, *Emperor v. Chaturbhuj*.
- (‘36) AIR 1936 Rang 90 (94) : 38 Cri L Jour 927, *Emperor v. Nga Mya Maung*. [See (‘33) AIR 1933 Oudh 254 (255) : 34 Cri L Jour 858, *Emperor v. Hub Lal*.]
- (‘34) AIR 1934 Sind 84 (88) : 35 Cri L Jour 1142, *Emperor v. Mt. Bhuro*.
- (‘27) AIR 1927 Oudh 611 (612) : 28 Cri L Jour 688, *Gur Charan v. Emperor*.
- (‘32) 33 Cri L Jour 932 (932) : 139 Ind Cas 740 (Oudh), *Emperor v. Bharat Singh*.]
- 19a. (‘39) AIR 1939 All 457 (458, 461) : 40 Cri L Jour 772, *Emperor v. Sheo Sewak*.
- (‘39) AIR 1939 Mad 96 (98) : 40 Cri L Jour 458, *Public Prosecutor v. Kondalrao*. (But where the trial Judge errs in failing to draw the clear, indubitable and irresistible inference from the facts established by the prosecution in the case, the High Court will interfere and set aside the order of acquittal in appeal.)
- (‘37) AIR 1937 Rang 7 (7, 8) : 38 Cri L Jour 295, *Emperor v. Maung Aung Gyaw*. (Appeal from acquittal—Evidence justifying conclusion arrived at by lower Court—High Court should treat appeal on same footing as appeal from conviction and should not interfere.)
- (‘36) AIR 1936 Pat 350 (353) : 15 Pat 108 : 37 Cri L Jour 877, *Emperor v. Chaturbhuj Narain*.
- 19b. (‘37) AIR 1937 Bom 152 (152) : 38 Cri L Jour 571, *Emperor v. Yemanya*.
20. (‘38) AIR 1938 Sind 108 (113) : 39 Cri L Jour 630 : I L R (1939) Kar 41, *Emperor v. Pursomal Gerimal*.
- (‘94) 19 Bom 51 (68), *Queen-Empress v. Kari Gowda*.
21. (‘28) AIR 1928 P C 254 (257) : 50 All 722 : 55 I A 390 : 29 Cri L Jour 828 (P C), *Kishan Singh v. Emperor*.

acquittal in respect of the major offence, it is open to the accused to ask the Court to consider all the evidence before it and to urge all possible grounds against conviction, and if the Court comes to the conclusion that the conviction even for the lesser offence is wrong, it can *suo motu* acquit the accused of that offence in the exercise of its powers under section 439.²²

16. Appeal from acquittal — Order for further inquiry. —

It is only in an appeal from an acquittal that the appellate Court can direct a further inquiry.¹ There is no power to order further inquiry in an appeal from a conviction² or from any other order.³ The appellate Court may, if necessary, take additional evidence under section 428.⁴

17. Appeal against acquittal — Power to order re-trial. —

The power to order a re-trial, whether in an appeal from a conviction or from an acquittal, is a *discretionary* one.¹ A re-trial should be ordered only where the trial is incurably defective so that even the taking of additional evidence under S.428 will not put the appellate Court in a position to dispose of the case satisfactorily.² Thus, where the lower Court had acquitted the accused on a misconception of the law and did not examine the defence witnesses, a re-trial was ordered on setting aside the acquittal.³ Where the evidence disclosed some other offence than that of which the accused was acquitted, it was held that a re-trial might be ordered.⁴

The discretion to order a re-trial will not be exercised, where the case is not of sufficient consequence,⁵ or where there is no evidence on the record sufficient for conviction,⁶ or where no action was taken against the accused for a long time after the offence and the ordering of a re-trial would result in the accused labouring under great

22. ('38) AIR 1938 Mad 723 (723) : 39 Cri L Jour 871, *Public Prosecutor v. Pan-chakshram*.

Note 16

1. (1900) 27 Cal 126 (129) : 3 C W N 601, *Charoobala Dabee v. Barendra Nath*.
2. ('21) AIR 1921 All 158 (158) : 23 Cr. L. J. 402, *Mohammad Ata v. Emperor*. (But further evidence may be taken.)
3. ('37) AIR 1937 All 305 (313) : 38 Cri L Jour 561 : ILR (1937) All 517 (FB), *Manni Lal v. Emperor*. (No power of remand under S. 476B.)
See Notes on Clause (d).
4. ('37) AIR 1937 Nag 285 (286) : 38 Cr. L. J. 1058 : ILR (1937) Nag 541, *Sheo Ram v. Emperor*.

Note 17

1. ('37) AIR 1937 Bom 152 (152) : 38 Cr. L. J. 571, *Emperor v. Yemanya Kalappa*. (Defect in trial entirely due to fault of prosecution in joining charges improperly — Retrial not ordered.)
2. ('32) AIR 1932 All 191 (192) : 54 All 413 : 33 Cr. L. J. 885, *Ram Khelawan v. Sheo Nandan*.
[See ('71-74) 7 Mad H C R Cr 339 (341) : 2 Weir 476, *In re Government Pleader*.]
3. ('92) 6 C P L R Cr 15 (16), *Empress v. Baiju Tali*. (Retrial should not be directed merely because Court directing it differs from conclusions arrived at by lower Court.)
3. ('33) 1933 Mad W N 242 (243), *Public Prosecutor v. Kandaswami Mudaliar*.
4. ('74) 7 N W P H C R 196 (199), *Queen v. Dukaran*.
5. ('71-74) 7 Mad H C R Cr 339 (341) : 2 Weir 476, *In re Government Pleader*.
[See ('32) AIR 1932 All 188 (190) : 54 All 416 : 34 Cr. L. J. 18, *Ali Hussain v. Lachminarain*. (Retrial can be ordered where case is of public importance.)]
6. ('24) AIR 1924 Cal 975 (976) : 51 Cal 924 : 26 Cr. L. J. 15, *Ramembrancer of Legal Affairs, Bengal v. Satish Chandra Roy*. (Grave defects in case of prosecution.)

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difficulties in the conduct of his case,⁷ or where there has already been full inquiry into the facts and no further evidence is likely to be forthcoming.⁸

The fact that evidence had been discovered subsequent to the acquittal is not a ground for setting aside the acquittal or for ordering a re-trial.⁹

An order for re-trial can be passed even subsequent to the order setting aside the conviction and sentence.¹⁰

Where, in an appeal against an order of acquittal, the High Court sets aside the order of acquittal but declines to order re-trial, the prosecution still has power to prosecute the accused for the same offence.¹¹

18. Re-trial of appeals. — An appeal is to all intents and purposes a trial,¹ and consequently the word “re-tried” will include the re-trial of an appeal also. Where a person is acquitted in appeal by the Sessions Judge, the High Court, on an appeal therefrom by the Provincial Government, can after reversing the acquittal, order the appeal to be re-tried.²

19. “Find him guilty and pass sentence.” — The appellate Court, setting aside an order of acquittal, may find the accused guilty of the *offence charged*, and pass sentence on him according to law.¹ The words “find him guilty” are, however, not limited to the offences

(25) AIR 1925 Lah 85 (85, 86) : 26 Cr. L. J. 320 : 5 Lah 404, *Emperor v. Jaswant Rai & Co.*

7. ('16) AIR 1916 Mad 110 (113, 115) : 39 Mad 527 : 16 Cr. L. J. 593 (FB), *Public Prosecutor v. Maliyakkal Kadiri Koya Haji.*

8. ('17) AIR 1917 Upp Bur 7 (7) : 3 Upp Bur Rul 19 : 18 Cr. L. J. 970, *Nga Po Pyaw v. Nga Po Nwe.*

9. ('02-03) 1902-1903 Upp Bur Rul 9 (12), *King-Emperor v. Nga Nainy.*
(06) 3 Cr. L. J. 234 (236) : 12 Bur L R 21, *Emperor v. Nga Po Gyi.* (Appellate Court cannot travel outside the record.)

[See however ('23) AIR 1923 Rang 65 (65) : 24 Cr. L. J. 744, *Mrs. May Boudville v. King-Emperor.* (Retrial not ordered as there was no reason to suppose that fresh evidence would be forthcoming.)]

10. ('81) 3 Mad 48 (51), *In re Rami Reddi.*

[See also ('29) AIR 1929 Lah 692 (692, 694) : 31 Cr. L. J. 675, *Sikandar Lal Puri v. Emperor.* (Point raised but not decided.)]

11. ('37) AIR 1937 Bom 152 (152) : 38 Cr. L. J. 571, *Emperor v. Yemanya Kalappa.*

Note 18

1. ('70) 1870 Pun Re No. 31 Cr, p. 48 (49), *Fuzl v. Crown.*

2. ('89) 13 Bom 506 (515), *Queen-Empress v. Ganesh Khanderao.*

(14) AIR 1914 Mad 50 (51) : 15 Cr. L. J. 409, *Public Prosecutor v. Raver Unni-thiri (Quære—Can do so under S. 439 read with cls. (a), (c) and (d) of S. 423.)*

[See also ('37) AIR 1937 Nag 394 (395) : 39 Cr. L. J. 75 : 1 L R (1938) Nag 157, *Raghunathmal v. Patiram.* (Appellate judgment of District Magistrate acquitting accused based on irrelevant matter—High Court in revision ordered retrial.)]

[But see ('36) AIR 1936 Rang 369 (370) : 37 Cr. L. J. 1008, *Emperor v. U Kadoe.* (The words “that the accused be re-tried” in S. 423 (1) (a) do not apply to a case where the order of acquittal is passed on appeal.)]

Note 19

1. [See ('23) AIR 1923 All 91 (109) : 45 All 226 : 25 Cri L Jour 497, *Emperor v. Har Prasad.*]

[See also ('25) AIR 1925 All 165 (171) : 47 All 205 : 26 Cri L Jour 599, *Emperor v. Raghunath Venaik.*]

of which the accused was accused in the lower Court; the appellate Court may find him guilty of all offences of which *the trial Court could have found him guilty* under the provisions of Ss. 237 and 238 of the Code, provided, of course, the accused is not prejudiced by the course adopted.² The fact that the trial was with the aid of assessors will not affect the power of the appellate Court to convict the accused for another offence under Ss. 237 and 238, even though the opinion of assessors could not be taken in respect of such offence.³

Where the accused has had no *legal trial*, he cannot be convicted and sentenced by the appellate Court. The only course open in such a case is to order a retrial.⁴

Where the accused is convicted in appeal, the appellate Court may pass sentence according to law. Where the trial Court convicted the accused and awarded him one year's imprisonment, and on appeal the accused was acquitted, it was held in an appeal against such acquittal, that the High Court, if it set aside the acquittal, had power to pass a *severer* sentence than that awarded by the trial Court, though it must be *within the powers* of the trying Magistrate.⁵

Ordinarily in an appeal against an acquittal the appellate Court convicting the accused refrains from passing a capital sentence.⁶

20. Appeal from conviction — General. — In an appeal from a conviction the appellate Court may adopt one of three courses according to the facts and circumstances of the case :

- (1) It may *reverse the finding and sentence* and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court, or committed for trial.
- (2) It may *alter the finding*, maintaining the sentence, or with or without altering the finding, *reduce the sentence*.
- (3) It may *alter the nature of the sentence*, but, subject to the provisions of S. 106, sub-s. (3), not so as to *enhance* the same.

It cannot simply remand the case directing that the lower Court should examine certain witnesses afresh and re-submit the record

2. ('28) AIR 1928 Bom 130 (132) : 52 Bom 385 : 29 Cri L Jour 403, *Emperor v. Ismail Khadirsab*.

('25) AIR 1925 Sind 105 (107) : 19 Sind L R 183 : 25 Cri L Jour 1057, *Faizullah v. Emperor*. (In absence of prejudice to accused, appellate Court can alter conviction into one of graver offence than that charged and found but falling within S. 237.)

3. ('28) AIR 1928 Bom 130 (133) : 52 Bom 385 : 29 Cri L Jour 403, *Emperor v. Ismail Khadirsab*. (AIR 1924 Bom 246 held no longer good law.)

4. ('16) AIR 1916 Mad 110 (113, 115) : 39 Mad 527 : 16 Cri L Jour 593 (FB), *Public Prosecutor v. Maliyakhal Kadiri Koya Haji*.

[See ('37) AIR 1937 Bom 152 (152) : 38 Cri L Jour 571, *Emperor v. Yemanya Kalappa*. (Trial illegal—Acquittal merely set aside—Retrial not ordered.)]

5. ('35) AIR 1935 Nag 139 (140, 141) : 31 Nag L R 312 : 36 Cri L Jour 867, *Emperor v. Abasalli Yusufalli*.

6. ('30) AIR 1930 Lah 409 (414) : 32 Cri L Jour 51, *Niamat Khan v. Emperor*. (Where conduct of accused has been high-handed and cruel and opposite party is not proved to have given any provocation, capital sentence may be passed.)

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to the appellate Court for decision of the appeal.¹ Nor can it direct a further inquiry to be made.²

Clause (b) cannot be taken to imply that, unless accompanied by a sentence, a conviction such as that under S. 562 of the Code, is not open to appeal; it is unnecessary to regard the section as an exhaustive statement of the powers of an appellate Court.³

21. "Reverse the finding and sentence."—Where an appellate Court reverses the finding and sentence of the lower Court, it must adopt one of the three courses :—

- (1) acquit or discharge the accused, or
- (2) order his re-trial by a Court of competent jurisdiction, or
- (3) order his commitment for trial.

A mere reversal of the conviction without adopting any of these courses amounts to an acquittal of the offence of which the accused was convicted in the trial Court.¹

Before any of these courses is adopted, it is necessary that the findings of the lower Court should be *reversed*. This reversal, however, does not amount to an acquittal within the meaning of section 403.²

It was held in the undermentioned case³ that where the accused had been convicted of offence X and the appellate Court considered him guilty not only of that offence but also of offence Y, it should *confirm* the conviction in respect of offence X and direct him to be tried for the other offence also by a Court of competent jurisdiction.

22. "Acquit or discharge the accused."—As has been seen already, an appellate Court reversing the conviction of the accused can acquit or discharge the accused.¹

Where A and B are convicted by the trial Court and B appeals and is acquitted on the merits, it does not follow that A will necessarily have the benefit of the finding of the appellate Court.² Where, however, the grounds of acquittal of B are common to A also, the position is different. In such cases, it has been held that the High Court as a *Court of revision* is entitled to set aside the conviction of A also, although

Note 20

1. ('25) AIR 1925 Cal 172 (172) : 26 Cri L Jour 313, *Abdus Samad v. Emperor*. [See also ('36) AIR 1936 Pat 438 (439) : 37 Cri L Jour 906, *Sri Krishna Prasad v. Emperor*. (Appellate Court setting aside conviction and sending case back for further evidence but not for complete re-trial—Proceeding is illegal.)]
2. See Note 16.
3. ('35) AIR 1935 Mad 157 (157) : 58 Mad 517 : 36 Cri L Jour 589, *Mayandi Nadar v. Pala Kudumban*.

Note 21

1. ('33) 1933 Mad W N 224 (224), *Chinna Similan v. Peria Similan*.
2. ('35) 36 Cri L Jour 1333 (1334) : 158 Ind Cas 200 (All), *Emperor v. Bahraichi*. (In appeal conviction set aside with a direction that accused be committed for trial.)
- See also S. 403 Note 8.
3. ('98) 2 Weir 482 (483), *In re Kannachampet Parangodan*.

Note 22

1. [See ('66) 15 Suth W R Cr 56 (56), *In re Panchanun Biswas*. ('81) 6 Bom 34 (38), *Imperatrix v. Pandharinath*.]
2. ('18) AIR 1918 Mad 918 (919):40 Mad 591:18 Cri L Jour 454, *In re Venkatakrishnayya*.

he had not appealed from his conviction.³ The *appellate Court* as such has not got this power,⁴ but the High Court *as the Court of revision* has.⁵

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Where A is acquitted and B is convicted by the trial Court and B appeals from his conviction, the appellate Court cannot interfere so as to affect the acquittal of A, when there is no appeal against such acquittal.⁶

23. "Order him to be re-tried." — Under the Code of 1872, where the trial Court was not one competent to try the case, the appellate Court was *bound* to order a re-trial.¹ Under the present section, where the appellate Court reverses the conviction of the accused, it *may* order him to be retried by a Court of competent jurisdiction.² The question, whether there should be a re-trial, is thus a matter of *judicial discretion* of the Court.³ As a general rule, an order for re-trial would be proper where the trial in the lower Court has been *illegal, irregular or otherwise defective*.⁴ In all serious cases

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3. ('66) 1866 Pun Re No. 71 Cr, p. 76 (77), *Lal Khan v. Kureem Khan*.
 ('67) 1867 Pun Re No. 6 Cr, p. 11 (12), *Crown v. Achhur Singh*.
 ('34) AIR 1934 Lah 346 (348) : 35 Cri L Jour 1046, *Mangal Singh v. Emperor*.
 (1900) 5 Cal W N 330 (331), *Broja Rahal v. Empress*.
 ('31) AIR 1931 Cal 618 (619) : 58 Cal 902 : 32 Cri L Jour 1003, *Rajani Kanta v. Emperor*. (Even without issuing notice on prosecution.)
 ('20) AIR 1920 Cal 617 (620) : 21 Cri L Jour 551, *Mir Mouze Ali v. Emperor*.
 ('16) AIR 1916 Lah 380 (384) : 17 Cri L Jour 97, *Bachinta v. Emperor*.
 ('11) 12 Cri L Jour 250 (251) : 10 Ind Cas 792 (L B), *T. R. S. Chari v. Emperor*.
 ('10) 11 Cri L Jour 99 (105):4 Ind Cas 980 (Lab), *Emperor v. Sada*. (High Court can when dealing with case in appeal acquit an innocent person though he has failed to exercise his right of appeal.)
 ('73) 19 Suth W R Cr 57 (65), *Queen v. Jaffirali*.
 ('28) AIR 1928 Pat 326 (335) : 29 Cr. L. J. 325, *Mt. Champa Pasin v. Emperor*. (High Court in appeal is not precluded from interfering with the conviction of an accused when the case comes up before High Court otherwise than at his instance.)
 ('34) AIR 1934 Oudh 151 (155) : 9 Luck 516 : 35 Cri L Jour 915, *Bhagwan Din v. Emperor*. (Illegality of sentence of non-appealing accused patent on record — High Court in appeal can exercise powers of revision and set aside conviction and sentence of such accused.)
 ('20) AIR 1920 Pat 471 (481, 482) : 21 Cri L Jour 705 : 5 Pat L Jour 430, *Raghu Bhumij v. Emperor*.
 4. ('10) 11 Cri L Jour 99 (105) : 4 Ind Cas 980 (Lab), *Emperor v. Sada*.
 ('75) 2 Weir 570 (570). (An appellate Court cannot on the appeal of one prisoner alter the sentence of another prisoner in the same case who has not appealed. When an appellate Court is of opinion that the sentence passed on a prisoner who has not appealed should be revised, the record must be submitted to the High Court.)
 5. ('93) 1893 All W N 51 (51), *Queen-Empress v. Ratan Singh*.
 [See also ('20) AIR 1920 Pat 471 (481, 482) : 5 Pat L J 480 : 21 Cri L Jour 705, *Raghu Bhumij v. Emperor*.]
 See also S. 439 Note 25.
 6. ('11) 12 Cri L Jour 575 (576) : 12 Ind Cas 839 (All), *Darbari Mal v. Emperor*.

Note 23

1. ('79) 1879 Pun Re No. 1 Cr, p. 1 (1), *Kishen Singh v. Khazan Singh*.
 2. ('88) 1888 Rat 367 (367), *Queen-Empress v. Kasturibhai*. (It can specify Court by which accused is to be re-tried.)
 3. ('08) 8 Cri L Jour 121 (125) : 8 C L J 59, *Durga Charan Sanyal v. Emperor*.
 [See also ('12) 13 Cr. L. J. 497(498):40 Cal 163:15 I.C. 641, *Nazimuddi v. Emperor*.
 ('83) 1883 All W N 99 (99), *Empress v. Bhagwan*.]
 4. ('39) AIR 1939 Sind 209 (216, 217) : 41 Cr. L. J. 28 : I L R (1940) Kar 249, *Shewaram v. Emperor*.
 ('37) AIR 1937 Pesh 71 (72) : 38 Cr. L. J. 741, *Najib Gul Md. v. Emperor*.
 ('36) AIR 1936 All 758 (759) : 38 Cr. L. J. 71, *Moliram v. Emperor*.

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where the first trial, owing to a defect of jurisdiction or other similar cause, is rendered abortive, a new trial should be ordered, unless it is quite clear that, on the materials before the Court, there is no chance of conviction.⁵

It is not, however, in every case, where there has been a defect in the trial, that the appellate Court will order a re-trial. A re-trial will not be ordered —

- (1) where the sentence is a small one, the offence not being a serious one, and the accused has sufficiently suffered in pocket;⁶
- (2) where the evidence is unsatisfactory⁷ and cannot, in any proper view of the case, support a conviction;⁸
- (3) where there is no probability of a conviction even if a re-trial is ordered⁹ and the accused has already been subjected to persecution for a long time;¹⁰

('11) 12 Cr. L. J. 585 (590) : 12 I C 961 : 36 Mad 457, *Jerimiah v. Vas.* (Power to direct re-trial is not confined to cases where trial was held by Court having no jurisdiction.)

[See ('23) AIR 1923 Mad 32 (34) : 46 Mad 117 : 23 Cr.L.J. 748, *In re Umar Hajee.* (Trial *de novo*—Witnesses not examined *de novo*—Depositions at previous trial filed—Procedure held illegal and re-trial ordered.)]

5. ('08) 8 Cri L Jour 121 (124, 126) : 8 C L J 59, *Durga Charan v. Emperor.*

6. ('25) AIR 1925 All 301 (303) : 26 Cri L Jour 734, *Tufail Ahamad v. Emperor.* ('34) AIR 1934 Lah 648 (648) : 36 Cri L Jour 468, *Kundan Lal v. Emperor.* (Technical offence.)

7. ('38) AIR 1938 Cal 782 (783) : 40 Cr. L. J. 56, *Suresh Chandra v. Emperor.* (Case failing for want of sufficient evidence.)

('27) 28 Cri L Jour 19 (22) : 99 Ind Cas 51 (Cal), *Mamat Ali v. Emperor.*

('10) 11 Cr. L. J. 258 (260, 261) : 5 I. C. 847 : 33 Mad 502, *Choragudi Venkataradi v. Emperor.* (Evidence not justifying conviction.)

('26) AIR 1926 Nag 53 (54, 55) : 26 Cr. L. J. 1090, *Ram Prasad v. Emperor.* (Do.)

('16) AIR 1916 Mad 1108 (1108) : 17 Cr. L. J. 193, *In re Mogambara Pattan.* (Order of re-trial is irregular in absence of assurance that evidence will be forthcoming.)

('32) AIR 1932 Oudh 23 (25) : 33 Cr.L.J. 167 : 7 Luck 390, *Sita Ram v. Emperor.* (Evidence not sufficient to support conviction.)

[See also ('13) 14 Cr.L.J. 623 (624) : 21 Ind Cas 671 (Mad), *In re Subba Thevan.*]

8. ('38) AIR 1938 Cal 51 (59) : 1 I L R (1938) 1 Cal 290 : 39 Cr. L. J. 161, *Goloke Behari v. Emperor.*

('38) AIR 1938 Cal 361 (362) : 39 Cr.L.J. 604, *Tripurari Bhattacharjee v. Emperor.* ('98) 25 Cal 711 (716) : 2 C W N 369, *Taju Pramanik v. Queen-Empress.* (No evidence to warrant conviction.)

('90) 14 Bom 115 (147), *Queen Empress v. Maganlal.*

('13) 14 Cr. L. J 219 (223) : 19 Ind Cas 315 (Cal), *Promothanath Roy v. Emperor.*

('82) 6 Bom 34 (37), *Imperatrix v. Phandharinath.*

('66) 5 Suth W R Cr 80 (89) : Beng L R Sup Vol 459 (FB), *Queen v. Elahi Bux.*

9. ('37) AIR 1937 Bom 152 (152) : 38 Cr.L.J. 571, *Emperor v. Yemanya Kallappa.* (Case of appeal against acquittal.)

('21) AIR 1921 Mad 687 (688) : 23 Cr.L.J. 700, *Ramaswami Thevan v. Emperor.*

('26) AIR 1926 Mad 638 (641) : 50 Mad 274 : 27 Cri L Jour 394, *In re Sogiamuthu Padayachi.*

('27) AIR 1927 Mad 442 (443) : 28 Cri L Sour 295, *Venkata Sivayya v. Emperor.*

10. ('40) AIR 1940 All 19 (21) : 41 Cr. L. J. 281, *Municipal Board, Ghaziabad v. Harsaran.* (Prosecution with bad motive and not to vindicate law in public interest—Accused sufficiently punished for offence by having to undergo trial—Retrial not necessary.)

('38) AIR 1938 Cal 51 (59) : 39 Cr. L. J. 161 : ILR (1938) 1 Cal 290, *Goloke Behari v. Emperor.*

('34) AIR 1934 Bom 303 (305) : 35 Cr. L. J. 1477, *Emperor v. Khim Chand.* (AIR 1934 Bom 48, followed.)

- (4) where the accused has already undergone a considerable portion of the sentence;¹¹
- (5) where the defect consists in the admission of irrelevant evidence, but there is other evidence on the record sufficient to enable the Judge to decide the case;¹²
- (6) where the only defect is that certain evidence has not been brought on the record which ought to have been, the appellate Court may, in such a case, itself take evidence under S. 423 and decide the case.¹³

Where there is no defect in the trial or irregularity in procedure, the mere fact that the appellate Court is unable to form an opinion as to whether the accused is to be convicted or acquitted,¹⁴ or that there is a chance that the prosecution may be able to produce better evidence,¹⁵ or that the appellate Court disagrees with the finding of the lower Court,¹⁶ is not a ground for ordering a re-trial.

Where the appellate Court ordered a new trial on the ground that, although the accused were shown by the evidence to have committed some offence, it was clear they had been convicted under a wrong section, and all the facts on which a conviction for any offence could be sustained had been put in issue before the trying Magistrate,

11. ('99) 3 Cal W N 332 (333), *Abdul Biswas v. Khetar Mandal*.

(11) 12 Cr.L.J. 82 (82):9 Ind Cas 455 (Cal), *Kanta Neya v. Emperor*. (Conviction under S. 323, Penal Code.)

(30) AIR 1930 Nag 255 (259) : 31 Cr. L. J. 705, *Girdhari v. Emperor*.

(27) AIR 1927 Lah 671 (672) : 8 Lah 496 : 29 Cr. L. J. 6, *Sai v. Emperor*.

(20) AIR 1920 Pat 590 (591) : 21 Cr. L. J. 496, *Raghu Singh v. Emperor*.

(18) AIR 1918 Pat 582 (583) : 19 Cr. L. J. 77, *Bhaso Singh v. Emperor*.

(31) AIR 1931 Lah 767 (767) : 33 Cr. L. J. 145, *Nur Hussain v. Emperor*.

(11) 12 Cr.L.J. 19 (19) : 8 Ind Cas 1101 (Mad), *M. Muthappa Nadar v. M. Kula Sankara Nadar*. (Accused having undergone punishment for more serious offence, re-trial in respect of minor offence was not ordered.)

[See however ('37) AIR 1937 All 240 (243) : 38 Cri L Jour 521, *Sarda Prasad v. Emperor*. (That the accused has undergone a part of the sentence is not in itself a sufficient ground for not ordering a re-trial.)]

12. ('23) AIR 1923 Rang 65 (65) : 24 Cr.L.J. 744, *Mrs. May Boudville v. Emperor*. [See also ('40) AIR 1940 Mad 685 (686), *Ramaswami Ayyar v. Chittoor Municipality*. (The marking of an irrelevant document in evidence is not a ground for ordering a re-trial by an appellate Court.)]

13. ('18) AIR 1918 All 183 (134) : 19 Cr. L. J. 485, *Ishwar Prasad v. Emperor*. ('83) 2 Weir 480 (480), *In re Iyachikone*.

[See however ('84) 1884 Pun Re No. 28 Cr, p. 48 (50), *Gohar v. Empress*. (Where the appellate Court does not want to act under S. 423 and the conviction cannot be sustained owing to the defect, the Court should order a re-trial and not dismiss the appeal.)]

14. ('90) 1890 Rat 530 (531), *Queen-Empress v. Magunlal*.

15. ('38) AIR 1938 Cal 361 (362) : 39 Cr. L. J. 604, *Tripurari Bhattacharjee v. Emperor*.

(38) AIR 1938 Pat 39 (40) : 39 Cri L Jour 278, *Sochiram v. Emperor*.

(31) 1931 Mad W N 517 (520), *Subramanyam v. Emperor*. (A Judge who takes this action constitutes himself as a sort of Public Prosecutor.)

(31) AIR 1931 Mad 227 (227, 228) : 32 Cr. L. J. 749, *Lakshmi Narasimham v. Satyanarayana*. (It is rather for supplying formal defects that appellate Court orders re-trial.)

(30) AIR 1930 Mad 189 (190) : 31 Cr. L. J. 422, *Ratnavelu Mudaliar v. Emperor*. (Do.)

16. ('36) AIR 1936 All 758 (759) : 38 Cr. L. J. 71, *Motiram v. Emperor*. (Appellate Court not entitled to order a re-trial merely because it disagrees with the finding of lower Court that accused had not committed the more serious offence but a lesser offence.)

(36) AIR 1936 Pesh 172 (175) : 37 Cri L Jour 1039, *Bawar Shah v. Emperor*.

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it was held that before quashing the sentence and ordering a re-trial, the appellate Court should have come to a certain conclusion as to the offence which the accused were shown by the evidence to have committed, and that it should have considered, whether, if the evidence showed that the accused should properly have been convicted of another offence than that charged, they would be prejudiced by amending the conviction.¹⁷

See also the undermentioned cases¹⁸ where a re-trial was ordered and the cases cited below¹⁹ where it was not ordered.

There is nothing preventing the appellate Court from directing a

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17. ('83) 2 Weir 480 (480, 481), *In re Iyachikone*.
18. ('37) AIR 1937 Rang 139 (141) : 38 Cri L Jour 1040, *Nga Kan Chai v. Emperor*. (Evidence of persons who might be able to tell what happened at time of occurrence not adduced by prosecution—It is not safe to convict accused without taking such evidence—Acquittal not possible on evidence as it stands—Re-trial should be ordered.)
- ('24) AIR 1924 Cal 257 (283):25 Cr. L. J. 817 (FB), *Emperor v. Barendra Kumar Ghose*. (Perfunctory cross-examination of prosecution witness is a good ground.)
- ('22) AIR 1922 Pat 40 (42) : 23 Cr. L. J. 218, *Lachmi Lal v. Emperor*. (Perfunctory trial and several irregularities.)
- ('23) AIR 1923 Pat 62 (64): 1 Pat 758: 24 Cr. L. J. 69, *Jagdeo Singh v. Emperor*. (Where there is evidence but the Court is unable to test it and the case is unsatisfactorily conducted.)
- ('28) AIR 1928 Pat 50 (51) : 28 Cri L Jour 893, *Sheoparson Singh v. Emperor*. (Serious mistakes in charge—Failure to consider important evidence—Order for re-trial from framing of charge proper.)
- ('96) 1 Cal W N 35 (36), *Bishnu Banwar v. Empress*. (Where two accused were wrongly tried jointly.)
- ('10) 11 Cri L Jour 684 (685) : 8 Ind Cas 594 (LB), *Hamdu Meah v. Emperor*. (Re-trial not ordered to fill up the deficiencies and reconcile the discrepancies in the evidence of prosecution.)
- ('03) 30 Cal 822 (830) : 7 C W N 639, *Birendra Lal v. Emperor*. (Misjoinder of charges—Charge to the jury defective.)
- ('07) 11 Cal W N c (c), *Dari Roy v. Empress*. (Re-trial for a graver offence may be ordered.)
- ('66) 5 Suth W R Cr 80 (93) : Beng L R Sup Vol 459 (FB), *In re Elahee Buksh*. (Erroneous direction to jury.)
- ('66) 4 Bom H C R Cr 3 (3), *Reg v. Cannu*. (Conviction under S. 403, Penal Code, set aside—Re-trial on charge under S. 406 ordered.)
- ('82) 1882 All W N 112 (112), *Empress v. Ram Prasad*.
- ('29) AIR 1929 All 710 (719) : 31 Cri L Jour 230, *Azam Ali v. Emperor*. (S. 403 forbids re-trial only where a person is convicted or acquitted and conviction or acquittal is in force.)
- ('33) AIR 1933 Cal 364 (366) : 60 Cal 814 : 34 Cri L Jour 320, *Amar Chandra v. Emperor*. (Special procedure—Omission of Judge to follow.)
- ('97) 1897 Rat 938 (939), *Queen Empress v. Sadashiv Balkrishna*. (Material evidence excluded.)
19. ('40) AIR 1940 Pat 295 (303): 41 Cri L Jour 267, *Feroze Kazi v. Emperor*. (It would be dangerous to order a re-hearing in a case in which there is enmity between the parties and the Court is doubtful as to the value of any evidence that may be adduced upon a re-hearing.)
- ('37) AIR 1937 Cal 269 (273): 38 Cri L Jour 1018, *Sanyashi Gain v. Emperor*. (Likelihood of witnesses confusing what they saw at time of occurrence of murder before two years — Re-trial not ordered.)
- ('28) AIR 1928 Pat 293 (294): 29 Cri L Jour 258, *P. K. Sen v. Emperor*. (Where the prosecution came into Court with an incomplete case, which so far as it went confirmed the defence — *Held*, that they were not entitled to a re-trial.)
- ('27) AIR 1927 Mad 177 (178): 50 Mad 735: 27 Cr.L.J. 1381, *Samiullah v. Emperor*. (Petty matter.)
- ('34) AIR 1934 Lah 415 (415): 35 Cr. L. J. 1447, *Amir v. Emperor*. (Do.)
- ('08) 7 Cr.L.J. 215 (216): 2 M L T 495, *Narayana v. Tahsildar of Conjeevaram*. (Interests of justice not requiring a re-trial.)

retrial on a fresh charge framed on the evidence already recorded.²⁰ However, the appellate Court cannot direct that the evidence already on the record should be treated as evidence in the case, as it savours of an order for further inquiry which cannot be passed in appeals from convictions.²¹ An order for re-trial, again, cannot *restrict* the evidence to be taken to that mentioned in the order; the order should be for re-trial in view of the instructions contained in the order; the accused is entitled to let in such additional evidence as he may desire.²²

Where a re-trial is ordered, it is open to the prosecution either to proceed or not to proceed as it may be advised.²³

Where the circumstances of the case warrant an order for re-trial, the appellate Court should not simply dismiss the appeal or report the case to the High Court.²⁴

Where a Magistrate *tries* a case which is exclusively triable by a Court of Session, the trial is void; there being in such cases no trial, the appellate Court cannot order a *re-trial*.²⁵

24. "By a Court of competent jurisdiction." — The words "order him to be re-tried by a Court of competent jurisdiction" do not imply that it is necessary before ordering a re-trial, that the original Court should have had *no jurisdiction* to try the case.¹ The re-trial may be ordered to be held by the original Court itself, if it was competent to try the case,² or by *another* Court of competent jurisdic-

20. ('13) 14 Cri L Jour 230 (231), 19 I C 326; 9 Nag L R 42, *Manna v. Emperor*. (Court may at the same time direct that new trial should commence with the framing of a proper charge.)

[But see ('32) 1932 Mad W N 114 (116), *Naganna v. Emperor*. (Appellate Court cannot direct that a particular charge be framed or that trial be resumed from a particular point.)]

21. ('18) AIR 1918 Pat 582 (583) : 19 Cr. L. J. 77, *Bhaso Singh v. Emperor*. ('35) AIR 1935 Nag 125(127):36 Cr.L.J. 740:31 Nag L R 246, *Potram v. Emperor*. [See also ('37) AIR 1937 Pat 246 (247) : 38 Cr. L. J. 657, *Ramchandra Prasad v. Emperor*. (A partial re-trial cannot be directed by the appellate Court — It can either direct a complete re-trial or call for further evidence to be placed before itself.)]

('16) AIR 1916 Pat 219 (221) : 17 Cr.L.J. 332 : 1 Pat L J 99, *Gajanand Thakur v. Emperor*. (Appellate Court setting aside conviction and ordering retrial and directing Magistrate to take additional evidence but at same time requiring him to record fresh decision on evidence already on record and upon the additional evidence which he was about to take—Order of appellate Court is illegal.)]

22. ('06) 3 Cr. L. J. 304 (305) : 3 C L J 303, *Mir Sarwarjan v. Emperor*.

23. ('21) AIR 1921 Cal 257 (258) : 22 Cr.L.J. 475, *Tenaram Mondal v. Emperor*.

24. ('93-1900) 1893-1900 Low Bur Rul 128(128), *Empress v. Nga San Hla Baw*. ('02) 2 Weir 484 (484, 485), *In re Chinna Mottayyan*. (In this case the matter was referred by the appellate Court to the District Magistrate.)

25. ('02) 29 Cal 412 (414), *Abdul Ghani v. Emperor*.

Note 24

1. ('11) 12 Cri L Jour 585 (590) : 12 Ind Cas 961 : 36 Mad 457, *Jeremiah v. Vas*. ('03) 7 Cal W N 301 (304), *Sarat Chandra Shah v. Emperor*.

('91) 2 Weir 481 (482), *In re Pera Naicken*.

('95) 1895 Pun Re No. 16 Cr, p. 50 (51), *Dani v. Queen-Empress*. (8 All 14, dissented from; 16 Bom 580 and 15 All 205, followed.)

(1900) 27 Cal 172 (174) : 4 C W N 166, *Satish Chandra Das v. Queen-Empress*.

[See also ('02) 29 Cal 412 (414), *Abdul Ghani v. Emperor*. (If lower Court not competent to try, appellate Court cannot order retrial.)]

2. See ('91) 2 Weir 481 (482), *In re Pera Naicken*.

(1900) 27 Cal 172 (174) : 4 C W N 166, *Satish Chandra Das v. Queen-Empress*.

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tion even where the original Court was itself a Court of competent jurisdiction.³

The Court convicting the accused may be competent to *try* the case, but not competent to *adequately* punish the accused for the offence. In such a case, the appellate Court, reversing the conviction, may order a re-trial to be held by a Court which can adequately punish the accused.⁴

There is nothing preventing the appellate Court from *specifying* the subordinate Court which should hold the re-trial.⁵

Can a re-trial be ordered before the appellate Court itself? There is a difference of opinion on the point. It was held by the High Court of Bombay in the undermentioned case⁶ that the re-trial, if ordered, must be by a Court of competent jurisdiction *subordinate* to the appellate Court and that the appellate Court could not order the re-trial to proceed before itself. According to the High Court of Madras, the words "Court of competent jurisdiction subordinate to such appellate Court" are not words of limitation and do not exclude the appellate Court, if the offence is one within its jurisdiction.⁷

Where, in a case tried by jury in Court X, the appellate Court reversed the conviction and sentence, and ordered a re-trial by Court Y which was competent to try the case with the aid of assessors, it was held by the Privy Council that there was no legal objection to the order made, but that the order was one which ought not to be made, unless justified by exceptional circumstances, inasmuch as it was likely to have very serious effects upon the rights of the accused, and that his privilege which he had enjoyed of a trial by a jury, he ought, in general, to retain.⁸

On the same principle, it has been held by the Calcutta High Court that, where a conviction by a jury is set aside on the ground of defective charge to the jury, but there is evidence on record the sufficiency of which must be considered by the jury, the proper course is to order a re-trial by jury.⁹ In the undermentioned case¹⁰ the Judicial Commissioner's Court of Sind in an appeal against an acquittal

3. ('93-1900) 1893-1900 Low Bur Rul 238 (240), *Queen-Empress v. Shaik Ali*. (Dissenting from 8 All 14.)

4. ('95) 1895 Pun Re No. 16 Cr, p. 50 (51), *Dani v. Queen-Empress*. ('04) 1 Cri L Jour 751 (754, 755) : 17 C P L R 97, *Emperor v. Sheikh Rasul*.

5. ('88) 1888 Rat 367 (367), *Queen-Empress v. Kasthuribai*. ('35) AIR 1935 P C 122 (124) : 62 I A 174 : 59 Bom 496 : 36 Cri L Jour 978 (PC), *Hari v. Emperor*.

6. ('98) 1898 Rat 982 (982), *Queen-Empress v. Fakira*.

7. ('07) 5 Cri L Jour 104 (105) : 30 Mad 228 : 16 M L J 546 : 2 M L T 46, *Public Prosecutor v. Manikka Gramani*.

(('90) 2 Weir 481 (481), *In re Vedakadeth Kanaran*.

8. ('25) AIR 1925 P C 122 (124) (P C), *Tilakdhari Singh v. Kesho Prasad*.

9. ('06) 4 Cri L Jour 412 (414) : 11 C W N 51, *Sheikh Fakir v. Emperor*.

(('12) 13 Cr.L.J. 715 (716) : 16 Ind Cas 523 (Cal), *Jamaruddi v. Emperor*. (Whole case should go to jury for re-trial.)

(('10) 11 Cri L Jour 96 (97) : 5 Ind Cas 315 (Cal), *Hazir Ali v. Emperor*.

(('08) 7 Cri L Jour 315 (317) : 7 C L J 246, *Kali Singh v. Emperor*. (Practice of the Court is to order re-trial.)

10. ('27) AIR 1927 Sind 104 (108) : 21 Sind L R 356 : 28 Cri L Jour 66, *Emperor v. Saram*.

in a case tried by jury, held that the High Court had jurisdiction to decide the case itself instead of ordering a new trial.

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25. Discharge and re-trial—If both can be ordered.—Where the appellate Court discharges an accused person on the ground, for example, of misjoinder of parties, it has power to add a direction that the accused should be re-tried. It is not obligatory on it to leave to the discretion of the Magistrate the course which should be taken in such matter.¹ It was, however, held in the case noted below² that it is not ordinarily the duty of the appellate Court to order the re-trial of a person whose conviction is set aside, and that the prosecution may be left to take such proceedings against the accused as they may be advised to take.

26. Effect of re-trial on offences of which accused had been acquitted in trial Court.—Suppose A is charged with having committed offences X and Y but is convicted of offence X only and on appeal the conviction is reversed and a re-trial ordered. Is the whole case re-opened and is A to be re-tried on both charges X and Y? Yes, if the facts of the case are such that the offences X and Y fall within S. 236 of the Code.¹ Where the accused is charged at one trial with *distinct* offences constituted by distinct acts and he is acquitted of one of such offences and convicted of the other, an order for re-trial in an appeal against the conviction will not re-open the whole case.²

Where A was charged in the trial Court with offences under ss. 302 and 201 of the Penal Code and was convicted under S. 302, the charge under S. 201 being withdrawn by the prosecution, it was held on appeal from the conviction that the appellate Court could order a re-trial even

Note 25

1. ('01) 28 Cal 104 (107, 108), *Kumudini Kanta v. Queen-Empress*.
2. ('08) 8 Cri L Jour 11 (17) : 4 Nag L R 71, *Emperor v. Balwant Singh*.
- ('08) 7 Cri L Jour 103 (105) : 7 C. L. J. 70, *Leakut Hossein Khan v. Emperor*.

Note 26

1. ('38) 1 L R (1938) 1 Cal 98 (117-119), *Kamala Kanta v. Emperor*. (S. 403 (1), Criminal P. C., has no application, inasmuch as the re-trial will not be a second trial but only a continuation of the first trial.)
- ('95) 22 Cal 377 (381, 382), *Krishna Dhan v. Queen-Empress*.
- ('12) 13 Cri L Jour 497 (498) : 15 I. C. 641 : 40 Cal 163, *Nazumuddi v. Emperor*.
2. ('36) 63 Cal 1112 (1114, 1115), *Naimaddin Biswas v. Emperor*.
- ('95) 22 Cal 377 (382, 383), *Krishna Dhan v. Queen-Empress*.
- ('27) AIR 1927 Pat 13 (15) : 6 Pat 208 : 27 Cr. L. J. 1100, *Abdul Hamid v. Emperor*.
- In the following cases it was held, without reference to S. 236 of the Code that the appellate Court could not order a re-trial in respect of an offence of which the accused was acquitted in the lower Court. It must be assumed that the offence in those cases were such as did not fall within S. 236 :*
- ('35) AIR 1935 Lah 945 (946) : 37 Cri L Jour 303, *Ali Mohammad v. Emperor*. (Conviction under S. 420, Penal Code, and acquittal under S. 465 — Appeal from conviction — Re-trial cannot be ordered in respect of both offences.)
- ('06) 11 Cal W N xci (xci), *Dwarka Nath Sahu v. Emperor*.
- ('35) AIR 1935 Cal 120 (121) : 36 Cri L Jour 553, *Nitya Gopal v. Emperor*.
- ('20) AIR 1920 Cal 568 (569) : 21 Cri L Jour 689, *Kala Nath v. Emperor*.
- ('33) AIR 1933 All 941 (948, 949) : 35 Cr. L. J. 668:56 All 210, *Lala v. Emperor*.
- [See also ('03) 26 Mad 478 (479, 480), *Sami Ayya v. Emperor*.
- ('35) 62 Cal 928 (936) : 37 Cri L Jour 707, *Abdul Khan v. Emperor*. (Per Lord William, J. — Charges of conspiracy to murder and murder — Accused convicted of former but acquitted on latter charge — Appeal by accused — The other charge cannot be re-opened at the retrial. Per Jack, J. — Order of retrial applies to all the charges framed by the original Court.)]

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in respect of the offence under S. 201, since there was no *acquittal* on that charge.³

27. Ordering re-trial for enhancing sentence. — The power of ordering a new trial merely for the purpose of enhancing the punishment ought to be very sparingly used.¹ It ought not to be used at all where the trial Court was competent to inflicting the maximum punishment for the offence.²

28. Remand for passing sentence or for writing proper judgment. — An appellate Court cannot remand the case to the lower Court for the purpose of passing a legal sentence; it must deal with the matter itself in accordance with law.¹ Similarly, in *Tara Chand v. Emperor*² it was held that an appellate Court had no power to remand a case for "re-hearing the parties and writing out a proper judgment," but that it was its duty to go into the whole facts fully itself and dispose of the case. In *In re Karupiah Pillai*,³ where the trial Court had not written a judgment in conformity with the provisions of S. 367, it was held that the correct procedure for the appellate Court to adopt was to accept the appeal and remand the case for re-hearing *de novo* and not to retain the case on file, merely calling for a fresh judgment from the lower Court.

29. Effect of order for re-trial in appeal. — Where the Sessions Judge as an appellate Court orders a re-trial in an appeal against the conviction of a first class Magistrate, the District Magistrate has no authority to disregard the same and release the prisoner.¹

30. "Or committed for trial." — An appellate Court reversing the conviction of the lower Court can order a commitment to be made in cases where the accused ought to be committed.¹ There was no such power before the Code of 1882.²

3. (05) 2 Cal L Juor 18n (18n), *Affiluddi v. Emperor*.
[See also ('35) 36 Cr. L. J. 1333 (1334):158 I. C. 200 (All), *Emperor v. Bahraichi*.]

Note 27

1. ('15) AIR 1915 All 185 (186) : 16 Cri L Jour 433, *Emperor v. Mohan Lal*.
2. ('93-1900) 1893-1900 Low Bur Rul 111(111,112), *Kazaw Rhi v. Queen-Empress*.

Note 28

1. ('07) 11 Cal W N eeliv (eeliv), *Mahabubali Khan v. Nikleswar Ghose*.
 2. ('06) 3 Cri L Jour 119 (120) : 32 Cal 1069.
 3. ('20) AIR 1920 Mad 171 (172) : 21 Cri L Jour 52.
- See also S. 367 Note 16.

Note 29

1. ('09) 10 Cr.L.J. 77 (77, 78) : 2 I. C. 541 : 5 Low Bur Rul 49, *Emperor v. Tun Lin*.

Note 30

1. ('24) AIR 1924 Mad 243 (245) : 24 Cri L Jour 840, *In re Ayarvali Pokker*. (In this case High Court itself committed case to Court of Session.)
 - ('15) AIR 1915 All 185 (186) : 16 Cri L Jour 433, *Emperor v. Mohan Lal*.
 - ('93) 15 All 205 (206) : 1893 All W N 105, *Queen-Empress v. Maula Baksh*. (It is competent to a Sessions Judge having reversed the finding and sentence to order the appellant to be committed for trial to the Court of Session.)
- See also S. 437 Note 15.
2. ('82) 1882 All W N 112 (112), *Empress v. Ram Prasad*.
 - ('68-69) 5 Bom H C R Cr 65 (66), *Reg. v. Chanveraya*.
 - ('75) 12 Bom H C R Cr 234 (237), *Reg. v. Tukaram Ragho*.
 - ('67) 8 Suth W R Cr 55 (55), *Queen v. Kassimuddin*.

Where a Magistrate convicts the accused of an offence which is exclusively triable by a Court of Session and the appellate Court reverses the finding and orders a commitment, it is not necessary that the Magistrate should commence a fresh inquiry and take evidence *de novo*. The inquiry and the evidence at the trial are sufficient for the purposes of commitment.³

The words "order him to be committed for trial" do not necessarily mean that the appellate Court cannot itself make the commitment, but should direct a *Magistrate* to do so. Both courses are open to the appellate Court.⁴

Where the appellate Court reverses the finding of the lower Court (Magistrate) on the ground that the offence is one exclusively triable by a Court of Session, the proper course to be adopted is to direct a commitment and not simply alter the charge into one for which the accused ought to have been committed and alter the sentences⁵ or try the case itself on such charge. Thus, where the appellate Court reversed a conviction for an offence under S. 376 on the ground that the act could not be said to be without the consent of the girl and was of opinion that the offence made out was one under S. 366 (offence triable exclusively by a Court of Session), but instead of directing a commitment, framed a charge under S. 366 and tried the case itself, it was held that it had no power to do so.⁶

It is not necessary that, in order that the appellate Court may direct a committal, the offence should be one exclusively triable by a Court of Session.⁷ Where A was convicted by a Magistrate under S. 326 of the Penal Code for having cut off his wife's nose and punished with imprisonment for two years, the High Court considered that the case was one which ought to have been committed, though the offence was not one exclusively triable by a Court of Session.⁸

(168) 10 Suth W R Cr 35 (36), *In re Hakim Sardar*.

(182) 1882 All W N 47 (48), *Empress v. Shahmat*.

(181) 1881 All W N 62 (62), *Empress v. Ratan Sahai*.

(166) 1866 Pun Re No. 34 Cr, p. 35 (36), *Wuzeer Singh v. Crown*.

3. (135) AIR 1935 All 579 (583); 36 Cr.L.J. 1013; 58 All 23, *Sahadeo Ram v. Emperor*.

(180) 2 All 910 (912), *Empress of India v. Illahi Baksh*.

(178) 2 Weir 479 (479).

4. (135) AIR 1935 All 579 (583); 36 Cr L Jour 1013; 58 All 23, *Sahadeo Ram v. Emperor*. (31 Mad 40, 10 Bom 319, 27 Mad 54, AIR 1922 All 345, 15 All 205 and AIR 1915 All 185, Relied upon; 6 Cr L Jour 7, Dissented from).

5. (122) AIR 1922 All 345 (346); 23 Cr L J 456, *Hasan Raza v. Emperor*. (Conviction under Ss. 452 and 147, Penal Code reversed and accused charged and convicted under S. 395.)

6. (125) AIR 1925 Rang 230 (231); 3 Rang 68; 26 Cr L J 1119, *Sircar v. Emperor*. (Following 8 Bom L R 120 and 3 Cr L Jour 240.)

7. (196) 23 Cal 350 (351), *Misri Lal v. Lachmi Narain*.

(133) AIR 1933 Lah 128 (129); 34 Cr L J 640, *Salihon v. Emperor*. (Dissented from 8 All 14.)

(192) 16 Bom 580 (583); 1892 Rat 577, *Queen-Empress v. Abdul Rahman*. [But see (1885) 8 All 14 (17); 1885 A W N 298, *Queen Empress v. Sukha*.]

8. (192) 16 Bom 580 (583, 584); 1892 Rat 577, *Queen-Empress v. Abdul Rahman*. (Dissenting from 8 All 14.)

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Where a conviction was set aside on the ground that the case was one exclusively triable by a Court of Session and had been tried by the Magistrate without jurisdiction, the High Court refused to make an order for commitment in view, *inter alia*, of the considerable expense which the accused had been put to in the conduct of the case.⁹

31. "Alter the finding." — The appellate Court may, under clause (b) of the section, alter the finding of the lower Court without ordering a re-trial. This power, however, must be taken to be limited by the general principle that the appellate Court cannot come to any finding which the lower Court could not have legally come to; the meaning of the section must be taken to be that the appellate Court is given the power to correct any mistakes of finding which the first Court may have committed.¹ Thus, an appellate Court cannot, in a case not falling within S. 237 of the Code, convict the accused of a *graver* offence than that charged.²

Where A is charged in the lower Court with having committed offences X and Y and is acquitted of X, the appellate Court may, in an appeal against the conviction for offence Y, alter the conviction to one for offence X of which A had been acquitted in the lower Court.³ The

9. ('32) AIR 1932 Cal 390 (394): 59 Cal 1233: 33 Cr L J 685, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Daulatram*.

Note 31

1. ('40) AIR 1940 Rang 118 (119, 120): 41 Cr.L.J. 621: 1940 R.L.R. 215, *E Maung Maung v. The King*. (Appellate Court cannot come to finding which is not within competency of trial Court or pass sentence which is beyond jurisdiction of trial Court.)

('39) AIR 1939 All 710 (712): 41 Cr. L. J. 111, *Nandkishore v. Emperor*. (Powers of appellate Court under S. 423 are limited by Ss. 236, 237 and 238.)

('38) AIR 1938 Mad 315 (315): 39 Cri L Jour 465, *In re Ponnuswami Servai*. (Conviction under S. 414, Penal Code, by second class Magistrate — Appeal — Alteration into one under S. 409, Penal Code, is not legal as offence under S. 409 is not triable by second class Magistrate.)

('38) AIR 1938 Nag 303 (305): 39 Cr. L. J. 747: 1 L R (1938) Nag 595, *Ahesanali Mahomedali v. Emperor*. (Appellate Court thinking that facts set out in order under S. 112 bring matter within cl. (a) instead of cl. (b) of S. 109—This alteration can be made.)

('17) AIR 1917 Lah 233 (234): 18 Cri L Jour 511: 1917 Pun Re No. 4 Cr, *Ahmad Din v. Emperor*. (Dissenting from 25 All 534.)

('85) 7 All 414 (420, 424): 1885 A W N 105 (FB), *Queen-Empress v. Pershad*.

('06) 4 Cri L Jour 490 (491): 3 Low Bur Rul 232, *Emperor v. Po Yin*.

('23) AIR 1923 Lah 260 (261): 3 Lah 440: 23 Cr.L.J. 709, *Arjan Mal v. Emperor*. (Appellate Court cannot convict accused of offence requiring sanction.)

[See however ('03) 25 All 534 (536): 1903 A W N 100, *Emperor v. Gur Narain Prasad*. (Appellate Court can alter conviction to one for any of the offences mentioned in S. 198 notwithstanding the absence of any complaint as required by it.)]

2. ('21) AIR 1921 Low Bur 36 (37): 23 Cri L Jour 740: 11 Low Bur Rul 45, *Nga Po Kyin v. Emperor*.

('80) 6 Cal L R 427 (428), *In the matter of Dwarka Nath Manjhee*.

('06) 4 Cri L Jour 490 (491): 3 Low Bur Rul 232, *Emperor v. Po Yin*.

('98-99) 3 Cal W N 653 (655, 656): 26 Cal 863, *Lala Ojha v. Queen-Empress*.

[See also ('05) 10 Cal W N xxxix (xxxix), *Bhagawat Singh v. King-Emperor*. (Point not decided.)]

[See however ('25) AIR 1925 Sind 105 (107): 25 Cri L Jour 1057: 19 Sind L R 183, *Faizulla v. Emperor*. (The case was however one falling within Ss. 236 and 237.)]

3. ('11) 12 Cri L Jour 572 (572): 12 I. C. 836: 34 All 115, *Sardara v. Emperor*.

same principle will apply with greater force, where A had not been expressly acquitted or convicted of offence X, but had simply been convicted of offence Y.⁴ But it has been held in the undermentioned decisions^{4a} that it is not open to the appellate Court under this clause to alter the finding to one of conviction for an offence of which the accused has been acquitted. These decisions purport to follow the decision of the Privy Council in *Kishan Singh v. Emperor*.^{4b} But it is submitted that the Privy Council decision is purely concerned with the powers of the High Court under S. 439 and does not touch the question of the powers of an appellate Court under this clause. Where A was charged with having committed offence X only, but the lower Court could, under the provisions of S. 237 or S. 238, have convicted the accused without a charge of offence Y also, the appellate Court can, in an appeal against the conviction for offence X, alter the conviction to one for offence Y.⁵ But can an appellate Court alter the finding in

(26) AIR 1926 All 700 (701) : 27 Cri L Jour 901, *Janki Prasad v. Emperor*.

(18) AIR 1918 All 65 (66) : 20 Cri L Jour 22, *Dulli v. Emperor*.

(34) AIR 1934 Oudh 200 (205, 206) : 9 Luck 607: 35 Cr. L. J. 973, *Lakhan Singh v. Emperor*.

(96) 23 Cal 975 (977, 979), *Queen-Empress v. Jabanullah*.

(32) AIR 1932 Cal 723 (726) : 60 Cal 179 : 34 Cr. L. J. 177, *Hanuman Sarma v. Emperor*.

(17) AIR 1917 Pat 625 (626) : 18 Cr. L. J. 982, *Dhanpat Singh v. Emperor*.

(18) AIR 1918 Pat 257 (258) : 19 Cr. L. J. 735 : 3 Pat L J 565, *Mahangu Singh v. Emperor*.

(10) 11 Cr. L. J. 534 (535) : 7 I. C. 861: 34 Mad 547, *Appanna v. Pethani Mahalakshmi*.

(14) AIR 1914 Cal 456 (459) : 41 Cal 350 : 15 Cr. L. J. 385, *Romesh Chandra v. Emperor*.

(04) 1 Cr. L. J. 942 (943) : 1904 P L R 110 : 1904 Pun Re No. 12 Cr, *Bhola v. Emperor*.

(11) 10 Ind Cas 372 (373) : 35 Mad 243: 12 Cr. L. J. 269, *Hanumappa v. Emperor*.

(24) AIR 1924 Rang 93 (97) : 1 Rang 436: 25 Cr. L. J. 247, *On Shwe v. Emperor*. See also S. 439 Notes 12 and 13.

4. ('37) AIR 1937 All 353 (358) : 38 Cri L Jour 621, *Emperor v. Jagannath*. (Accused charged alternatively under S. 366A, or S. 498, Penal Code—No finding by lower Court in respect of S. 498—Conviction under S. 366A—Acquittal under S. 498 not implied—High Court can alter conviction from S. 366A to S. 498.)

(33) AIR 1933 All 565 (567, 568) : 55 All 834 : 34 Cri L Jour 1064, *Raghunath v. Emperor*.

(31) AIR 1931 Sind 9 (12) : 25 Sind L R 1 : 32 Cri L Jour 517, *Sabjhatullah v. Emperor*.

(12) 13 Cri L Jour 457 (459) : 15 I C 89 : (1911) 1 Upp Bur Rul 100, *Ali Muddin Meah Jan*.

4a. ('38) AIR 1938 Sind 202 (206) : 40 Cr. L. J. 93 : 1 L R (1939) Kar 75, *Jado Rakim v. Emperor*.

(37) AIR 1937 All 240 (242, 243) : 38 Cri L Jour 521, *Sarda Prasad v. Emperor*.

(36) AIR 1936 All 758 (759) : 38 Cri L Jour 71, *Motiram v. Emperor*.

(29) AIR 1929 Nag 325 (327) : 30 Cri L Jour 944, *Kisan Das v. Emperor*.

[See also ('35) AIR 1935 Rang 512 (514) : 37 Cr. L. J. 246, *Paw Tha U v. Emperor*. (Accused charged under Ss. 302, 392 read with S. 114, Penal Code—Sessions Judge not convicting accused under S. 392 amounts to acquittal under it—High Court cannot alter conviction from S. 302 to S. 379, Penal Code.)]

4b. ('28) AIR 1928 P C. 254 (257) : 50 All 722:55 I A 390:29 Cri L Jour 828 (PC).

5. ('36) AIR 1936 Rang 281 (282) : 39 Cri L Jour 761 : 1936 R L R 139, *Maung Ba v. The King*. (Trial Magistrate convicting accused under S. 353, Penal Code—Appellate Court can alter conviction to one under S. 352.)

(36) AIR 1936 Nag 132 (133, 134) : 38 Cr. L. J. 390 : 1 L R (1936) Nag 99, *Diwan Singh v. Emperor*.

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such a way that the altered offence was neither *charged* in the trial Court nor was one for which the accused could have been convicted under the provisions of Ss. 237 and 238? The general trend of opinion is that it cannot do so,⁶ and this is in accord with the principle above

('36) AIR 1936 Oudh 44 (47) : 37 Cri L Jour 12, *Emperor v. Sheo Narain Singh*. (Accused acquitted of offence under S. 302, Penal Code, can in appeal be convicted of offence under S. 307, Penal Code.)

('86) 1886 Rat 293 (294), *Queen-Empress v. Balu*. (Conviction under S. 457, Penal Code, altered into one under S. 414 in appeal.)

('32) AIR 1932 Nag 173 (173) : 28 Nag L R 218 : 34 Cri L Jour 66, *Deo Ram v. Emperor*. (A person charged with house-breaking can be convicted of receiving stolen property in appeal.)

('27) AIR 1927 Cal 520 (521, 522) : 54 Cal 476 : 28 Cri L Jour 404, *Dibakar v. Saktidhar Kabiraj*. (Appellate Court may alter charge and conviction if accused is not prejudiced.)

[See also ('29) AIR 1929 Lah 508 (509) : 30 Cri L Jour 413, *Biru v. Emperor*. (Where a person has been charged and tried for an offence under S. 380, Penal Code, he can be legally convicted under S. 403 of the Code if he has not been taken by surprise by such a procedure.)]

[But see ('26) AIR 1926 All 33 (34) : 26 Cr.L.J. 1494, *Mula v. Emperor*. (Accused convicted under S. 457, Penal Code, cannot be convicted under S. 411 in appeal.)]

6. ('39) AIR 1939 All 710 (712) : 41 Cri L Jour 111, *Nand Kishore v. Emperor*.

('37) AIR 1937 Nag 123 (124) : 19 N. L. J. 158 (161), *Kartikram v. Emperor*. (Appellate Court has no power to convict accused of a case he has not been called upon to meet.)

('36) AIR 1936 Pat 536 (537) : 37 Cr. L. J. 1156, *Ramdhani Mahton v. Emperor*. (Charge and conviction under S. 426, Penal Code — Appeal — Conviction under S. 352, Penal Code, maintaining sentence is not legal.)

('35) AIR 1935 Cal 561 (570) : 62 Cal 433 : 36 Cri L Jour 1275 (SB), *Emperor v. Bhawani Prasad*.

('11) 12 Cr.L.J. 269 (271) : 10 I.C. 372 : 35 Mad 243, *Golla Hanumappa v. Emperor*.

('26) AIR 1926 Cal 431 (432) : 26 Cri L Jour 1018, *Rakhal Chandra v. Jamini Kanta*. (Conviction under S. 147, Penal Code, cannot be altered to one under S. 323, Penal Code.)

('03) 30 Cal 288 (290), *Yakub v. Lethu*. (Trial for offence of rioting — Appellate Court cannot convict under Ss. 448 and 323.)

('25) AIR 1925 Mad 706 (706) : 26 Cri L Jour 1036, *In re Kadalnatha Pillai*. (Conviction under S. 159, Madras Local Boards Act — Appellate Court cannot convict under S. 163 (1) of that Act.)

(1900) 27 Cal 990 (991) : 5 C W N 31, *Rahimuddi v. Asgar Ali*. (Conviction for rioting with common object of theft — Finding by appellate Court of different common object—Conviction on such finding is not legal.)

('24) AIR 1924 All 766 (767) : 25 Cri L Jour 1292, *Cheda Singh v. Emperor*. (In appeal charge cannot be altered to another one for which evidence is ample.)

('18) AIR 1918 Mad 496 (496, 497) : 18 Cri L Jour 860, *In re Mongalu Aorodhono Hathi*. (Appellate Court acquitting persons charged with rioting but convicting under sections 448 and 323, Penal Code.)

('24) AIR 1924 Mad 375 (376) : 47 Mad 61 : 25 Cri L Jour 554, *In re Shreeramulu*. (Alteration of charge under sections 147 and 323, Penal Code, into one under S. 160.)

('27) AIR 1927 Rang 32 (32) : 4 Rang 355 : 27 Cri L Jour 1360, *Nga Shwe Zon v. Emperor*. (Charge under S. 452, Penal Code—Appellate Court convicting under Arms Act.)

('10) 11 Cri L Jour 340 (340) : 5 Ind Cas 974 (Mad), *In re Bomma Reddy*. (Conviction by the appellate Court under S. 379, Penal Code, by altering the conviction of the original Court under sections 447 and 352.)

(1900) 27 Cal 660 (662), *Jatusingh v. Mahabir Singh*. (Conviction for theft—Appellate Court convicting accused of being members of unlawful assembly.)

('33) 1933 Mad W N 910 (911), *Govinda Ravalu v. Emperor*. (Conviction by first Court under sections 147 and 323, Penal Code—Conviction changed on appeal into one under sections 149 and 323.)

('25) AIR 1925 Nag 294 (294) : 26 Cri L Jour 1358, *Akbar Hussain v. Emperor*. (Charge and conviction under S. 468, Penal Code, by trial Court—Change of conviction under section 471 in appeal is not proper.)

stated, that an appellate Court cannot come to any finding which the trial Court could not have come to. If the appellate Court considers that the accused is guilty of another offence than that charged, it should direct a re-trial with directions to alter the charge.^{6a} It is conceived that it may also frame a fresh charge itself on the analogy of S. 227, and proceed, after notice to the accused, to dispose of the case. This, however, should not be done if it is likely to prejudice the accused.⁷

In some cases, however, it has been held that the appellate Court can, where the facts are the same, alter the conviction from one under a wrong section to one under the proper section, if it does not prejudice the accused.⁸ It has also been held in the cases cited

- (21) AIR 1921 Pat 496 (497): 22 Cr. L. J. 485, *Mayadhar Mahanti v. Danardan Kund.* (No charge for the offence in the trial Court—Conviction by appellate Court.)
 (20) AIR 1920 Pat 590 (591): 21 Cri L Jour 496, *Raghu Singh v. Emperor.* (Conviction under S. 457, I. P. C., altered into one under S. 456.)
 (99) 3 Cal W N 367 (368), *Monoranjan Chowdhary v. Queen-Empress.* (Alteration of findings under Ss. 109 and 211, Penal Code, to one under S. 193.)
 (23) AIR 1923 Lah 260 (261): 3 Lah 440: 23 Cr. L. J. 709, *Arjan Mal v. Emperor.* (Conviction under S. 189, I. P. C., altered into one under Ss. 176 and 109.)
 (34) AIR 1934 Lah 178 (179): 35 Cr. L. J. 519, *Mange v. Emperor.* (Conviction under S. 376, Penal Code—Alteration into one under S. 323.)
 (99-1900) 5 Cal W N 296 (297), *Rameshwar v. Joji Sahoo.* (Cannot convict of any offence which did not form the subject-matter of the complaint.)
 (24) AIR 1924 Cal 532 (533): 24 Cri L Jour 312, *Patal Ghosh v. Emperor.* (Alteration of the conviction of the petitioners from S. 325, I. P. C., to S. 323.)
 (15) AIR 1915 Cal 219 (219): 15 Cr. L. J. 701, *Genu Manjhi v. Emperor.* (Alteration from S. 147, I. P. C., to S. 323.)
 (15) AIR 1915 Cal 181 (182): 16 Cri L Jour 42, *Har Narau v. Emperor.* (Alteration from S. 147, I. P. C., to S. 353.)
 (06) 3 Cr. L. J. 210 (212): 8 Bom L R 120, *Emperor v. Sakharan Ganu.* (Alteration of conviction under S. 376, Penal Code, into S. 366 is illegal.)
 (87) 1887 Rat 353 (353), *Queen-Empress v. Basappa.* (Conviction under S. 323, Penal Code—Accused could not be convicted in appeal under S. 117 for which the accused was not tried.)
 [See (15) AIR 1915 All 357 (358): 16 Cri L Jour 599, *Debi Singh v. Emperor.* (The powers conferred by the Code of Criminal Procedure upon a Court of Appeal are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge which he has to meet.)
 (88) 1888 Rat 368 (368), *Queen-Empress v. Krishna.* (Conviction for an offence under S. 411, Penal Code—Alteration of conviction into one either under S. 379 or S. 411—Held that such alternative conviction in appeal was illegal.)]
 [See also (11) 12 Cr. L. J. 73 (74): 9 I. C. 436 (Lah), *Emperor v. Mahua Singh.*]
 6a. (32) AIR 1932 Cal 723 (726, 727): 60 Cal 179: 34 Cr. L. J. 177, *Hanuman v. Emperor.*
 (15) AIR 1915 Cal 181 (182): 16 Cri L Jour 42, *Har Narain v. Emperor.*
 7. [See (16) AIR 1916 Mad 1222 (1222): 16 Cr. L. J. 737, *In re Mukha Muthirayan.*
 (34) AIR 1934 Lah 833 (834): 36 Cri L Jour 274, *Ratan Singh v. Emperor.* (Conviction for attempting to cheat X—Alteration into one for cheating Y.)]
 8. (38) AIR 1938 Oudh 263 (263): 39 Cr. L. J. 937, *Emperor v. Shankar Dayal.* (Conviction under S. 452, Penal Code, from charge under S. 323, Penal Code, is not illegal provided injustice is not caused to the accused.)
 (33) AIR 1933 Pat 26 (27): 34 Cri L Jour 419, *Jagannath Misra v. Emperor.*
 (27) AIR 1927 Pat 199 (200): 6 Pat 217: 28 Cr. L. J. 529, *Ganpat Lal v. Emperor.*
 (13) 14 Cri L Jour 239 (239): 19 Ind Cas 335 (Mad), *Kunhambu v. Emperor.* (Conviction under S. 353, Penal Code, altered into one under S. 183.)
 (22) AIR 1922 All 143 (143): 23 Cri L Jour 198, *Hanuman v. Emperor.*
 (32) AIR 1932 Cal 865 (866): 33 Cri L Jour 828, *Raghubir Kahar v. Emperor.* (Finding of guilt under Ss. 420/75 altered into one under Ss. 379/75.)
 (28) AIR 1928 Pat 359 (362): 29 Cr. L. J. 374, *Ulfat Khan v. Emperor.* (Accused charged under S. 147 can be convicted under S. 323, Penal Code, in appeal.)
 (29) AIR 1929 Pat 11 (15): 7 Pat 758: 30 Cr. L. J. 205, *Bhondur Das v. Emperor.* (Magistrate convicting for offence under S. 326 read with S. 149, Penal Code—Appeal—Conviction altered to one under Ss. 326 and 34, Penal Code.)

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below,^{8a} that the only restriction on the appellate Court's power is that the accused is not prejudiced by the alteration of the charge and that the appellate Court could alter the finding, even though the case does not fall within S. 237 or S. 238. It is submitted that this view cannot be supported on principle. Section 233 of the Code provides that every distinct offence must be separately charged, though where a trial does take place without a charge, it is a curable *irregularity* under S. 535. This principle applies equally to the appellate Court as well as to the trial Court,⁹ and there is nothing to show that the appellate Court can disregard the rule any more than the trial Court. Though the words "may alter the finding" in the section are general, they must be construed in harmony with other provisions of the Code and not as overriding them.^{9a}

The word "finding" is not limited to a finding upon a point of law as distinct from a finding upon a point of fact.^{9b}

Where X was charged under S. 143 and also under S. 379 of the Penal Code, but was convicted only under S. 143 and acquitted of the offence under S. 379 of the Penal Code, and the appellate Court

('33) AIR 1933 Pat 26 (27) : 34 Cri L Jour 419, *Jagannath Misra v. Emperor*.

('03) 1 Upp Bur Rul, Penal Code, 9 (13), *Ko Set Sherwin v. King-Emperor*.

('87) 1887 Pun Re No. 59 Cr, p. 156 (157), *Buta v. Empress*. (Finding under S. 411 altered to one under S. 403, Penal Code.)

('03) 2 Weir 485 (486), *In re Veera Reddi*.

('99) 26 Cal 863 (867, 868) : 3 C W N 653, *Lala Ojha v. Queen-Empress*.

('04) 1 Cri L Jour 694 (696) : 1 A L J 245, *Mohammad Yasin v. Emperor*.

(1900) 13 C P L R 125 (126), *Empress v. Ram Din*. (Conviction under S. 459, I. P. C., altered to one under Ss. 326 and 511.)

('75) 12 Bom H C R Cr 1 (7), *Reg. v. Ramajirao*.

[See ('06) 3 Cri L Jour 348 (349) : 3 Low Bur Rul 112, *Emperor v. Kyaw Hla Aung*. (Appellate Court can alter finding to legalize sentence.)]

[See also ('36) AIR 1936 Nag 263 (264) : 38 Cri L Jour 455 : ILR (1937) Nag 102. *Nathusingh v. Emperor*. (Prosecution under S. 181, Penal Code — Appellate Court can change it to S. 193 of the Code.)]

('36) AIR 1936 Nag 275 (276) : 38 Cri L Jour 380 : ILR (1937) Nag 145, *Vithal v. Emperor*.]

See also S. 236 Note 1.

8a. ('17) AIR 1917 Mad 687 (688) : 17 Cri L Jour 384, *In re Manuar Krishna Chetty*.

('33) AIR 1933 Pesh 9 (12) : 34 Cri L Jour 266, *Sharif v. Emperor*. (S. 423 (1) (b) lays down that in an appeal from conviction appellate Court may "alter the finding." This power is not in any way qualified or restricted by Ss. 236, 237 and 238.)

('19) AIR 1919 Mad 188 (189) : 20 Cri L Jour 780, *In re Pullannavara Hanumantha*.

('99) 26 Cal 863 (867, 868) : 3 C W N 653, *Lala Ojha v. Queen-Empress*.

[See also ('03) 25 All 534 (535, 536) : 1903 A W N 100, *Emperor v. Gur Narain Prasad*. (The power of an appellate Court in altering a finding under S. 423, Criminal P. C., is not limited by any preliminaries imposed upon the first Court before it takes cognizance of the offence involved in the altered finding.)]

9. ('05) 2 Cri L Jour 694 (695) : 1905 Pun Re No. 38 Cr, *Sahib Singh v. Emperor*.

[See however ('15) AIR 1915 Mad 302 (303) : 15 Cri L Jour 680, *In re Surya Narayana Rao*. (Where two persons are tried together and convicted of one offence, the appellate Court has power to convict one of two persons tried for a certain offence and the other of another offence found on the facts.)]

See also S. 233 Note 2.

9a. ('10) 11 Cri L Jour 49 (49) : 33 Mad 264 : 5 I. C. 145, *Padmanaba Payi Kanniah v. Emperor*.

9b. ('18) AIR 1918 Pat 257 (258) : 19 Cr. L. J. 735 : 3 Pat L Jour 565, *Mahangu Singh v. Emperor*. (Distinguishing A I R 1917 Pat 625 and A I R 1914 Cal 456.)

confirmed the conviction under S.143 but set aside the acquittal under S. 379, it was held that the appellate Court had no jurisdiction to do so inasmuch as it was not a case of any *alteration of conviction*.¹⁰

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Charge for substantive offence—Conviction by appellate Court for abetment—As has been seen before, a conviction for offence X can be altered to one for offence Y if, on the facts of the case, the accused could have been convicted of offence Y without a charge by the lower Court under the provisions of Ss. 237 and 238. The abetment of an offence is not a minor offence and cannot come under S. 238.¹¹ But it may come under S. 237, if there is no element in it which is not included in the charge for the substantive offence. In such a case, the accused may be convicted in appeal for abetment of the offence.¹² See also S. 236 Note 8.

32. Reduction of sentence.—Where the appellate Court rejects the appeal summarily under S. 421, it cannot reduce the sentence.¹ Nor can it, while affirming the conviction, reverse the sentence absolutely inasmuch as every conviction must be followed by a sentence. If it thinks the sentence severe, it must pass at least a nominal sentence.²

An appellate Court has power to reduce the sentence,³ but not to remit any sentence—a function which belongs to the Government.⁴

Where A and B are co-accused and A alone appeals, the appellate Court can, in the ends of justice, reduce the sentence passed on B.⁵

33. “Alter the nature of the sentence . . . but not so as to enhance the same. — Under the Code of 1861, the appellate Court had no power to enhance the sentence passed by the lower Court.¹

10. ('23) AIR 1923 Cal 658 (658) : 24 Cri L Jour 938, *Prasanna Chandra v. Upendra Nath*.

11. ('27) AIR 1927 All 35 (36) : 49 All 120 : 27 Cri L Jour 1118, *Mahabir Prasad v. Emperor*.

('27) AIR 1927 Cal 63 (64) : 28 Cri L Jour 2, *Hulas Chand v. Emperor*.

('35) AIR 1935 Pesh 67 (68) : 36 Cr L Jour 1438, *Suraj Bhan v. Emperor*.

See also S. 238 Note 2.

12. ('26) AIR 1926 Rang 207 (207, 208) : 27 Cri L Jour 1285, *Nga Po v. Emperor*.

(Charge under dacoity—Conviction under abetment of robbery is not improper.)

('27) AIR 1927 All 35 (36) : 49 All 120 : 27 Cri L Jour 1118, *Mahabir Prasad v. Emperor*.

('31) AIR 1931 Oudh 274 (276, 277) : 7 Luck 102 : 32 Cri L Jour 905, *Khuman v. Emperor*.

('35) AIR 1935 Pesh 67 (68) : 36 Cr L J 1438, *Suraj Bhan v. Emperor*.

Note 32

1. ('86) 1886 Rat 304 (305), *Queen-Empress v. Govinda Rao*.

2. ('91) 1891 Rat 545 (546), *Queen-Empress v. Lakshmibai*.

3. ('37) AIR 1937 Mad 231 (232) : 59 Mad 995 : 37 Cr. L. J. 1150, *In re Abdul Gani*.
[See ('66) 1866 Pun Re No. 1 Cr, p. 1 (2), *Achar Putwaree v. Crown*.

(1865) 3 Suth W R Cr 16 (17), *Queen v. Keeifa Singh*. (Illegal sentence of ten years' transportation reduced to transportation for seven years.)

('67) 7 Suth W R Cr 39 (39), *Queen v. Bhamaur Doosadh*. (Illegal sentence of fourteen years reduced to legal sentence of ten years.)

('05) 2 Cr. L. J. 206 (207) (Lah), *Inam Din v. Emperor*. (Sentence of transportation for life reduced to one for seven years.)

4. ('69) 1869 Pun Re No. 11 Cr, p. 20 (21), *Crown v. Loodun*.

5. ('32) AIR 1932 Lah 615 (615) : 34 Cri L Jour 458, *Jalal v. Emperor*.

Note 33

1. (1865) 4 Suth W R Cr 20 (20, 21), *Queen v. Buloram Doss*.

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Under the Code of 1872, s. 280, as amended by Act XI of 1874, the appellate Court could enhance such sentence.² Under the Code of 1882 and the present Code such power does not exist.^{2a}

There is a great difference of opinion as to whether particular sentences passed by the appellate Court are enhancements of the sentences passed by the first Court. Thus, the following views have been expressed :

- (1) A sentence of fine and in default x months' imprisonment is a lighter sentence than a sentence merely of x months' imprisonment.³ A contrary view has been held in the undermentioned cases,⁴ namely that it is really an enhancement inasmuch as even if the x months' imprisonment is fully served out, the fine nevertheless continues to be leviable in other ways from the accused.
- (2) A sentence of six months' imprisonment and a fine of Rs. 1000 and in default three months' imprisonment, in substitution of a sentence of nine months' imprisonment is not an enhancement.⁵ The case will be different if the imprisonment in default added to the substantive sentence of imprisonment *exceeds* the original imprisonment awarded.⁶
- (3) Where x is convicted of robbery, but the appellate Court rejects the *evidence as to violence* and finds x guilty only of theft, the maintaining of the same sentence as was awarded for robbery

2. ('81) 1881 All W N 62 (62), *Empress v. Ratan Sahai*.

('77) 1877 Rat 131 (131, 132), *Queen-Empress v. Tharekhan*.

('80) 4 Bom 239 (240), *Imperatrix v. Rama Prema*.

('75) 1875 Pun Re No. 8 Cr, p. 11 (11, 12), *Shamru Lal v. Crown*.

('76) 1 Mad 54 (54).

2a. ('36) AIR 1936 Lah 729 (730) : 37 Cr. L. J. 950, *Abdul Rahman v. Emperor*. (Appellate Court cannot pass sentence of fine for aggregate amount beyond the maximum allowed to the lower Court.)

3. ('99) 23 Bom 439 (441), *Queen-Empress v. Chagan Jagannath*.

('07) 5 Cr. L. J. 36 (38) : 16 M L J 360 : 30 Mad 103 (FB), *Bhakthavatsalu Naidu v. Emperor*. (No enhancement of sentence when aggregate period of imprisonment is less than period of original sentence although fine is imposed in addition.)

('31) AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cr. L. J. 1217, *Mohammad Hussain v. Emperor*. (Do.)

[See also ('37) AIR 1937 Lah 195 (196) : 38 Cr. L. J. 428, *Prabhu Dyal v. Emperor*.]

4. ('01) 23 All 497 (499) : 1901 A W N 176, *King-Emperor v. Sagwa*.

('07) 6 Cr. L. J. 100 (101) : 3 Nag L R 90, *Shamlay v. Emperor*.

('24) AIR 1924 Pat 563 (564) : 3 Pat 638 : 25 Cr. L. J. 1186, *Bhola Singh v. Emperor*.

[See also ('37) AIR 1937 Oudh 462 (463) : 38 Cr. L. J. 935, *Shankar Singh v. Emperor*. (Imposition of substantial fine in place of sentence of imprisonment and maintaining same sentence of imprisonment in default of payment amounts to enhancement.)]

5. ('98) 23 Bom 439 (441), *Queen-Empress v. Chagan Jagannath*.

('07) 5 Cr. L. J. 36 (38) : 30 Mad 103 : 16 M L J 360 (FB), *Bhakthavatsalu Naidu v. Emperor*.

('31) AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cr. L. J. 1217, *Md. Hussain v. Emperor*.

[But see ('01) 23 All 497 (499) : 1901 A W N 176, *King-Emperor v. Sagwa*.

('07) 6 Cr. L. J. 100 (101) : 3 N L R 90, *Shamlay v. Emperor*.

('24) AIR 1924 Pat 563 (564) : 3 Pat 638 : 25 Cr. L. J. 1186, *Bhola Singh v. Emperor*.]

6. ('98) 23 Bom 439 (441), *Queen-Empress v. Chagan Jagannath*.

('94) 17 All 67 (68, 69) : 1894 A W N 202, *Queen-Empress v. Ishri*.

[See ('07) 5 Cr. L. J. 36 (38) : 30 Mad 103 : 16 M L J 360 (FB), *Bhakthavatsalu Naidu v. Emperor*.

('31) AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cr. L. J. 1217, *Md. Hussain v. Emperor*.]

would be an enhancement. Where X is convicted of theft in a 'building' but the appellate Court finds him guilty of simple theft by putting a different construction upon the word 'building,' both the Courts are at one as to the *act committed* and differ as to the application of the law. In the latter case, the alteration of the conviction to one of theft and maintaining the sentence is not an enhancement of the sentence. In other words, the alteration of an offence to a less grave offence, but maintaining the sentence, is not an enhancement when the *act committed* is held to be the same, but the alteration is due to a different interpretation of the law.⁷

- (4) Where the appellate Court passes a sentence which the lower Court has no power to pass, there is an enhancement of the sentence.⁸
- (5) Where the accused, convicted of two offences, is acquitted as regards *one* of such offences, the maintainance of the whole punishment, awarded for the two offences, amounts to an enhancement.⁹ The reason alleged for this view is that when a single sentence is awarded for two offences, part of it must be deemed to be for one offence and part for the other, so that the maintaining of the whole sentence for one only of the offences is an enhancement.¹⁰ A contrary view has been expressed in the cases below.^{10a}

7. ('27) AIR 1927 Mad 789 (789, 790) : 28 Cr. L. J. 824, *Rangaswami v. Emperor*.

8. ('24) AIR 1924 All 130 (130) : 45 All 591 : 25 Cr. L. J. 312, *Mad. Yakub Ali v. Emperor*. (Appellate Court's power to vary sentence is measured by trial Court's power.)

('11) 12 Cr. L. J. 444 (445, 446) : 7 Nag LR 109 : 11 IC 788, *Sitaram v. Emperor*. (Do.)

('30) AIR 1930 Lah 318 (318) : 31 Cr. L. J. 166, *Yusaf v. Municipal Committee Murree*. (Alteration of sentence of fine into one of whipping which lower Court could not pass.)

9. ('33) AIR 1933 Lah 933 (933) : 35 Cr. L. J. 108, *Kehr Singh v. Emperor*.

('07) 5 Cr. L. J. 68 (89) : 30 Mad 48 : 1 M L T 403, *Pramasiva Pillai v. Emperor*. (In such cases, some reduction of sentence by the appellate Court must be made unless the Court thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for enhancement of sentence.)

('11) 12 Cri L Jour 454 (455) : 11 Ind Cas 798 (Mad), *In re Prola Narasimham*.

('16) AIR 1916 Mad 622 (622) : 16 Cri L Jour 271, *In re Appanda Natha Nainar*.

('08) 7 Cri L Jour 361 (362) : 3 M L T 312, *In re Somasundaram Pillai*.

('10) 11 Cri L Jour 483 (483) : 7 Ind Cas 415 (Mad), *Emperor v. Varadhan*.

('92) 1892 Rat 618 (618), *Queen-Empress v. Natha*.

('17) AIR 1917 Lah 358 (360) : 1916 Pun Re No. 31 Cr : 18 Cri L Jour 372, *Mangal Singh v. Emperor*.

('10) 11 Cr. L. J. 727 (727) : 8 I. C. 880 (Mad), *In re Kesireddi Panasa Ramudu*.

('27) AIR 1927 All 375 (376) : 49 All 484 : 28 Cr. L. J. 495, *F. M. Thorpey v. Emperor*.

('87) 1887 Pun Re No. 45 Cr, p. 110 (113), *Azim Khan v. Empress*.

('97) 24 Cal 316 (317), *Ramzan Kunjra v. Ramkhalawan*.

('28) AIR 1928 Bom 346 (347) : 29 Cri L Jour 1082, *Ramachandra v. Emperor*.

('96) 22 Bom 760 (761), *Queen-Empress v. Hanma*.

('05) 2 Weir 487 (487), *In re Ramanujam Pillai*.

[See ('16) AIR 1916 Mad 788 (788) : 16 Cri L Jour 446, *In re Choitano Ranto*. (When conviction on some charges is set aside, sentence must be reduced.)

('97) 24 Cal 317n (318n), *Arpin Sheikh v. Aroddi Datia*.]

10. ('27) AIR 1927 Mad 789 (789) : 28 Cr. L. J. 824, *Rangaswami Kanda Pillai v. Emperor*.

10a. ('08) 8 Cri L Jour 75 (88) (Lah), *Ishar Das v. Emperor*.

('11) 11 Cr. L. J. 243 (244) : 5 I. C. 754 (Mad), *In re Mari*. (Not an enhancement when the true inference to be drawn from the sentence is that the Magistrate did not mean to pass a separate sentence for the offence of which the petitioner was acquitted in appeal.)

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- (6) Where a person is guilty of acts constituting a single offence, but, they are split up into two or more offences and the accused is sentenced separately or given one combined sentence for the two or more supposed offences, the appellate Court is competent to alter the conviction to the proper one for the single offence and maintain the aggregate of the two sentences or the whole of the combined sentence; there is no enhancement in such a case.¹¹
 - (7) Where a charge has several counts, the appellate Court setting aside the conviction on some of the counts, but maintaining the entire sentence, does not give any enhanced sentence.¹²
 - (8) A fine in lieu of simple imprisonment is not an enhancement.¹³
 - (9) Rigorous imprisonment in lieu of simple imprisonment for the same term is enhancement.¹⁴
 - (10) Solitary confinement, even if the imprisonment awarded is reduced, is enhancement.¹⁵
 - (11) A sentence of imprisonment in lieu of fine is an enhancement.^{15a}
 - (12) An increase of fine¹⁶ or a sentence of whipping¹⁷ in lieu of decrease in imprisonment is an enhancement.
- See also the undermentioned cases.¹⁸

(130) AIR 1930 Pat 79 (80) : 31 Cri L Jour 173, *Bechu Singh v. Emperor*. (It depends on the circumstances of the particular case whether a retention of the sentence awarded by the trial Court constitutes an enhancement of sentence—It does not follow that if the conviction on one of several charges in a trial is set aside while one or more others are affirmed, there must necessarily be a reduction of sentence.)

11. ('07) 6 Cr. L. J. 43 (45) : 3 Nag L R 67, *Balbhadr Bani v. Tribhuban Nath*.

12. ('28) AIR 1928 Mad 651 (652):29 Cr.L.J. 847, *Kaliappa Goundan v. Emperor*.

13. ('11) 12 Cr. L. J. 444 (446):11 I. C. 788: 7 Nag LR 109, *Sita Ram v. Emperor*.

14. ('24) AIR 1924 All 130 (130) : 45 All 594 : 25 Cr.L.J. 312, *Mohd. Yakub Ali v. Emperor*.

15. ('90) 1890 All W N 170 (170), *Empress v. Peman*.

15a. ('93) 18 Bom 751 (751), *Queen-Empress v. Dansung Dada*.

('93-1900) 1893-1900 Low Bur Rul 423 (425), *Kyaw kaing v. Queen-Empress*.

('96) 18 All 301 (302) : 1896 A W N 58, *Queen-Empress v. Lakshmi Kant*.

[See also ('83) 2 Weir 486 (486), *In re Chadalavad Ramanappa*. (Imprisonment in addition to fine.)]

16. ('97) 2 Weir 487 (487), *In re Appu*.

17. ('28) AIR 1928 Rang 265 (265): 30 Cri L Jour 328, *In re Kyaing Nga Hmwe*.

('97) 2 Weir 487 (487), *In re Appu*.

[See also ('40) AIR 1940 Rang 81 (82) : 41 Cri L Jour 455 : 1939 Rang L R 744, *The King v. Kyaw Aye*. (Order of detention in Borstal School cannot be altered into sentence of whipping, as it would amount to enhancement of sentence.)]

[But see ('84) 1884 Pun Re No. 3 Cr, p. 4 (4), *Jiwan v. Empress*. (Rigorous imprisonment for four years substituted by whipping in case of juvenile offender.)]

18. ('38) AIR 1938 Oudh 233 (233): 39 Cr.L.J. 889, *Shital Prasad v. Emperor*. (Accused convicted of offence punishable with fine only but bound over under S. 562 — Imposition of fine in appeal — *Held*, imposition of fine, though in the circumstances of the case could hardly be called enhancement of sentence, it still entailed a greater burden on the accused.)

('36) AIR 1936 Rang 227 (228): 37 Cr.L.J. 790: 14 Rang 119, *Emperor v. Ah Htwé*. (Order for detention in Borstal School for any period permitted by Act does not amount to enhancement of sentence.)

('87) 1887 All W N 100 (101), *Empress v. Mada*. (The Deputy Magistrate sentenced the accused to 15 days' rigorous imprisonment and a fine of Rupees 10, or, in default, to a further term of one week—The District Magistrate on appeal altered the sentence to a fine of Rs. 50 or, in default to one month's rigorous imprisonment — *Held*, that the sentence was enhanced.)

('35) AIR 1935 Rang 64 (64, 65): 12 Rang 607: 36 Cr.L.J. 366, *Emperor v. Bacho*. (Substitution of legal sentence in lieu of illegal sentence of whipping is enhancing

The real solution of the conflict lies in recognising the fact that the question whether a sentence has been enhanced is a *question of fact* to be determined in each particular case with reference to the *facts of that case*.¹⁹ The proper test is whether the accused considers the substituted sentence heavier than that awarded.²⁰ Thus, a substitution of three days' rigorous imprisonment and Rs. 100 fine and in default one month's rigorous imprisonment may not be an enhancement if the convict does not consider the fine of Rs. 100 too heavy to pay.²¹

Where the accused were convicted by the Magistrate under Ss. 363 and 498, Penal Code, but were sentenced under S. 363 only and subsequently in appeal were found guilty under S. 498 only, it was held that the appellate Court could pass appropriate sentence under S. 498 provided such sentence did not exceed that passed by the trial Court.²²

As a practical guide to the subordinate Courts in Burma, the High Court of Rangoon has laid down certain principles on which a whipping may be substituted for imprisonment. See the undermentioned cases.²³

An additional order for security passed under S. 106, sub-s (9), is

sentence — Proper course is to set aside illegal portion of sentence and refer case for revision by High Court.)

(^{'71}) 15 Suth W R Cr 7 (8, 9): 6 Beng L R App 95, *Queen v. Banda Ali*. (Substitution of legal sentence in lieu of illegal sentence of whipping is enhancement of sentence.)

(1900) 1900 Pun L R Cr No. 32(33): 1901 Pun Re No. 29 Cr, *Hasana v. Empress*. (Order for joint fine — Two persons who have been sentenced to a fine of Rs. 75 each were jointly fined Rs. 150 — On appeal by appellate Court, held this amounted to an enhancement in each case.)

19. (^{'01}) 23 All 497 (499): 1901 A W N 176, *King-Emperor v. Sagwa*.

(1900) 27 Cal 175 (177), *Rakkal Raja v. Khirode Pershad*. (Alteration of a sentence of three months' imprisonment to one month's imprisonment with a fine of Rs. 20, or in default of payment to 15 days' rigorous imprisonment does not amount to enhancement.)

20. (^{'30}) AIR 1930 Mad 193 (194): 31 Cr. L. J. 203, *Subba Goundan v. Emperor*. (Alteration of sentence of three months' rigorous imprisonment to one month and fine of Rs. 60, and in default two months' imprisonment is not enhancement.)

(^{'34}) AIR 1934 All 1031 (1032): 36 Cr. L. J. 335, *Satyavan Acharya v. Emperor*. (On appeal fine substituted in lieu of imprisonment — No general rule as to whether this amounts to enhancement of sentence.)

(^{'14}) AIR 1914 Lah 539 (539): 1915 Pun Re No. 7 Cr: 16 Cr. L. J. 603, *Kripa Ram v. Emperor*. (Altering a sentence of three months' imprisonment to one of one month's imprisonment and a fine and in default one month's further imprisonment is not enhancement.)

(^{'26}) AIR 1926 Lah 543 (543): 27 Cri L Jour 812, *Kanshi Ram v. Emperor*. (Where the accused is insolvent and unable to pay the fine, an alteration of a sentence of two months' imprisonment and Rs. 50 fine or in default one month's further imprisonment, to six week's imprisonment and Rs. 200 fine, or in default for further imprisonment of six weeks is enhancement of sentence.)

[See also (^{'16}) AIR 1916 Lah 130 (130): 17 Cr. L. J. 212, *Manchand v. Emperor*. (If on appeal from a sentence of one week's rigorous imprisonment (part of which had already been undergone) the sentence is altered into one of fine of Rs. 50 or in default one week's rigorous imprisonment, the sentence amounts to an enhancement.)]

21. (^{'14}) AIR 1914 All 530(531): 36 All 485: 15 Cr. L. J. 519, *Emperor v. Mehar Chand*.

22. (^{'38}) AIR 1938 Cal 439 (440), 39 Cri L Jour 684, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Hossein Ali*.

23. (^{'29}) AIR 1929 Rang 177 (179): 7 Rang 319: 30 Cr. L. J. 936 (FB), *Emperor v. Chit Pon*. (Substitution of 30 stripes for three months' rigorous imprisonment is enhancement.)

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not an enhancement of the sentence.²⁴ As to whether an order for costs under S. 31 of the Court-fees Act is an enhancement of sentence, see S. 546A Note 3.

The provision against enhancement of sentence in this clause applies only to a *convicted* person. It does not, therefore, preclude the award of rigorous instead of simple imprisonment to a person who has been bound over under chapter VIII but who has failed to give the required security.²⁵

34. "Appeal from any other order"—Clause (c).—Clause (c) applies to an appeal from "any other order," *i. e.*, any other order than an order of acquittal or of conviction.¹ Thus, appeals from orders under S. 514^{1a} or S. 476² or S. 185³ can be dealt with under this clause. In an appeal under sub-s.(3) of S. 250, the appellate Court can, under this clause, set aside the order for compensation though it cannot set aside the acquittal.⁴

The only orders that can be passed in appeals from orders not being acquittals or convictions are those specified in this clause, namely, *alteration* or *reversal* of the order of the lower Court, and those specified in clause (d), namely, *amendment*, or *consequential or incidental orders*.⁵ Thus, in an appeal against an order under S. 118, a *further inquiry*⁶ or a *re-trial*⁷ cannot be ordered.

The word "alter" in clause (c), though literally may include an alteration increasing the severity of the penalty, cannot be so construed; the whole tenor of the section shows that the Court has no power, by alteration, to increase the severity of the penalty imposed by the trial Court.⁸

(132) AIR 1932 Rang 150 (151, 152) : 10 Rang 317 : 33 Cr. L. J. 758, *Emperor v. Nga Aung Myat*. (Period of imprisonment already undergone should be considered by appellate Court in inflicting sentence of whipping.)

24. ('18) AIR 1918 Nag 64 (65) : 20 Cr. L. J. 760, *Maharaj Singh v. Emperor*.

('19) AIR 1919 All 375 (376) : 20 Cri L Jour 302, *Zafar Hussain v. Emperor*.

25. ('36) AIR 1936 Sind 188 (189) : 30 S L R 322 : 38 Cr. L. J. 168, *Emperor v. Manu Chabilo*.

Note 34

1. ('98) 21 Mad 124(126):2 Weir 593 (FB), *Queen-Empress v. Srinivasalu Naidu*.

1a. ('05) 2 Cr.L.J. 131(132):1905 P L R 99:1905 Pun Re No.15 Cr, *Masta v. Emperor*. ('12) 13 Cr.L.J. 31 (31):5 Sind L R 179: 13 IC 223, *Karam Bahadin v. Emperor*.

2. ('98) 21 Mad 124 (126): 2 Weir 593 (FB), *Queen-Empress v. Srinivasalu Naidu*.

3. ('85) 1885 Pun Re No. 42 Cr, p. 89 (89), *Ram Kala v. Ganga*. (Case in revision—Revisional Court can under S. 439 exercise same powers as those of an appellate Court under S. 423, cl. (c).)

4. ('32) AIR 1932 Cal 120 (121): 58 Cal 1436: 33 Cr.L.J. 269, *Surendra Nath v. Basanta Chandra*.

5. ('34) AIR 1934 Mad 202 (202): 34 Cr.L.J. 947, *In re Narappa Reddy*. (Appeal against order to give security—De novo trial cannot be ordered.)

('29) AIR 1929 Lah 28 (28): 30 Cri L Jour 491, *Chandan v. Emperor*.

6. ('06) 3 Cri L Jour 243 (243): 33 Cal 8, *Dayanath v. Emperor*.

[But see ('20) AIR 1920 Upp Bur 28 (29): 3 Upp Bur Rul 270: 22 Cri L Jour 309, *Nga San Dun v. Emperor*.]

7. ('34) AIR 1934 Mad 202 (202): 34 Cr.L.J. 947, *In re Narappa Reddy*.

('29) AIR 1929 Lah 28 (28): 30 Cri L Jour 491, *Chandan v. Emperor*.

[See however ('26) AIR 1926 All 403 (403,404):48 All 501:27 Cr.L.J. 945, *Bhagwat Singh v. Emperor*. (Order for re-trial is incidental order.)]

8. ('23) AIR 1923 Oudh 44 (45):24 Oudh Cas 286: 22 Cri L Jour 766, *Rameshwar Baksh Singh v. Emperor*.

35. Subsequent events — Power to take notice of. — An appellate Court has to look to the offence as charged, and the conviction should not be disturbed because it thinks that, owing to subsequent events, the parties may have committed another offence.¹ Thus, facts which happened subsequent to the conviction or verdict cannot be utilised for the purpose of altering the verdict or of reducing the sentence.²

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But where, after the verdict of the jury, it was discovered that the foreman of the jury had taken bribe, the verdict was set aside.³

36. Power to direct sentences to run concurrently. — The High Court can, under this section, and S.561A of the Code, act under S.397 and direct separate sentences in separate trials to run concurrently.¹

37. Appellate Court cannot canvass previous convictions. — An appellate Court cannot go into the legality of previous convictions or of orders passed against the accused.¹

38. Appellate Court, when to report to the High Court. — Where the appellate Court comes to the conclusion that the sentences in respect of the convicted persons ought to be enhanced, and therefore wishes to report to the High Court, it should do so in separate proceedings and not keep the appeal undisposed of till the report is made and orders passed thereon.¹ An appellate Court should not refer the matter of the appeal to the High Court; it should decide the appeal itself.²

39. "Any amendment or any consequential or incidental order" — Clause (d). — The appellate Court has, under clause (d), power to make any amendment, or any consequential or incidental orders that may be just and proper.¹

[See however ('36) AIR 1936 Sind 188 (189): 30 S L R 322: 38 Cr.L.J. 168, *Emperor v. Manu Chabilo*. (Person ordered to give security under Ch. 8 failing to do so — Trial Magistrate ordering that he should be detained in simple imprisonment — High Court in revision can direct that the imprisonment should be rigorous.)]

Note 35

1. ('68) 9 Suth W R Cr 65 (65, 66), *Ramjee Doss v. Meeajan Sheikh*.
2. ('29) AIR 1929 Cal 92 (93): 30 Cri L Jour 484, *Intaz Mandal v. Emperor*.
3. ('33) AIR 1933 Cal 639 (640): 60 Cal 751: 34 Cr. L. J. 1072, *Hafez Molla v. Emperor*.

Note 36

1. ('31) AIR 1931 Bom 529 (529): 33 Cr. L. J. 77, *Nagappa Vyankappa v. Emperor*.
[See ('29) AIR 1929 All 585 (585): 51 All 888: 30 Cr. L. J. 904, *Sis Ram v. Emperor*.]
See also S. 397 Note 11.

Note 37

1. ('24) AIR 1924 Rang 295 (297): 25 Cri L Jour 1303, *On Pe v. Emperor*.

Note 38

1. ('84) 1884 All W N 130 (130), *Empress v. Durga Prasad*.
2. ('15) AIR 1915 All 185 (186): 16 Cri L Jour 433, *Emperor v. Mohan Lal*.
('68) 9 Suth W R Cr 5 (5), *Sreekissan v. Jugal*.
('69) 11 Suth W R Cr 24 (24), *Queen v. Nussooruddeen*.
('14) AIR 1914 Low Bur 226 (226): 7 Low Bur Rul 251: 15 Cr. L. J. 667, *Emperor v. Sulaiman*.
See also S. 438 Note 4.

Note 39

1. ('36) AIR 1936 Cal 529 (533, 534): 37 Cri L Jour 1092: 1 L R (1937) 1 Cal 169, *Netai Chandra v. Emperor*.

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Clause (d) deals with orders to be passed *after the appeal has been heard* and cannot apply to matters that may arise *pending* appeal, such as the release of the appellant on bail.² Nor can it apply to matters at the stage of *admission* of the appeal. Thus, an order cannot be passed under this clause excusing the delay in filing an appeal after limitation, inasmuch as the application of this section is legitimate only after the preliminary stage indicated in Ss. 421 and 422 has been passed, *i. e.*, after the appeal is validly admitted.³ It has, however, been held in the case cited below^{3a} that an order dispensing with security by a person convicted under S. 107 of the Code can be passed *pending appeal* as an incidental order under clause (d). It is submitted that this is not correct. Clause (d) should be construed along with the first portion of the section which makes it clear that an order under clause (d) can be passed only *after perusing the record and hearing the appeal*.

Whether a particular order is "consequential or incidental" depends on the terms of the order under consideration in each particular case and the circumstances in which it is made.⁴

In *Mehi Singh v. Mangal Khanda*,⁵ a Full Bench of the High Court of Calcutta observed as follows:

"'Consequential or incidental' orders, within the purview of the provision, must fall under one or other of the two heads :

First, there are orders which follow as a matter of course, being the necessary complements to the main order passed without which the latter would be incomplete or ineffective. Such are directions as to the refund of fines realized from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under section 250 ; and for them no separate authority is needed. *Secondly*, there are orders which, though ancillary in character, require more than the support of a criminal Court's inherent jurisdiction, and could not be passed without express authority."

The principle in *Mehi Singh's case* was followed by the Allahabad High Court in the undermentioned case.⁶ The Rangoon High Court⁷ has, however, dissented from it.

The following have all been held to be "consequential" or "incidental" orders within the meaning of clause (d) :

- (1) An order for costs under S. 148, sub-s. (3) is incidental to an order for possession under S. 145.⁸

2. ('34) AIR 1934 All 845 (845) : 36 Cri L Jour 177, *Darsu v. Emperor*.

3. ('23) AIR 1923 Mad 95 (96) : 24 Cri L Jour 89, *In re Mittoor Moideen*.

3a. ('32) AIR 1932 All 680 (681):54 All 861:33 Cr.L.J.731, *Katwaroo v. Emperor*.

4. ('33) AIR 1933 Rang 288 (290, 291) : 11 Rang 361 : 35 Cri L Jour 1 (FB), *Mg Mya Khin v. Maung Po Htwa*.

5. ('11) 12 Cri L Jour 529 (531): 12 I. C. 297 : 39 Cal 157 (FB).

6. ('22) AIR 1922 All 107 (109) : 44 All 401 : 23 Cr. L. J. 349, *Dunn v. Emperor*.

7. ('40) AIR 1940 Rang 278 (279) : 1940 R L R 502, *King v. Mg Khin Maung*.

(S. 423 amplifies powers of appellate Court — But it does not empower it to pass any order which might have been made by lower Court — Order of acquittal by High Court in appeal or revision — Order for compensation under S. 250 is not consequential on or incidental to order of acquittal.)

[See also ('33) AIR 1933 Rang 288 (291) : 11 Rang 361 : 35 Cri L Jour 1 (FB), *Mg Mya Khin v. Maung Po Htwa*.]

8. (33) AIR 1933 Rang 288 (291) : 11 Rang 361 : 35 Cr.L.J. 1 (F B), *Mg Mya Khin v. Maung Po Htwa*. (Such order may be passed by High Court in revision of order passed by Magistrate under S. 145.)

- (2) An order under S. 517 for restoration of property to the person entitled may be passed as a consequential or incidental order.⁹
- (3) An order under S. 520: see Notes to S. 520.
- (4) Where a member of a Bench of Magistrates has not signed the judgment, the appellate Court can, as an incidental order, send the case back to him for such signature.¹⁰
- (5) An order under S. 81 of the Court-fees Act (now S. 546A, Criminal Procedure Code) can be passed as an incidental order.¹¹
- (6) An order under S. 471 of the Code is incidental to an order of acquittal on the ground of insanity.¹²
- (7) An order sending a case back for re-hearing can be passed under this clause.¹³
- (8) An order directing refund of compensation on the setting aside of an order for compensation is a consequential or incidental order within clause (d).¹⁴

Before the present Code, there was no provision corresponding to clause (d) of this section and it was held on the language of S. 250, that it was the *Magistrate by whom the case was heard* that could pass an order under that section and not an appellate Court.¹⁵ The introduction of clause (d) would appear to make a difference. It has, however, been held that an order under S. 250 is not 'consequential' or 'incidental' to an order of discharge or acquittal and cannot be passed by the appellate Court under this clause.¹⁶ See also S. 250 Note 6.

See also S. 148 Note 6.

9. ('28) AIR 1928 Lah 567 (567, 568, 571): 10 Lah 187: 29 Cr. L. J. 810, *Thiraj v. Emperor*.

(106) 4 Cr. L. J. 370 (371): 3 A L J 770: 1906 A W N 256, *Emperor v. Gopi Nath*. (Order as to property which it did not previously include.)

(14) AIR 1914 Cal 658 (660): 15 Cr. L. J. 184, *Hagu Biswas v. Manmatha Nath*. See also S. 520 Note 5.

10. ('19) AIR 1919 All 308 (308): 41 All 217: 20 Cr. L. J. 214, *Gopal Das v. Emperor*.

11. ('25) AIR 1925 Mad 136 (137): 47 Mad 914: 25 Cr. L. J. 1213, *Thimmiah v. Emperor*.

12. ('22) AIR 1922 Mad 54 (55): 23 Cr. L. J. 71, *A. B. Mahaminad v. Emperor*. ('15) AIR 1915 Low Bur 34 (35): 8 Low Bur Rul 290: 16 Cr. L. J. 670, *Emperor v. Nga E Maung*.

13. ('14) AIR 1914 Mad 50 (51): 15 Cr. L. J. 409, *Public Prosecutor v. Raver Unithiri*.

14. ('03) 25 All 315 (316): 1903 A W N 57, *In the matter of Safdar Hussain*.

15. ('75) 8 Mad H C R vii (vii): 2 Weir 314.

16. ('11) 12 Cr. L. J. 529 (531, 532): 39 Cal 157: 12 I. C. 297 (FB), *Mehi Singh v. Mangal Khanda*. (Overruling 11 Cri L Jour 46.)

(140) AIR 1940 Rang 278 (279): 1940 R L R 502, *King v. Mg. Khin Maung*.

(139) AIR 1939 Sind 321 (322): 41 Cr. L. J. 53: I L R (1940) Kar 119, *Emperor v. Muhammad Alan*.

(126) AIR 1926 Lah 427 (427): 7 Lah 152: 27 Cri L Jour 570, *Notified Area, Kharar v. Karia Ram*.

(124) AIR 1924 All 224 (224): 46 All 80: 25 Cri L Jour 967, *Chedi v. Ram Lal*.

(106) 3 Cr. L. J. 441 (442): 28 All 625: 3 A L J 382: 1906 A W N 145, *Emperor v. Chittan*.

(101) 3 Bom L R 841 (842), *Hari Chand v. Fakir Sadrudin*. (No reference to clause (d) was made.)

[See also ('33) 1933 Rang 288 (290): 11 Rang 361: 35 Cri L Jour 1 (FB), *Ma Mya Khin v. Maung Po Htwa*. (Quere.)]

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Notes 39-40

The following orders have been held not to be within clause (d):

- (1) Order as to costs of the *appeal itself*¹⁷ or of the adjournment of the appeal.¹⁸
- (2) Order setting aside an order under S. 31 of the Court-fees Act¹⁹ (now S. 546A, Criminal Procedure Code.)
- (3) Order reviewing the order of the predecessor.²⁰
- (4) Order staying criminal proceedings pending decision of civil Court.²¹ But where an order under S. 476, sub-s. (1), is set aside, proceedings under S. 476, sub-s. (2), which had been begun may be stayed under clause (d).²²

As to whether the appellate Court can expunge the remarks occurring in the lower Court's judgment, see S. 561A Note 7.

40. Verdict of jury — Sub-section (2). — Section 418 provides that an appeal in jury cases is limited to questions of *law*.¹ This sub-section provides that an appellate Court cannot alter or reverse the verdict of a jury unless such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding by the jury of the law as laid down by him.^{1a} This sub-section should not, however, be construed as controlling S. 418 and as laying down that no question of law can be taken in appeal unless there is a misdirection by the Judge or a misunderstanding by the jury of the law as laid down by him. Where the trial is illegal in fact, it may be set aside for *that* reason only and

17. ('33) AIR 1933 All 264 (269) : 55 All 301 : 34 Cri L Jour 414 (F B), *Kapoor Chand v. Suraj Prasad*.

(25) AIR 1925 Mad 438 (440) : 48 Mad 262 : 26 Cr. L. J. 707 (FB), *Veerappa Naidu v. Avudayanmal*. (It does not necessarily follow from an order passed in revision.) [But see ('14) AIR 1914 Bom 128 (128) : 15 Cri L Jour 522, *Emperor v. Ganpat Sitaram*.]

18. ('02) 1902 All W N 59 (59, 60), *King-Emperor v. Chhabraj Singh*.

19. ('09) 9 Cr. L. J. 83 (83, 84) : 31 Mad 547, *Emperor v. Maddipatla Subbarayudu*.

20. ('29) AIR 1929 Bom 309 (311) : 53 Bom 578 : 31 Cr. L. J. 309, *Emperor v. Lakshman Ram Shet*.

21. ('31) AIR 1931 Pat 411 (413, 414) : 33 Cr. L. J. 147, *Jagannath Acharya v. Rajagopalachari*.

22. ('12) 13 Cr. L. J. 492 (492) : 6 Low Bur Rul 49 : 15 I. C. 492, *Nga San Tin v. Emperor*.

Note 40

1. ('34) AIR 1934 Pat 309 (310) : 13 Pat 529 : 35 Cr. L. J. 1104, *Nanhak Ahir v. Emperor*.

See also S. 418 Note 2.

1a. ('38) AIR 1938 Cal 51 (58) : 39 Cri L Jour 161 : ILR (1938) 1 Cal 290, *Goloke Behary v. Emperor*. (Misdirection — What amounts to — Failure to marshal evidence relating to each element of charge.)

('38) AIR 1938 Cal 460 (463) : 39 Cri L Jour 674, *Ebadi Khan v. Emperor*.

('36) AIR 1936 Mad 516 (519) : 37 Cri L Jour 909 : 59 Mad 904, *Ratnasabapathi Goundan v. Public Prosecutor*.

('34) AIR 1934 Cal 105 (111) : 61 Cal 6 : 35 Cri L Jour 554, *Khoda Bux Haji v. Emperor*. (Arguments on behalf of the convicted person must be limited to the matters referred to in sub s. (2) of S. 423.)

[See ('39) AIR 1939 Bom 457 (460) : 41 Cri L Jour 176 : ILR (1939) Bom 648, *Emperor v. Jhina Soma*. (No Court will interfere with the verdict of a jury, even if it may think itself differently of the evidence, or because it thinks that another jury may have come to a different conclusion—To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury to a farce.)]

no question of misdirection by the Judge or misunderstanding by the jury of the law arises at all.^{1b}

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Section 537 provides that no finding, sentence or order of a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in any proceeding, or on account of any misdirection in any charge to the jury unless such error, etc., has occasioned a *failure of justice*. Where there is an error of law or a misdirection by the Judge or a misunderstanding by the jury of the law as laid down by him and there has been a *consequent* erroneous verdict and failure of justice, the appellate Court is entitled to interfere with the verdict.² Where there is no misdirection and the verdict

1b. ('27) AIR 1927 Cal 949(950,951):28 Cr.L.J.449, *Kasem Ali v. Emperor*. (Only two persons charged for conspiracy between themselves and convicted — One of them subsequently acquitted — The conviction of the other also should be set aside.)

('26) AIR 1926 Lah 193 (191) : 27 Cri L Jour 793, *Fit-maurice v. Emperor*.

See also the following cases :

('27) 28 Cri L Jour 108 (110) : 99 Ind Cas 236 (Cal), *Basanta Kumar Gossain v. Emperor*. (No misdirection but verdict on mere speculation set aside.)

('31) AIR 1931 Bom 311 (312) : 55 Bom 435 : 32 Cr. L. J. 1077, *Emperor v. Issuf Mohammad*. (Improper letting of evidence — Effect on jury — Verdict may be set aside.)

('23) AIR 1923 Pat 142 (142) : 23 Cri L Jour 141, *Maddoddar Ram v. Emperor*. (Where during the trial before a jury, the Public Prosecutor had read an alleged confession of the accused which not having been recorded according to law was ruled out as inadmissible, *held* that the irregularity of allowing it to be read might have influenced the minds of the jury, however carefully the Judge may have endeavoured to remove any impression caused thereby and that the accused was entitled to a re-trial.)

('67) 7 Suth W R Cr 6 (6), *Queen v. Chand Bagdee*. (A conviction on no evidence is wrong in point of law.)

('71) 16 Suth W R Cr 19 (19, 20), *Queen v. Rutton Dass*. (Do.)

(1864) 1 Suth W R Cr 21 (21), *Queen v. Gopaul Bhreewala*. (In a case tried by a jury every petition of appeal should state distinctly in what respect the law has been contravened.)

2. See the following cases :

('37) AIR 1937 Pat 440 (442) : 38 Cri L Jour 919 : 16 Pat 413, *Rameshwar Singh v. Emperor*.

('08) 18 Mad L Jour 541 (541):8 Cri L Jour 397 : 4 M L T 194, *In re Gangi Reddy Buchanna*. (Charge to jury—Omission to refer to plea of accused or to evidence bearing thereon is misdirection.)

('34) AIR 1934 Pat 309 (310):13 Pat 529:35 Cr.L.J. 1104, *Nanhak Ahir v. Emperor*.

('09) 9 Cr L Jour 308(309):1 Ind Cas 547 (Mad), *Kuppan v. Emperor*. (Failure of Judge to instruct jury that confession of accused is no evidence against co-accused is misdirection.)

('27) 28 Cri L Jour 19 (22):99 Ind Cas 51 (Cal), *Mamat Ali v. Emperor*. (Omission to place before jury evidence favourable to accused is error of law.)

('20) AIR 1920 Cal 406 (406):21 Cr.L.J. 829, *Edon Karikar v. Emperor*. (Summing up charge to jury confusing—Retrial ordered.)

('21) AIR 1921 Cal 257 (257, 258):22 Cr.L.J. 475, *Tenaram v. Emperor*. (Omission to tell jury that adverse inference might be drawn from failure to examine material witnesses and omission to draw attention to discrepancies in evidence of principal witnesses are misdirections.)

('20) AIR 1920 Cal 980(982, 986):21 Cr.L.J. 802, *Suryakanta v. Emperor*. (Failure to direct jury to particular aspect of case or telling jury that statement of one accused should be taken for what it is worth against co-accused—Misdirection.)

('66) 6 Suth W R Cr 17 (17), *Queen v. Khutub Sheikh*. (Omission to point out to jury danger of relying upon uncorroborated testimony of accomplices.)

('12) 13 Cri L Jour 271 (272) : 14 I.C. 655 (Mad), *Venkattan v. Emperor*. (Failure to bring to notice of jury fact of great importance elicited in cross-examination.)

('68) 10 Suth W R Cr 7 (9), *Queen v. Ramgopal*. (Charge not bearing character of summing up of evidence.)

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- ('67) 8 Suth W R Cr 26 (27), *Queen v. Sheik Tufani*.
 ('67) 8 Suth W R Cr 19 (25, 26), *Queen v. Nausab Jan*. (Omission to advise jury not to convict upon uncorroborated testimony of approver.)
 ('20) AIR 1920 Cal 698 (699) : 22 Cri L Jour 60, *Asimuddin v. Emperor*. (Judge not telling jury that there was no evidence against accused.)
 ('74) 11 Bom H C R Cr 166 (169, 170), *Reg. v. Sakharan Mukundji*. (Refusal to admit proper evidence, and subsequently withdrawing from the jury evidence once legally admitted.)
 ('10) 11 Cri L Jour 683 (683, 684) : 8 Ind Cas 573 (Mad), *Public Prosecutor v. Papakha*. (Telling jury to leave out of consideration evidence of witness and retracted confession of accused.)
 ('10) 11 Cri L Jour 334 (334) : 5 Ind Cas 935 (Mad), *In re Shivappa Higada*.
 ('10) 11 Cri L Jour 222 (222) : 6 Ind Cas 14 (Mad), *In re Suretti*. (Failure to explain law to jury and omission to explain definition of robbery.)
 ('10) 11 Cri L Jour 187 (188) : 4 Ind Cas 1103 (Mad), *In re Manjunath*.
 ('13) 14 Cri L Jour 623 (623) : 21 I. C. 671 (Mad), *In re Subbu Thevan*. (Judge explaining away fact without leaving it to jury to decide.)
 ('16) AIR 1916 Mad 851 (854) : 39 Mad 449 : 16 Cr.L.J. 294, *Annava Muthiriyam v. Emperor*. (Failure to warn jury against considering inadmissible evidence though consented to by the accused.)
 ('03) 1 Weir 446 (447), *In re Mookkandi Maniagarar*.
 ('03) 26 Mad 467 (468) : 2 Weir 517, *Guzzala Hanuman v. Emperor*.
 ('06) 4 Cri L Jour 502 (503) : 1M L T 350, *Para Thandan v. Emperor*. (Omission to direct jury to give benefit of doubt was under the circumstances of the case, held to be misdirection.)
 ('81) 10 Cal L R 4 (6), *Jugut Mohini Dassee v. Madhu Sudhan Dutt*.
 ('08) 8 Cri L Jour 6 (8) : 35 Cal 531 : 7 C. L. J. 599 : 12 C W N 774, *Natabar Ghose v. Emperor*. (Material ingredient of offence not stated to jury.)
 ('21) AIR 1921 Cal 64 (65) : 23 Cr. L. J. 344, *Aimuddi Chowkidar v. Emperor*.
 ('07) 5 Cri L Jour 78 (80) : 30 Mad 44, *Mari Valayan v. Emperor*. (Omission to lay down law by which jury are to be guided.)
 ('08) 7 Cr. L. J. 358 (358) : 18 M L J 250, *In re Acchalha Beori*. (Telling jury that confessions to police if followed by production of stolen property are admissible is misdirection.)
 ('08) 7 Cr. L. J. 325 (327) : 31 Mad 127 : 18 M L J 66, *In re Sankappa Rai*. (Directing jury that statement of witness before investigating Magistrate is strong evidence against accused.)
 ('18) AIR 1918 Cal 314 (318) : 19 Cr. L. J. 81, *Asraf Ali v. Emperor*.
 ('26) AIR 1926 Cal 1107 (1109) : 27 Cr. L. J. 1402, *Jahur Sheikh v. Emperor*.
 ('26) AIR 1926 Cal 728 (730) : 27 Cr. L. J. 398, *Hari Charan v. Emperor*. (Omission to warn jury not to take into account conviction of co-accused vitiates verdict.)
 ('26) AIR 1926 Cal 235 (238) : 53 Cal 181 : 26 Cr. L. J. 1577, *Abdul v. Emperor*.
 ('26) AIR 1926 Cal 226 (227) : 26 Cr. L. J. 1021, *Gadadhar Sarkar v. Emperor*. (Charge to jury should not tend to make the jury forget distinction between knowledge and mere suspicion on accused's part regarding offence.)
 ('21) AIR 1921 Cal 697 (698) : 22 Cr. L. J. 606, *Abdul Rahim Mir v. Emperor*.
 ('14) AIR 1914 Cal 549 (550) : 15 Cr. L. J. 147, *Ofel Mollah v. Emperor*. (Judge's opinion expressed in dogmatic and unqualified terms held to be misdirection.)
 ('20) AIR 1920 Cal 90 (91) : 21 Cr. L. J. 183, *Emperor v. Abdul Sheikh*.
 ('27) 28 Cri L Jour 108 (110) : 99 Ind Cas 236 (Cal), *Basant Kumar Gossain v. Emperor*. (Acquittal ordered when the evidence cannot, in any proper view of the case, support a conviction.)
 ('98) 25 Cal 711 (713, 714) : 2 Cal W N 369, *Taju Pramanik v. Queen-Empress*.
 ('98) 25 Cal 561 (563, 564), *Biru Mandal v. Queen-Empress*. (Omission to explain law to jury.)
 ('98) 25 Cal 416 (418, 419) : 2 Cal W N 347, *Nabi Baksh v. Queen-Empress*.
 ('98) 25 Cal 230 (231, 233), *Ali Fakir v. Queen-Empress*.
 ('96) 23 Cal 252 (253), *Queen-Empress v. Imam Ali Khan*. (Non-direction amounting to misdirection.)
 ('05) 2 Cri L Jour 311 (313) : 1 C L J 385, *Panchu Mandal v. Emperor*.
 (1900) 4 Cal W N 576 (581), *Sadhu Sheikh v. Empress*.
 (1900) 4 Cal W N 196 (200), *Rahmat Ali v. Empress*. (Omission to point out circumstances favourable to accused.)
 (1900) 4 Cal W N 193 (196), *Sri Prasad Misser v. Empress*. (Omission to explain law to jury.)

is a reasonable and honest one, the appellate Court cannot interfere.³ Nor can it interfere, even if there is a misdirection, unless it has

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- (197) 1 Cal W N 301 (302, 303), *Tomji Paramanik v. Empress*. (Failure to put before jury all elements which constitute offence.)
 (199) 26 Cal 49 (50), *Basanta Kumar v. Queen-Empress*.
 (1908) 7 Cri L Jour 315 (317) : 7 C L J 246, *Kali Singh v. Emperor*. (It is misdirection for Judge to say that he sees no reason to disbelieve a particular witness.)
 (1907) 5 Cri L Jour 424 (426) : 34 Cal 325, *Dasarath Mondal v. Emperor*.
 (1906) 3 Cri L Jour 144 (147, 148) : 10 C W N 153, *Sourendra Nath v. Emperor*. (Omission to warn jury that statement of one accused is not to be used against co-accused.)
 (1909) 9 Cri L Jour 401 (405) : 32 Mad 46 : 1 Ind Cas 867, *In re Giddigadu*.
 (1903) 26 Mad 38 (40) : 2 Weir 733, *Thandraya Mudaly v. Emperor*. (Failure to tell jury that confession caused by promise is irrelevant.)
 (1908) 21 Mad 83 (90, 91) : 2 Weir 503, *Queen-Empress v. Raman*.
 (1910) 11 Cr. L. J. 557 (558) : 8 Ind Cas 52 (Cal), *Asfar Sheikh v. Emperor*. (Asking jury to accept statement in the first information in preference to evidence in the case.)
 (1910) 11 Cri L Jour 538 (539) : 7 Ind Cas 915 (Cal), *Harendra Pal v. Emperor*.
 (1910) 11 Cr. L. J. 9 (10) : 4 Ind Cas 543 (Cal), *Emperor v. Nakul Kabiraj*. (Failure to place evidence fairly before jury.)
 (1930) AIR 1930 Cal 370 (378) : 58 Cal 96 : 32 Cr. L. J. 10, *Government of Bengal v. Santiram Mondal*.
 (1929) AIR 1929 Cal 726 (727) : 57 Cal 619 : 31 Cri L Jour 909, *Khiro Mondal v. Emperor*. (Direction to jury to consider question of voluntary nature of confession is misdirection.)
 (1930) AIR 1930 Cal 276 (278) : 57 Cal 1266 : 31 Cr. L. J. 1207, *Panchanan Gogai v. Emperor*. (Omission to tell jury to reject evidence of hostile witness altogether.)
 (1926) AIR 1926 Cal 584 (585) : 27 Cr. L. J. 125, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Sader Saik*. (Witnesses for prosecution not present—Court holding that there is no evidence and directing to return verdict of not guilty—It is misdirection.)
 (1930) AIR 1930 Cal 708 (709) : 58 Cal 580 : 32 Cri L Jour 228, *Nawab Ali v. Emperor*. (Non-direction amounting to mis-direction.)
 (1933) AIR 1933 Cal 509 (511) : 34 Cri L Jour 811, *Chittya Ranjan v. Emperor*. (Caution against approver's testimony being not sufficient in absence of independent corroboratory evidence not given—Conviction set aside.)
 (1931) AIR 1931 Cal 617 (617) : 33 Cri L Jour 40, *Bhupnath Mondal v. Emperor*. (Wrong explanation as to presumption under S. 114, Evidence Act.)
 (1932) AIR 1932 Oudh 28 (31) : 33 Cri L Jour 275, *Emperor v. Zamin*.
 (1934) AIR 1934 Oudh 354 (359) : 10 Luck 119 : 35 Cri L Jour 1066, *Lal Behari Singh v. Emperor*. (Point of law as to necessity of charge for conviction not brought to notice of jury.)
 (1925) AIR 1925 Pat 797 (805, 806) : 4 Pat 626 : 27 Cri L Jour 49, *Rupan Singh v. Emperor*.
 (1900) 6 Cal 247 (249) : 7 C L R 74, *Gogun Chunder Ghose v. Empress*. (Judgment in civil suit out of which criminal prosecution arose referred to by Judge in his charge to jury.)
 (1926) AIR 1926 Mad 370 (370) : 27 Cri L Jour 176, *In re Ambalam*. (Where the defence case was not adequately put before the jury and evidence was admitted which should have been excluded.)
 (1929) AIR 1929 Cal 170 (171) : 30 Cri L Jour 912, *Dwarkadas v. Emperor*. (Non-direction amounting to misdirection.)
 3. (1927) AIR 1927 All 108 (109) : 27 Cri L Jour 1355, *Jia Lal v. Emperor*.
 (1911) 12 Cri L Jour 193 (195) : 10 Ind Cas 684 (Cal), *Rashidazzaman v. Emperor*.
 (1909) 9 Cr. L. J. 567 (567) : 32 Mad 179 : 2 I C 807, *Public Prosecutor v. Bonigiri Pottigadu*.
 (1908) 2 Cal W N 702 (709, 718), *Queen-Empress v. Bhairab Chunder*. (High Court cannot go into the merits of the verdict in such a case.)
 (1924) AIR 1924 Mad 230 (230) : 25 Cr. L. J. 269, *Mulimayandi Thevan v. Emperor*. (Where misdirection to the jury is not proved the verdict of the jury will be upheld in appeal.)
 (1927) AIR 1927 Oudh 549 (549) : 28 Cri L Jour 937, *Babban v. Emperor*.

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resulted in the verdict being erroneous⁴ and has further occasioned a failure of justice.⁵

- (‘34) AIR 1934 All 1032 (1033) : 36 Cri L Jour 322, *Banshi Dar v. Emperor*. (The High Court cannot go into questions of fact in such cases.)
- (‘27) AIR 1927 Pat 370 (375) : 7 Pat 15 : 28 Cr. L. J. 692, *Ram Chariter Singh v. Emperor*. (Where the High Court is of opinion that the accused should have been acquitted and that the verdict is against the weight of the evidence, the Court may direct a copy of the judgment to be sent to the Local Government for necessary action.)
- (‘30) AIR 1930 Cal 712 (713) : 32 Cr. L. J. 236, *Hafezali Haldar v. Emperor*. (It is for appellant to show affirmatively that there has been misdirection.)
- (‘30) AIR 1930 Cal 437 (439) : 32 Cr. L. J. 455, *Mohiuddin v. Emperor*.
- (‘93) 1893 Rat 644 (652), *Queen-Empress v. Yesu*. (Non-direction is not misdirection—Verdict will not be interfered with unless non-direction amounts to misdirection.)
- (‘20) AIR 1920 Cal 271 (271) : 46 Cal 635 : 21 Cr. L. J. 8, *Mohini Mohan v. Emperor*. (Verdict on circumstantial evidence alone—No interference.)
[See (‘66) 5 Suth W R Cr 3 (4), *Queen v. Narain Bagdee*.]
[See also (1865) 2 Suth W R Cr 5 (5), *Queen v. Gopaul Das*. (Pleas that the prosecutor is at feud with the prisoner and that the prisoner’s confession was given at the instance of the police are not grounds of appeal.)]
4. (‘40) AIR 1940 Lah 87 (88) : 41 Cri L Jour 482, *A. M. Mathews v. Emperor*. (‘Erroneous’ explained.)
- (‘32) AIR 1932 Cal 474 (478) : 59 Cal 1361 : 33 Cri L Jour 854, *Saroj Kumar v. Emperor*.
- (‘29) AIR 1929 All 364 (364) : 30 Cr. L. J. 622, *Abdul Majid Khan v. Emperor*. (Court of revision also cannot do so.)
- (‘08) 8 Cri L Jour 35 (36) : 10 Bom L R 565, *In re Shambhulal Ficandas*.
- (‘35) AIR 1935 All 103 (105) : 36 Cri L Jour 612, *Aziz Khan v. Emperor*.
- (‘03) 27 Bom 626 (632) : 5 Bom L R 599, *Emperor v. Waman Shivram*.
- (‘89) 1889 Rat 452 (454), *Queen Empress v. Lalsing*.
- (‘29) AIR 1929 Pat 313 (315) : 8 Pat 344 : 30 Cr. L. J. 721, *Ram Das v. Emperor*.
[See (‘09) 10 Cri L Jour 11 (12) : 2 Ind Cas 434 (Mad), *Toolipatti Rama Goundan v. Emperor*.]
[See also (‘34) AIR 1934 Cal 847 (849) : 62 Cal 337 : 36 Cri L Jour 358, *Ilu v. Emperor*. (In an appeal from a trial by a jury, on a question as to misdirection as to evidence, the High Court has to see whether, on a proper direction and having all the circumstances before them, the jury, as reasonable men, would have found that the charge was proved.)]
5. (‘40) AIR 1940 Lah 87 (89) : 41 Cri L Jour 482, *A. M. Mathews v. Emperor*.
- (‘37) AIR 1937 Pat 263 (271, 274) : 15 Pat 817 : 38 Cri L Jour 673, *Samarendra Kumar v. Emperor*.
- (‘36) AIR 1936 Pat 46 (47) : 37 Cri L Jour 320, *Hari Mahto v. Emperor*.
- (‘09) 9 Cri L Jour 93 (93) : 4 M L T 483, *In re Kaiyan*.
- (‘03) 5 Bom L R 207 (208), *Emperor v. Apunna Devappa*.
- (‘26) AIR 1926 All 429 (431) : 27 Cr. L. J. 785, *Dhiraji v. Akasi*. (Misdirection must have affected jury’s verdict.)
- (‘27) AIR 1927 Cal 680 (682):54 Cal 539:28 Cr.L.J. 689, *Ayub Mandal v. Emperor*.
- (‘33) 1933 Mad W N 320 (323), *Arumugha Goundan v. Emperor*.
- (‘09) 10 Cri L Jour 498 (499) : 4 Ind Cas 120 (Cal), *Keshab Pal v. Emperor*. (No failure of justice — No interference.)
- (‘24) 25 Cr L.J. 294 (295):76 I.C. 966 (967) (Cal) (FB), *Emperor v. Charu Chunder*.
- (‘70) 13 Suth W R Cr 23 (24), *Queen v. Sheppard*. (No interference unless Judge has manifestly put the evidence before jury in such a way as is likely to mislead them.)
- (‘73) 19 Suth W R Cr 71 (72) : 10 Beng L R App 36, *Queen v. Raj Kumar Bose*.
- (‘09) 9 Cr. L. J. 311 (311, 312) : 1 Ind Cas 546 (Mad), *Sinna Thevan v. Emperor*. (Misdirection not prejudicial to accused but favourable to them—No interference.)
- (‘66) 5 Suth W R Cr 80 (87, 93) : Beng L R Sup Vol 459 (FB), *In re Elahee Buksh*. (Improper advice given by a judge to the jury upon a question of fact, or the omission of the judge to give that advice which he, in the exercise of a sound judicial discretion ought to give the jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty.)

The admission of inadmissible evidence and the rejection of admissible evidence during the trial are questions of law. Where the Judge in his charge to the jury puts inadmissible evidence before the jury or fails to warn them against considering such evidence, there will be a misdirection which will, subject to the provisions of S. 537, form a ground of interference in appeal.⁶ Where inadmissible evidence has been admitted during the trial, but there has been no misdirection, it will nevertheless be *an error of law* and will, subject to the provisions of S. 537, be a ground of appeal.^{6a}

Where a verdict is set aside on the ground of misdirection or error of law, the appellate Court should ordinarily direct a re-trial⁷ though where the Court is satisfied that the evidence is wholly insufficient to support the conviction,⁸ or where the accused has been sufficiently

('34) AIR 1934 Pat 309 (310) : 13 Pat 529 : 35 Cr. L. J. 1104, *Nanhak Ahir v. Emperor*. (Proper direction to jury—Jury acting on evidence of approver—High Court cannot interfere.)

('28) AIR 1928 Pat 326 (330, 333) : 29 Cr. L. J. 325, *Mt. Champa Pasin v. Emperor*. (The considerations governing the appeal from the trial held with the aid of assessors differ greatly from those governing an appeal from the trial by a jury—In the latter case the appeal is restricted by the provisions of Ss. 423 (2) and 537, whereas in the former case the whole case is before the appellate Court.)

('35) AIR 1935 All 103 (105) : 36 Cr. L. J. 612, *Aziz Khan v. Emperor*.

[See also ('14) AIR 1914 P C 155 (164) : 15 Cr. L. Jour 326 (PC), *Ibrahim v. Emperor*. (Objectionable evidence not affecting verdict of jury—No miscarriage of justice.)]

('26) AIR 1926 Cal 147 (148) : 27 Cr. L. J. 277, *Keramat Mandal v. Emperor*. (Contravention of law by the Judge on an unimportant matter and having a remote bearing on the question in issue does not justify reversal of verdict of jury.)]

See also S. 297 Note 13.

6. See ('89) 12 Mad 196 (197) : 2 Weir 519, *Queen-Empress v. Arumugha*. (A Sessions Judge should caution the jury not to accept an approver's evidence unless it is corroborated. It is a misdirection not to do so.)

('31) AIR 1931 Cal 65 (66) : 32 Cr. L. Jour 421, *Obedali Sheikh v. Emperor*. (Inadmissible evidence referred to in charge.)

('98) 25 Cal 736 (742) : 2 C W N 484, *Abbas Peada v. Queen-Empress*.

('03) 27 Bom 626 (632) : 5 Bom L R 599, *Emperor v. Waman Shivram*.)

6a. [See ('26) AIR 1926 Bom 238 (240) : 27 Cr. L. Jour 481, *Kuthubuddin Khan v. Emperor*. (Misreception of evidence held on facts not to occasion failure of justice.)]

('31) AIR 1931 Bom 311 (313) : 55 Bom 435 : 32 Cr. L. Jour 1077, *Issuf Mohammad v. Emperor*. (Misreception of evidence which might have influenced the jury—Verdict set aside.)]

7. ('26) AIR 1926 All 429 (431, 432) : 27 Cr. L. J. 785, *Dhiraji v. Akasi*. (It is only under special circumstances that Court should order acquittal.)

[See also ('19) AIR 1919 Cal 115 (116) : 46 Cal 212n : 20 Cr. L. Jour 225, *Beni Madhub Kundu v. Emperor*. (On appeal to the High Court the verdict of the jury was set aside with the remark that it would be open to the Crown to proceed further with the case if it be so advised and that the accused be enlarged on bail till a fresh trial, if any. Held, the order of the High Court was an order for re-trial subject to the right of the Crown, if it thought fit, to withdraw the proceeding.)]

8. ('71) 15 Suth W R Cr 37 (39, 40) : 6 Ben L R App 108, *Queen v. Mahima Chandra*.

('02) 29 Cal 782 (791) : 6 C W N 553, *Jamiruddi Masalli v. Emperor*.

('99) 2 Weir 386 (388), *Kizhakedath Unniram v. Queen*. (Evidence worthless—No re-trial was ordered.)

('26) AIR 1926 All 429 (431, 432) : 27 Cr. L. J. 785, *Dhiraji v. Akasi*.

('98) 25 Cal 711 (714, 716) : 2 C W N 369, *Taju Parammanick v. Queen-Empress*. (Nowhere does the law lay down that where the verdict of the jury is set aside, the Court must necessarily direct a new trial.)

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harassed by repeated trials,⁹ it may discharge or acquit the accused. But can the Court go into the evidence and decide upon the *facts* whether, upon the merits, the decision is right and, if so, confirm the conviction notwithstanding a misdirection or an error of law?

In *Wafadar Khan v. Queen Empress*,¹⁰ it was held by the High Court of Calcutta that it was not open to the appellate Court to do so; the word "erroneous" according to that decision is not to be read as meaning "wrong on facts," but as meaning that the verdict had been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. The appellate Court cannot determine for itself whether the verdict, as a conclusion of fact, is right or wrong, as, to hold otherwise would be to substitute the decision of the Court for the verdict of the jury. In *Romesh Chandra v. Emperor*,¹¹ where inadmissible evidence had been received but there was no misdirection, it was held that the misreception of evidence was likely to have adversely affected the appellant, that the verdict must be set aside on the ground of an error of law, and that a re-trial only should be ordered. Referring to s. 167 of the Evidence Act, which runs as follows:

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision,"

it was observed that the section merely says that the improper admission of evidence is not a "ground of itself" for interference, that the fact that the trial is by a jury is *another factor* to be taken into account, that the appellate Court cannot say on the principle of *Wafadar Khan's case* that there is other evidence which would justify the decision, and cannot confirm the decision unless it is satisfied that the *verdict of the jury* would have been the same if no evidence had been wrongly received. The High Court of Allahabad

(26) AIR 1926 Nag 53 (54, 55) : 26 Cr. L. J. 1090, *Ram Prasad v. Emperor*.

(28) AIR 1928 Pat 326 (335) : 29 Cr. L. Jour 325, *Mt. Champa v. Emperor*. (Whole case for prosecution found to be false—Retrial not ordered.)

(32) AIR 1932 Oudh 23 (25):33 Cr. L. J. 167: 7 Luck 390, *Sita Ram v. Emperor*.

(66) 5 Suth W R Cr 80 (89) : Beng L R Sup Vol 459 (F B), *In re Elahee Buksh*. [See also ('89) 1889 Rat 466 (466), *Queen-Empress v. Rama*.]

9. ('26) AIR 1926 All 429 (431, 432) : 27 Cr. L. J. 785, *Dhiraji v. Akasi*.

[See also ('31) AIR 1931 Bom 311 (313) : 55 Bom 435 : 32 Cr. L. J. 1077, *Issuf Muhammad v. Emperor*. (Accused young and been in prison for four months—Re-trial not ordered.)]

10. ('94) 21 Cal 955 (976, 977).

[See also ('25) AIR 1925 Cal 161 (163, 164) : 26 Cr. L. J. 307, *Harcendra Nath v. Emperor*. (Two points to be considered:—(a) whether jury were influenced and (b) whether independent of that evidence there is other evidence to justify verdict.)]

(75) 24 Suth W R Cr 18 (20), *Queen v. Luckhy Narain*.

(1900) 4 Cal W N 576 (581, 582), *Sadhu Sheikh v. Empress*. (Quære.)

[See however ('30) AIR 1930 Cal 199 (200) : 31 Cr. L. J. 737, *Emperor v. Dinabandhu*. (Appellate Court, where sentence of death is passed against accused, can deal with the case as a whole and consider whether verdict has been rightly arrived at.)]

11. ('19) AIR 1919 Cal 514 (518) : 46 Cal 895 : 20 Cr. L. J. 324. (21 Cal 955; 4 Cal W N 576, followed.)

has, in *Ikramuddin v. Emperor*^{11a} followed the view of the Calcutta High Court as expressed in *Wafadar Khan's case*, and has held that an appellate Court has no power to look at the evidence and find the accused guilty of any offence with which he was not charged in the trial Court and which was not laid before the jury. The High Court of Bombay has, on the other hand, held that, where a verdict of the jury is vitiated by a misdirection or a misreception of evidence, the appellate Court has power to convict or acquit the accused as the evidence, *according to its own view*, is or is not sufficient for conviction or, where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, to order a new trial.¹² A similar view has been taken by the High Courts of Madras¹³ and Lahore^{13a} and the Judicial Commissioner's Courts of Nagpur¹⁴ and Sind.¹⁵ The Calcutta High Court also held a similar view in the undermentioned decisions.¹⁶

There is no specific provision in the Code that repugnancy in the verdict of the jury is, as in English law, by itself, a sufficient ground for quashing a conviction. The powers under S. 423 have, however, been held to be large enough to invoke the application of the English law rule inasmuch as it is a rule of practice based upon natural and substantial justice.¹⁷

Where a Sessions Judge, under the erroneous impression that he

- 11a. ('17) AIR 1917 All 173 (175, 176) : 39 All 348 : 18 Cri L Jour 491.
12. ('33) AIR 1933 Bom 153 (156) : 35 Cr. L. J. 747, *Ramchandra v. Emperor*. ('03) 27 Bom 626 (636) : 5 Bom L R 599, *Emperor v. Waman Shivram*. ('69) 6 Bom H C R Cr 47 (50 51), *Reg v. Ramaswami Mudaliar*. (Case under the Code of 1861—If the appellate Court thinks that it is material and has prejudiced the accused, it may treat the case as if it had been tried with the aid of assessors and after excluding such evidence if it considers that the remaining evidence is sufficient to sustain the verdict it may uphold the conviction.)
(73) 10 Bom H C R Cr 497 (501, 502), *Reg. v. Amirta Govinda*. ('95) 19 Bom 749 (763), *Queen-Empress v. Ramchandra*.
[See also ('18) AIR 1918 Pat 201 (209), : 19 Cri L Jour 886, *Ram Bhagwan v. Emperor*. (Admission of evidence which should have been rejected—High Court can consider whether rest of evidence is sufficient to sustain verdict.)]
See also S. 297 Note 13.
13. ('03) 26 Mad 1 (8) : 2 Weir 521, *Emperor v. Edward William Smither*.
[See ('35) AIR 1935 Mad 793 (794) : 37 Cr.L.J. 64 (SB), *M. Ramanuja Ayyangar v. Emperor*. (S. 167, Evidence Act, not inapplicable to jury trials.)]
[See however ('95) 2 Weir 493 (493), *In re Muppidi Krishnamurthi*. (If it were clear that any offence committed by the prisoner were triable by assessors we could have dealt with the matter ourselves.)]
13a. ('40) AIR 1940 Lah 87 (89) : 41 Cr. L. J. 482, *A. M. Mathews v. Emperor*.
14. ('26) AIR 1926 Nag 53 (54) : 26 Cr. L. J. 1090, *Ram Prasad v. Emperor*. (No restriction on the powers of the appellate Court to deal with the case of which it has complete seisin in any of the manners provided by S. 423 of the Code.)
15. ('39) AIR 1939 Sind 209 (211, 212) : 41 Cr. L. J. 28 : 1 L R (1940) Kar 249, *Shewaram Jahanand v. Emperor*. (When ordering re-trial what is better course stated.)
(25) AIR 1925 Sind 116 (123) : 25 Cri L Jour 761, *Topandas v. Emperor*.
(27) AIR 1927 Sind 104 (107) : 21 S L R 356 : 28 Cr.L.J. 66, *Emperor v. Saran*.
16. ('32) AIR 1932 Cal 474 (478) : 33 Cr. L. J. 854 : 59 Cal 1861, *Saroj Kumar v. Emperor*.
(30) AIR 1930 Cal 199 (200) : 31 Cri L Jour 737, *Emperor v. Dinabandhu*.
(30) AIR 1930 Cal 370 (378) : 32 Cr. L. J. 10 : 58 Cal 96, *Government of Bengal v. Santiram Mondal*.
17. ('25) AIR 1925 Cal 501 (506, 507) : 26 Cr.L.J. 662, *I. G. Singleton v. Emperor*.

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was *bound* to accept the verdict of the jury, did so and convicted and sentenced the accused, the High Court on appeal by the accused set aside the *conviction and sentence* alone (without touching the verdict of the jury) so that the Judge might again have an opportunity of considering if he should accept the verdict or express disagreement with it and refer the case to the High Court. It was pointed out that setting aside the conviction and sentence without affecting the verdict of the jury was not prohibited under sub-section (2).¹⁸

Section 424

424.* The rules contained in Chapter xxvi as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court:

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

Synopsis

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| <p>1. Legislative changes.</p> <p>2. Scope and object of the section.</p> <p>3. Contents of judgment — General. See S. 367 Note 4.</p> <p>4. Points for determination. See S. 367 Note 5.</p> <p>5. Reasons for decision. See S. 367 Note 7.</p> | <p>6. Remarks in judgment. See S. 367 Note 8.</p> <p>7. What the appellate judgment should contain.</p> <p>8. Who can pronounce judgment.</p> <p>9. "Other than a High Court."</p> <p>10. Effect of non-observance of the provisions of this section. See S. 537 Note 12.</p> |
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Other Topics (miscellaneous)

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| <p>Applicability to appeals from orders under Ss. 110, 250, 476 and 123 (3). See Note 2.</p> <p>Benefit of doubt to accused. See Note 7.</p> <p>Comparison with O. 20, R. 2. See Note 8.</p> <p>Consideration of defence evidence though not referred to by vakil. See Note 7.</p> <p>Consideration of improper evidence — Irregular. See Note 7.</p> <p>Death of High Court Judge without signing. See Note 9.</p> <p>Dictation of judgments. See Note 8.</p> <p>Inapplicable to summary rejection under S. 421. See Note 2.</p> <p>Inconsistent findings. See Note 7.</p> <p>Independent judgment with its explicit opinion. See Note 7.</p> <p>Judgment on merits even in case of default of appearance. See Note 7.</p> | <p>Judgment—To be definite. See Note 6.</p> <p>Judgment to be self-contained and to give full analysis of evidence. See Notes 2 and 7.</p> <p>Judgment to be temperate and sober and not satirical. See Note 7.</p> <p>Judgment written after transfer and pronounced by successor—Illegal. See Note 8.</p> <p>No discussion of evidence or statement of reasons—Mere assurance of careful consideration — Not sufficient. See Notes 2 and 7.</p> <p>Points for determination, decisions and reasons. See Notes 7 and 10.</p> <p>Separate discussion and finding as to each accused. See Note 7.</p> <p>"So far as practicable." See Note 7.</p> <p>What are not proper judgments. See Note 7.</p> |
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* 1882 : S. 424; 1872 and 1861 — Nil.

18. ('37) AIR 1937 All 195 (196) : 38 Cr.L.J. 465 : I L R (1937) All 419, *Manjia v. Emperor*.

1. Legislative changes. — This section was first introduced in the Code of 1882; there has been no amendment to it since.

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Notes 1-2

Even before the enactment of this section, the High Courts had insisted on the appellate Courts writing a proper reasoned judgment, when an appeal was dismissed.¹

2. Scope and object of the section. — The object of the section is twofold, *firstly*, to produce uniformity in procedure and to ensure that judgments of subordinate criminal Courts are written in such a way as to promote public confidence in their decisions and to safeguard them against the possible suggestion that cases are disposed of without proper consideration¹ and *secondly* to enable the High Court in revision to grasp the nature of the case without reference to the records.² The High Court in criminal revision as a rule depends mainly upon the findings arrived at by the lower appellate Courts on questions of evidence. It is, therefore, the duty of such Courts to see that their judgments are self-contained and give a full analysis of the evidence.³

Where an appellate Court merely says that it has very carefully gone through the records of the case and dismisses the appeal without a discussion of the evidence or without giving reasons, the assurance of the appellate Court can hardly be considered as a substitute for the judicial determination of the questions of evidence involved in the case. Such a judgment is not likely to inspire confidence in the trial of appeals in Courts below.⁴

This section applies only when an appeal is admitted and heard under S. 423 but not where it is summarily rejected under S. 421 of the Code.⁵ See also S. 421, Note 7.

The provisions of this section have been held to apply to appeals

Section 424 — Note 1

1. ('69) 5 Mad H C R App xii (xii). (The High Court cannot revise the proceedings of appellate Court unless reasons are set out.)
- ('76) 1876 Pun Re No. 6 Cr, p. 9 (10), *Utam v. Crown*. (This case was dissented from in 1881 Pun Re No. 31.)
- ('72-92) 1872-92 Low Bur Rul 516 (517), *Kyauzan v. Queen-Empress*. [See ('71) 8 Bom H C R Cr 101 (102), *Reg. v. Moroba Bhaskarji*.]

Note 2

1. ('12) 13 Cr. L. J. 559 (560) : 8 Nag L R 84 : 15 I. C. 975, *Jairam v. Emperor*. ('97) 19 All 506 (507) : 1897 A W N 142 (F B), *Empress v. Pandeh Bhat*.
2. ('97) 1897 Pun Re No. 18 Cr, p. 49 (50), *Sanwant v. Empress*. ('17) AIR 1917 Pat 336 (337) : 18 Cr. L. J. 750 (751), *Talabar Chowdhry v. Emperor*. (A judgment even if it be under S. 421 should conform with rules in Ch. XXVI.) ('27) AIR 1927 Nag 88 (89) : 27 Cri L Jour 1404, *Maroti v. Mt. Kasa Bai*.
3. ('30) AIR 1930 Lah 1051 (1051, 1052) : 32 Cr. L. J. 271, *Ahmad Ali v. Emperor*. [See ('40) AIR 1940 All 80 (81) : 41 Cr. L. J. 249, *Ram Singh v. Emperor*. (Failure to write a proper judgment would be to encourage convicted persons to waste their money and time of the High Court in making applications in revision.)]
4. ('30) AIR 1930 Lah 1051 (1052) : 32 Cri L Jour 271, *Ahmad Ali v. Emperor*.
5. (1900-02) 1 Low Bur Rul 270 (271), *Taung Bo v. Crown*. ('93 1900) 1893-1900 Low Bur Rul 606 (607), *Nga Po Kin v. Queen-Empress*. ('99) 1 Bom L R 225 (225), *Queen-Empress v. Gopala*. ('95) 20 Bom 540 (541), *Empress v. Warubai*. ('94) 21 Cal 92 (96), *Rash Behari Das v. Balgopal Singh*. [But see ('17) AIR 1917 Pat 336 (337) : 18 Cr. L. J. 750 (751), *Telebar Chowdhry v. Emperor*.]

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against orders passed under S. 110,⁶ S. 250⁷ and S. 476.⁸

3. Contents of judgment — General. — See Section 367 Note 4.

4. Points for determination. — See Section 367 Note 5.

5. Reasons for decision. — See Section 367 Note 7.

6. Remarks in judgment. — See Section 367 Note 8.

7. What the appellate judgment should contain. — The appellate judgment should comply so far as may be practicable with the provisions of S. 367.¹ Thus, the appellate judgment should contain, among other things, the point or points for determination, the decision thereon and the reasons for the decision.² There is a difference of opinion on the question whether, when the appellate Court agrees with the judgment of the lower Court and dismisses an appeal, it is sufficient merely to state in the appellate judgment: "I have considered the evidence, and I agree with the Magistrate in his conclusions and in his reasons;" one set of cases holding that it is sufficient,³ another set of cases holding that it is not sufficient⁴ and a third set of cases holding that it may be sufficient in a *simple* case but not in a *complicated* case.⁵

6. ('22) 23 Cri L Jour 378 (378) : 67 Ind Cas 202 (202) (All), *Sunchri v. Emperor*. ('13) 14 Cr.L.J. 419 (420) : 40 Cal 376 : 20 Ind Cas 403, *Fidoi Hossen v. Emperor*. ('16) AIR 1916 All 197 (197) : 17 Cri L Jour 309 : 38 All 393 (394), *Lal Behari v. Emperor*.

7. ('22) AIR 1922 Pat 157 (158) : 23 Cri L Jour 261, *Deo Narain Mahto v. Chhatoo Raut*.

8. ('27) AIR 1927 Cal 281 (281) : 54 Cal 355, *Hamid Ali v. Madhu Sudhan Das*. (Per Chotzner, J.)

Note 7

1. ('40) AIR 1940 Sind 113 (114) : 41 Cri L Jour 724, *Abdul Karim v. Emperor*. ('37) AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, *Abdul Wahid v. Emperor*.

('25) AIR 1925 Cal 266 (266) : 25 Cri L Jour 901, *Gaharali v. Emperor*.

('20) AIR 1920 Lah 335 (335) : 21 Cri L Jour 223, *Bindrabai v. Emperor*.

('10) 11 Cri L Jour 348 (349) : 37 Cal 194 : 5 I.C. 999, *Ram Lal Singh v. Haricharan*.

2. ('40) AIR 1940 All 18 (19) : I L R (1939) All 865 : 41 Cri L Jour 220, *Bansidhar v. Emperor*.

('40) AIR 1940 Sind 113 (114) : 41 Cri L Jour 724, *Abdul Karim v. Emperor*.

('38) AIR 1938 Cal 522 (523) : 39 Cri L Jour 791, *Kalicharan v. Priya Nath*.

('37) AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, *Abdul Wahid v. Emperor*.

('36) AIR 1936 Nag 160 (160) : I L R (1937) Nag 38 : 39 Cri L Jour 349, *Bapurao Annaaji v. Emperor*.

('33) AIR 1933 Nag 328 (328) : 35 Cri L Jour 136, *Jodhi Ujjar Gond v. Emperor*.

('10) 11 Cri L Jour 348 (349) : 37 Cal 194 : 5 I. C. 999, *Ram Lal Singh v. Hari Charan Ahir*.

('13) 14 Cri L Jour 570 (570) : 1 Upp Bur Rul 169 : 21 I. C. 170, *Nga Po Han v. Emperor*.

('22) AIR 1922 Pat 157 (158) : 23 Cr. L. J. 261, *Deo Narain Mahto v. Chhatoo Raut*.

('04) 9 Cal W N xxiii (xxiii), *Ekhatar Khan v. Emperor*.

('21) AIR 1921 Lah 102 (102) : 2 Lah 308 : 23 Cr.L. J. 9, *Dalip Singh v. Emperor*.

(An appellate judgment which the High Court is unable to follow, without the help of original judgment is not according to law.)

('05) 2 Cri L Jour 170 (171) : 32 Cal 178, *Ekcowri Mukerjee v. Emperor*.

[See ('92) 1892 All W N 60 (60), *In the matter of the petition of Zafaryab Ali*. (Judgment passed in revision.)]

3. ('97) 19 All 506 (509) : 1897 A W N 142 (FB), *Queen-Empress v. Pandeh Bhat*.

('26) AIR 1926 Bom 512 (512) : 27 Cr. L. J. 1153, *Patilbura Raoji Bala v. Emperor*.

('29) AIR 1929 Pat 231 (232) : 30 Cri L Jour 1070, *Lakhan Singh v. Emperor*.

1864) 1864 Suth W R Gap Cr 6 (8), *Queen v. Hurihur Churn Singh*.

4. See the cases cited in foot notes (9) to (17a).

('26) AIR 1926 All 318 (318, 319) : 27 Cri L Jour 449, *Shankar v. Emperor*.

('31) AIR 1931 Pat 379 (381) : 11 Pat 143 : 32 Cr.L.J. 1197, *Agore Dutta v. Emperor*.

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The true test, would, however, appear to be really to see whether the judgment indicates that the appellate Court has really and not nominally *considered* the case and arrived at an *independent judgment*.⁶ It is not necessary for the appellate Court to write a long and elaborate judgment⁷ or repeat *in extenso* all that has been stated by the trial Court.⁸ The judgment should, however, be independent and self-contained so that the High Court in revision may be able to follow it without reference to the trial Court's judgment.⁹

6. ('23) AIR 1923 Rang 188 (188) : 1 Rang 301 : 24 Cr.L.J. 920, *Bhag v. Emperor*. (It should not be a mere supplement to the trial Court's judgment.)
 ('40) AIR 1940 All 18 (19) : 1 L R (1939) All 865 : 41 Cr.L.J. 220, *Bansidhar v. Emperor*.
 ('38) AIR 1938 Cal 522 (522, 523) : 39 Cr. L. J. 791, *Kali Charan v. Priya Nath*. (Appellate Court should not merely consider whether there are reasons for differing from trial Court's judgment.)
 ('21) AIR 1921 Lah 102 (103) : 2 Lah 308 : 23 Cr. L. J. 9, *Dalip Singh v. Emperor*.
 ('09) 9 Cri L Jour 528 (529) : 2 Ind Cas 225 (All), *Shiam Lal v. Emperor*.
 ('19) AIR 1919 Cal 668 (669) : 20 Cri L Jour 238, *Kafiluddin Sarkar v. Emperor*.
 ('28) AIR 1928 Lah 863 (863) : 29 Cri L Jour 705, *Qadir Bakhs v. Emperor*.
 ('16) AIR 1916 All 180 (181) : 17 Cri L Jour 167, *Sarican v. Emperor*.
 ('16) AIR 1916 All 48 (49) : 17 Cri L Jour 461, *Gayani v. Emperor*.
 ('10) 11 Cr. L. J. 331 (331, 332) : 5 I. C. 928 (Mad), *In re Seperumal Udayan*.
 ('27) AIR 1927 Nag 88 (89) : 27 Cr. L. J. 1404, *Maroti v. Mt. Kasa Bai*.
 ('20) AIR 1920 Pat 121 (122) : 21 Cr. L. J. 618, *Narain Prasad Bose v. Emperor*.
 ('97) 1 Cal W N 169 (170), *Kasimuddi v. Queen-Empress*.
 ('84) 1884 Pun Re No. 31 Cr. p. 56 (56), *Hakim Singh v. Empress*.
 ('31) 1931 Mad W N 119 (120), *Manika Reddi v. Emperor*.
 [See ('22) 23 Cr. L. J. 378 (378):67 Ind Cas 202 (202) (All), *Sunchri v. Emperor*. (Perfunctory judgment bad.)]
 [See also ('21) AIR 1921 Oudh 102 (102) : 24 Oudh Cas 230, *Madad Ali v. Emperor*. (No proper consideration of case against one accused.)]
 ('05) 10 Cal W N xxxix (xxxix), *Bhagabat Singh v. Emperor*.
 ('07) 6 Cr. L. J. 137 (137) (Lah), *Mohammad Shah v. Emperor*. (Where the appellate judgment does not show that it has examined the evidence, it becomes necessary to examine the case in detail in revision.)]
 7. ('37) AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, *Abdul Wahid v. Emperor*.
 ('28) AIR 1928 Lah 863 (863) : 29 Cri L Jour 705, *Qadir Bakhs v. Emperor*.
 ('21) AIR 1921 Lah 102 (102, 103) : 2 Lah 308 : 23 Cr.L.J.9, *Dalip Singh v. Emperor*.
 ('09) 9 Cri L Jour 528 (529) : 2 Ind Cas 225 (All), *Shiam Lal v. Emperor*. (The question is not about the length of the judgment but about the matter it contains.)
 ('05) 2 Cri L Jour 170 (171) : 32 Cal 178, *Ekcowri Mukerjee v. Emperor*.
 (1864) 1864 Suth W R Gap Cr 6 (S), *Queen v. Hurihur Churen Singh*. (Appellate Court confirming the decision of lower Court need not enter into prolix detail.)
 8. ('31) 1931 Mad W N 119 (119, 120), *Manika Reddi v. Emperor*.
 ('17) AIR 1917 Cal 285 (286) : 20 Cal W N 1296 (1300) : 18 Cr. L. J. 294, *Arindra Rajbanshi v. Emperor*.
 ('19) AIR 1919 Cal 668 (669) : 20 Cr. L. J. 238 (239), *Ku filuddin Sarkar v. Emperor*.
 ('16) AIR 1916 All 48 (49) : 17 Cri L Jour 461 (461), *Gayani v. Emperor*.
 9. ('40) AIR 1940 All 18 (19) : ILR (1939) All 865 : 41 Cri L Jour 220, *Bansidhar v. Emperor*. (It is not enough for the appellate Court to say that all points arising in case have been considered by Court below and have been correctly decided.)
 ('38) AIR 1938 Cal 522 (522) : 39 Cri L Jour 791, *Kali Charan v. Priya Nath*.
 ('37) AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, *Abdul Wahid v. Emperor*.
 ('37) AIR 1937 Sind 26 (27) : 30 Sind L R 382 : 38 Cri L Jour 363, *Ghous Bux v. Emperor*. (Appellate judgment should not be supplementary to the judgment of trial Court.)
 ('35) AIR 1935 Cal 316 (321, 322) : 62 Cal 749 : 36 Cr L J 982, *Abdul Rahman v. Emperor*. (If appellate Court can gather from judgment of lower appellate Court what its decision is that is sufficient.)
 ('24) AIR 1924 Lah 660 (661) : 25 Cri L Jour 113, *Solhu v. Krishna Ram*.
 ('21) AIR 1921 Lah 102 (103):2 Lah 308:23 Cr.L.J. 9, *Dalip Singh v. Emperor*.
 ('23) AIR 1923 Lah 344 (344) : 25 Cri L Jour 246, *Rahm Ali v. Crown*.
 ('08) 35 Cal 138 (140) : 12 Cal W N 134 : 6 Cr.L.J. 427, *Jamait Malliek v. Emperor*.

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It was held in the following cases that there was no proper judgment where it simply stated :

1. "I have heard the appellant's pleader, and have also gone through the evidence and read the judgment of the lower Court. I do not see any reason to alter the finding of the lower Court."¹⁰
2. "I see no reason to doubt the guilt of the accused. The appeal is rejected."¹¹
3. "I can see no reason to suspect the evidence as regards the finding of the property."¹²
4. "Read proceedings. I see no reason for interfering with the decision or sentence. Appeal dismissed."¹³
5. "After hearing the arguments of the pleaders for the appellants and examining the record, I am of opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe."¹⁴
6. "I am satisfied that the judgment of the trial Court is substantially right."¹⁵
7. "I see no reason to distrust the finding of the lower Court. The sentence passed, however, appears harsh. I reduce the term of imprisonment to fifteen days."¹⁶
8. "I agree with the lower Court that the opposite side is in cultivating possession of the same."¹⁷

See also the undermentioned cases.^{17a}

(103) 7 Cal W N 30 (31, 32), *Bholanath Mullick v. Emperor*.

[See however (10) 11 Cri L Jour 331 (331, 332) : 5 Ind Cas 928 (Mad), *In re Seperumal Udayan*.

10. (105) 10 Cal W N lxvi (lxvi), *Syed Khan v. Abhoy Charan*.

[See also (196) 23 Cal 420 (421), *Girish Myti v. Queen-Empress*. (In this case the judgment ran . . . "After reading the evidence and hearing the learned counsel for the appellant and the learned Government pleader I am convinced that the Deputy Magistrate has decided the case rightly . . .")]

11. (105) 9 Cal W N cexlv (cexlv), *Mohararseet v. Emperor*.

12. (113) 14 Cri L Jour 570 (570) : 1 Upp Bur Rul 169 : 21 I.C. 170, *Nga Po Han v. Emperor*.

13. (188) 1888 All W N 280 (280), *Empress v. Sameshar*.

[See (186) 1886 All W N 289 (289), *Empress v. Bhujpal*. (In this case the Judgment ran — "I do not find reason to interfere on behalf of any of the appellants — The appeals are dismissed.")]

14. (195) 22 Cal 241 (243, 244), *Farkan v. Samsher Mahomed*.

15. (124) AIR 1924 Cal 537 (537) : 24 Cr. L. J. 311, *Baishnav Charan v. Emperor*.

16. (186) 13 Cal 110 (111), *In re Ram Das Maghi*.

17. (121) AIR 1921 Pat 504 (504) : 22 Cr. L. J. 656, *Mangla Majhi v. Emperor*.

17a. (140) AIR 1940 All 18 (19) : 1 L R (1939) All 865 : 41 Cri L Jour 220, *Bansidhar v. Emperor*. (It is not enough for appellate Court to say that all points arising in case have been considered by Court below and have been rightly decided.)

(140) AIR 1940 All 80 (81) : 41 Cri L Jour 249, *Ram Singh v. Emperor*. (Appellate Court after hearing long arguments merely agreeing with what the trial Court said — Judgment not proper.)

(137) AIR 1937 Pesh 88 (89) : 39 Cr.L.J. 337, *Abdul Wahid v. Emperor*. (Appellate judgment merely consisting of two words—"Appeal rejected"—Judgment is not proper.)

(133) AIR 1933 Nag 328 (328) : 35 Cr. L. J. 136, *Jodhi Ujjar Gond v. Emperor*. (Judgment as follows—"I have gone through the record — The conviction under S. 419, Penal Code is sound—The fine of Rs. 30 is very light — I see no reason to interfere and dismiss the appeal.")

(117) AIR 1917 Oudh 113 (114) : 18 Cr. L. J. 649, *Bansidhar v. Emperor*. (Judgment as follows — "It is obvious that if one quarter of the evidence for the prosecution is true, and I see no reason to doubt that it is, the appellant is the

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Evidence must be discussed. — The law of appeal constitutes the appellate Court a Judge of facts as completely as the Court of first instance.¹⁸ It is the final Court on facts¹⁹ and the appellant is entitled to have an explicit opinion on the question of fact.²⁰ It is, therefore, the duty of a Court of appeal to exercise an independent judgment in reviewing the evidence as well as in determining questions of law or procedure.²¹

The Court of appeal should discuss the evidence and probabilities arising from the circumstances of the case;²² the reason for the finding

most proper person to be bound over under S. 110, Criminal Procedure Code"—*Held* there is no proper judgment.)

(17) AIR 1917 Pat 592 (593) : 18 Cr. L. J. 994, *Sheo Narayan Raut v. Emperor*. (Merely stating that a detailed judgment had been recorded by the trial Court and that nothing had been urged in appeal which affected the reason given for the conviction is no judgment at all.)

(16) AIR 1916 All 180 (181) : 17 Cr. L. J. 167 (167), *Sarwan v. Emperor*. (Judgment was as follows—"It has been shown to be necessary to bind these men over under S. 110, Criminal Procedure Code, and after hearing arguments on their behalf I can find no reason whatsoever to interfere with the order"—*Held* it is no judgment.)

(85) 11 Cal 449 (450), *Kamruddin Dai v. Sonatun Mandal*. (In this case the judgment ran—"It is urged that the evidence is quite untrustworthy, and that the decision should be reversed—The depositions have been gone through and commented on at considerable length—Appeal is dismissed.")

(88) 15 Bom 11 (12), *In re Shivappa*. (In this case the judgment ran—"The affray was... to be split up—There is no ground for doubting the justice of the Magistrate's finding that the two appellants took part in the affray—The appeal is dismissed and the conviction and sentence are confirmed.")

(84) 2 Weir 536 (536), *In re Samshir Ali Shah*. (In this case the judgment ran—"If believed, the prosecution evidence is sufficient to warrant the conviction; I decline to interfere.")

18. (76) 1876 Pun Re No. 5 Cr, p. 6 (7), *Turin v. Crown*.

19. (24) AIR 1924 Pat 380 (381) : 24 Cri L Jour 407, *Jivan Raut v. Emperor*.

20. (24) AIR 1924 Cal 618 (619) : 25 Cr. L. J. 1044, *Inatulla Sarkar v. Emperor*.

21. (38) AIR 1938 Cal 522 (522, 523) : 39 Cri L Jour 791, *Kali Charan v. Priya Nath*. (Appellate Court should not merely consider whether there are reasons for differing from trial Court's judgment.)

(17) AIR 1917 Oudh 113 (114) : 18 Cri L Jour 649 (650), *Bansidhar v. Emperor*.

(16) AIR 1916 All 197 (197) : 17 Cri L Jour 309 (310) : 38 All 393, *Lal Behari v. Emperor*. (Appellate judgment must show on the face of it that the Judge has applied his mind to a consideration of the evidence on the record and of the pleas raised.)

(90) 1890 All W N 148 (148), *Queen-Empress v. Bishan*.

(15) AIR 1915 Bom 139 (139) : 16 Cri L Jour 832, *Devendra Shivappa v. Emperor*.

[See also (21) AIR 1921 Pat 487 (487), *Harinath Chowdhri v. Emperor*.

(95) 1895 Rat 826 (827), *Empress v. Dagdu Gangaram*.]

22. (37) AIR 1937 Nag 394 (395, 396) : 1 L R (1938) Nag 157 : 39 Cri L Jour 75, *Raghunathmal Shermal v. Patiram Sada Ram*. (A mere statement in the judgment that the appellate Court has gone carefully through the whole evidence and that there are many discrepancies in the depositions of witnesses is no discussion of the evidence at all.)

(19) AIR 1919 Pat 529 (530) : 20 Cr. L. J. 645 (647), *Darogi Chamar v. Emperor*.

(24) AIR 1924 Pat 380 (381) : 24 Cri L Jour 407, *Jivan Raut v. Emperor*.

(04) 1 Cri L Jour 305 (310, 311) : 28 Bom 479 : 6 Bom L R 324, *Emperor v. Bal Gangadhar Tilak*.

(12) 13 Cr. L. J. 712 (712) : 16 Ind Cas 520 (Mad), *Balusu Lakshmiyya v. Emperor*.

(25) AIR 1925 Cal 266 (266) : 25 Cri L Jour 901, *Gohar Ali v. Emperor*.

(26) 27 Cri L Jour 114 (114) : 91 Ind Cas 690 (Lah), *Huramat Ali v. Emperor*.

(28) 29 Cri L Jour 1031 (1032) : 112 Ind Cas 359 (Lah), *Dalip Singh v. Emperor*.

(72) 17 Suth W R Cr 59 (59, 60), *In re Goomanee*. (An appellate Court is bound precisely in the same way as the Court of first instance to test the evidence extrinsically as well as intrinsically.)

Section 424
Note 7

should also be stated.²³ The appellate Court should record a definite finding as to the guilt or innocence of the accused.^{23a}

Case of each accused should be considered. — Where there are more than one accused the appellate Court should discuss the evidence against each accused and give its finding as to the guilt or innocence of each accused.²⁴

Court bound to consider the case on merits even when accused is absent. — When the appeal is once admitted it cannot be disposed of summarily. If the appellant or his pleader is absent, it is still the duty of the appellate Court to go through the record and write a judgment in accordance with law.²⁵ A judgment stating "No one appears; I see no reason to interfere. I dismiss the appeal," has been held to be not a proper judgment.²⁶

- [See ('27) AIR 1927 Lah 797 (798), *Sardul Singh v. Emperor*.
('24) AIR 1924 Pat 181 (182) : 24 Cri L Jour 181, *Durga Singh v. Emperor*.
(Appellate judgment not referring to oral evidence but drawing inferences from documents and probabilities of case — Strong and legal reasons given for the conclusions—Judgment is not defective.)]
23. ('25) AIR 1925 Lah 644 (644) : 26 Cr. L. J. 1380 (1380), *Thakur Singh v. Emperor*.
('03) 7 Cal W N 30 (31), *Bholanath Mullick v. Emperor*.
('25) AIR 1925 Rang 112 (112) : 2 Rang 641 : 26 Cr. L. J. 395, *San Dun v. Emperor*.
(Order of restriction under S. 7 of Burma Habitual Offender's Restriction Act—Usual rules of procedure except as suggested by S. 117, sub-s. (4) of the Cr. P. C. apply)
('07) 5 Cr. L. J. 349 (350) : 5 C L J 452, *Rupa Mandal v. Keshab Mandal*.
('10) 11 Cr. L. J. 348 (349) : 37 Cal 194 : 5 I C 999, *Ram Lal Singh v. Hari Charan Ahir*.
('12) 13 Cr. L. J. 48 (48) : 13 Ind Cas 288, (Ajmer-Merwara.) *Mt. Suriya v. Lachmi Narain*.
[See also ('08) 8 Cr. L. J. 203 (205) : 35 Cal 718, *Manaruddi v. Emperor*.
('18) AIR 1918 Mad 814 (815) : 18 Cr. L. J. 752 (752), *In re Vcerappa Naick*.
('11) 12 Cri L Jour 496 (496) : 12 Ind Cas 216 (Mad), *Goripati Chelamiah v. Emperor*.]
- 23a. ('17) AIR 1917 Cal 792 (793) : 18 Cr. L. J. 698, *Kobbat Ali v. Emperor*.
(Merely remarking that the evidence of the prosecution is on the whole slightly stronger, and the story as regards probability is far more likely is not enough for conviction of accused.)
24. ('25) AIR 1925 Mad 712 (712) : 26 Cr. L. J. 1039, *In re Chinna Manikkam*.
('40) AIR 1940 Sind 113 (113, 114) : 41 Cri L Jour 724, *Abdul Karim v. Emperor*.
(Order under S. 118 must contain a consideration of the case of each accused separately.)
- ('37) AIR 1937 Sind 26 (27) : 30 S L R 382 : 38 Cr. L. J. 363, *Ghousbux v. Emperor*.
(The same rule applies to orders under S. 118.)
- ('18) AIR 1918 Mad 350 (351) : 19 Cr. L. J. 200, *Dakshinamurthi Rajali v. Emperor*.
('21) AIR 1921 Oudh 102 (102) : 24 Oudh Cas 230, *Madad Ali v. Emperor*.
('24) AIR 1924 Cal 618 (619) : 25 Cri L Jour 1044, *Inatulla Sarkar v. Emperor*.
('16) AIR 1916 Mad 1125 (1125) : 16 Cr. L. J. 496 (496), *In re Cherukath Mammad*.
('16) AIR 1916 Mad 732 (733) : 16 Cri L Jour 735, *In re Bapu Naidu*.
('11) 12 Cri L Jour 43 (43) : 9 Ind Cas 261 (Cal), *Jatra Mohan v. Akhil Chandra*.
('17) AIR 1917 Cal 285 (286) : 20 Cal W N 1296 (1300) : 18 Cr. L. J. 294, *Arindra Rajbanshi v. Emperor*.
('07) 6 Cr. L. J. 427 (429) : 35 Cal 138, *Jamait Mullick v. Emperor*. (The necessity is greater when a large number of persons are jointly proceeded against and directed to furnish security for good behaviour.)
25. ('23) AIR 1923 Pat 368 (368) : 24 Cri L Jour 453, *Newa Lal Rai v. Emperor*.
('07) 11 Cal W N cxxxv (cxxxv), *Noai v. Emperor*.
26. ('16) AIR 1916 All 43 (44) : 17 Cr. L. J. 353 (353), *Ram Bharose v. Emperor*.
('25) AIR 1925 Lah 644 (644) : 26 Cri L Jour 1380, *Thakur Singh v. Emperor*.
(In this case the judgment was, "Appellant absent, waited till 12 noon; I see no reason to interfere with the judgment of the lower Court.")

It has been held that even where the counsel for appellant does not refer to the defence evidence the Court should consider it and give a decision.²⁷

Miscellaneous. — The appellate Court should give to the accused the benefit of doubt, if, on going through the records, it has reasonable doubts about the guilt of the accused.²⁸

The judgment should be temperate, sober and not satirical.²⁹ The Court should not give inconsistent findings.³⁰ It is irregular to consider evidence not properly placed before the Court.³¹

As to the power of the appellate Court to raise a plea of private defence on behalf of the accused when he has not himself raised the point in the lower Courts, see the undermentioned case.³²

An appellate judgment should not impute motives to the Judge or Magistrate whose judgment is under appeal.³³

8. Who can pronounce judgment. — There is nothing in this Code corresponding to O. 20, R. 2 of the Civil Procedure Code. Where, after the hearing of a criminal appeal the Judge was transferred and he subsequently wrote the judgment and forwarded the same to his successor who pronounced it, it was held that the judgment was passed without jurisdiction and should be set aside.¹

As to whether judgments can be dictated, see S. 367 Note 3.

9. "Other than a High Court." — The provisions of this section apply only to subordinate Courts and not to the judgment of a High Court; the High Court can undoubtedly dismiss an appeal without giving reasons.¹ There is no provision in the Code requiring the High

[See also ('23) AIR 1923 Pat 297 (298) : 26 Cri L Jour 419, *Kabir Shah v. Emperor*. (Appellant absent—Pleader appearing after judgment signed—Appellate Court can do nothing.)]

27. ('13) 14 Cr.L.J. 419(420): 40 Cal 376: 20 I.C. 403, *Fidoi Hossein v. Emperor*.

[See ('17) AIR 1917 Oudh 323 (323) : 18 Cr. L. J. 689 (689), *Beni v. Emperor*.]

28. ('98) 1898 Pun Re No. 6 Cr, p. 15 (17), *Moula Baksh v. Empress*.

('83) 2 Weir 535 (535), *In re Yakoob Sahib*.

[See ('17) AIR 1917 Cal 792 (793) : 18 Cr. L. J. 698, *Kobbat Ali v. Emperor*.]

29. ('12) 13 Cr. L. J. 259 (265) : 14 I. C. 643 (LB), *Emperor v. Thomas Pellako*.

30. ('12) 13 Cr. L. J. 595 (596) : 16 I. C. 163 (Cal), *Ambica Missir v. Emperor*.

('13) 14 Cr. L. J. 295 (296) : 19 I. C. 951 (Cal), *Baburam v. Emperor*. (If the finding of the Sessions Court is inconsistent with his conclusion that would only be a ground for rehearing the appeal.)

31. ('37) AIR 1937 Nag 394 (395) : 11 L.R (1938) Nag 157 : 39 Cr. L. J. 75, *Raghunathmal Shermal v. Patiram Sada Ram*. (Appellate judgment based on irrelevant matters and entirely on police report—Appeal held should be re-heard.)

('16) AIR 1916 Cal 912 (913) : 17 Cri L Jour 439 (440), *Superintendent and Remembrancer of Legal Affairs v. Mon Mohan Roy*. (It is irregular for a Judge, while dealing with connected criminal appeals to make cross-references to the evidences.)

32. ('98) 21 All 122 (123, 126) : 1898 A W N 208, *Queen-Empress v. Timmal*. (The appellate Court cannot raise such a plea.)

33. ('83) 2 Weir 535 (535), *In re Yakoob Sahib*.

Note 8

1. ('31) AIR 1931 Cal 637(638): 33 Cr.L.J. 60, *Jogesh Chandra v. Surendra Mohan*.

Note 9

1. ('33) AIR 1933 Pat 38 (40): 11 Pat 697: 34 Cr.L.J. 118, *Kuldip Das v. Emperor*.

'26) AIR 1926 Sind 275 (276): 20 Sind L R 82: 27 Cr.L.J. 343, *Dwarka v. Emperor*.

'10) 11 Cri L Jour 348 (349) : 37 Cal 194 : 5 I C 999, *Ram Lal Singh v. Hari Charan Ahir*.

Section 424
Notes 9-10

Court after pronouncing a judgment in open Court to date and sign the same. Where certain appeals were heard by a High Court Judge and judgments were delivered in open Court and taken down by the judgment-writer, but the judgments were not signed owing to the death of the Judge, it was held that nevertheless the appeals should be deemed to have been finally disposed of.²

10. Effect of non-observance of the provisions of this section. —
See Section 537 Note 12.

Section 425

425.* (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court; and, if necessary, the record shall be amended in accordance therewith.

Section 426

426.† (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

* 1882 : S. 425; 1872 : S. 299; 1861 : S. 406.

† 1882 : S. 426; 1872 : S. 281; 1861 : S. 421.

2. (1933) AIR 1933 All 40 (40,41); 55 All 132 : 34 Cr.L.J. 703, *Prag Madho Singh v. Emperor*.

Synopsis

Section 426
Notes 1-3

- | | |
|--------------------------|---------------------------------|
| 1. Scope of the section. | 5a. Suspension of sentence. |
| 2. "Pending an appeal." | 6. Release on bail. |
| 3. "A convicted person." | 7. High Court—Sub-section (2). |
| 4. "Appellate Court." | 8. Exclusion of time—Sub-s.(3). |
| 5. "Sentence." | |

Other Topics (miscellaneous)

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|--|---|
| Applicability to appeals from orders under S. 107 or 118. See Note 3. | Release and not mere suspension of sentence for exclusion of term. See Note 8. |
| Bail refused by appellate Court — High Court can grant. See Note 7. | Release—Offence if bailable or not. See Note 6. |
| Detention under S. 10, Reformatory Schools Act—Not sentence. See Note 5. | Section 561A—Inherent jurisdiction of High Court pending appeal to Privy Council. See Note 7. |
| Leave to appeal to Privy Council — No power to stay execution. See Note 4. | Suspension of sentence by Court which passed it. See Notes 4 and 7. |
| Legislative changes. See Note 6. | Suspension only by appellate Court and not other Courts. See Note 4. |

1. Scope of the section. — This section provides for the suspension of sentences pending appeal and for release of the appellant on bail. In *Queen-Empress v. Pohpi*,¹ Young, J., observed as follows :

"Section 426 of the Criminal Procedure Code provides a procedure by which the appellate Court may, for special reason, order that the execution of the sentence or order appealed against be suspended ; and if the appellant is in confinement, that he be released on bail or on his own bond. Such special provision is provided for special circumstances only and therefore is not generally applicable to all cases, seeing that in many cases (as in the case now under consideration) the appellant is in jail under a legal warrant, and cannot appear in any Court until such warrant is set aside, and such warrant can be set aside only under some special provision such as that referred to in the special cases to which S. 426, Criminal Procedure Code, alludes."

2. "Pending an appeal." — The *pendency* of an appeal by a convicted person is a condition precedent to the exercise of jurisdiction under this section.¹

3. "A convicted person." — It has been held by the High Courts of Allahabad¹ and Patna² that the words "convicted person"

Section 426 — Note 1

1. ('91) 13 All 171 (188) : 1891 All W N 48 (FB).

Note 2

1. ('30) AIR 1930 Pat 274 (275) : 31 Cri L Jour 958 : 9 Pat 131, *Charan Mahto v. Emperor*. (Person ordered to execute a bond under S. 118 is not a 'convicted person.')
('32) AIR 1932 Mad 720 (721) : 56 Mad 149 : 33 Cr. L. J. 826, *Pitchai v. Muhammad Atham*. (Words "pending any appeal by convicted person" govern whole section.)

Note 3

1. ('36) AIR 1936 All 107 (108) : 58 All 589 : 36 Cr. L. J. 155, *Emperor v. Masuria*. (Person bound over preferring appeal under S. 406—S. 498 and not S. 426 applies — Sessions Judge can under S. 498 grant him bail — He cannot however under S. 426 suspend execution of lower Court's order — Division Bench ruling.)
[See however ('32) AIR 1932 All 680 (681) : 54 All 861 : 33 Cr. L. J. 731, *Katwaroo Rai v. Emperor*. (Order under S. 107 — The words would include persons against whom order is made; even if this section does not apply, order can be made under S. 423 (1) (d) — Single Bench decision.)]
('34) AIR 1934 All 845 (845) : 57 All 264 : 36 Cr. L. J. 177, *Darsu v. Emperor*. (Though person imprisoned under S. 120 is not strictly speaking a convicted person, either S. 426 can be applied by analogy or if it is inapplicable, order of release can be passed under S. 498 — Single Bench decision.)]
2. ('30) AIR 1930 Pat 274 (275) : 9 Pat 131 : 31 Cr. L. J. 958, *Charan Mahto v. Emperor*. (Order under S. 118.)

Section 426
Notes 3-7

mean persons convicted of an offence and that this section would be inapplicable to the case of persons who are bound over.

4. "Appellate Court." — The only Courts which have power to suspend the execution of a sentence or order under this section are the appellate Court and the High Court.¹ So a sentence cannot be suspended by the Court which passed it² or a Court to which the appeal does not lie.³ It has been held that the Privy Council, in an application for leave to appeal to itself, is not a Court of criminal appeal, and cannot stay execution of the sentence.⁴

5. "Sentence." — An order of detention by a District Magistrate under S.10 of the Reformatory Schools Act in lieu of a sentence of imprisonment is not a *sentence* within the meaning of this section. An appellate Court, therefore, has no power to suspend operation of such order.¹

5a. Suspension of sentence. — An order of suspension of sentence should only be passed when very special cause is shown, for the result of suspension of sentence is that if the appeal finally fails, the convicted person only serves the original period of his sentence less the period of suspension.¹ See Note 8.

6. Release on bail. — Under the Code of 1861, a convicted person could be released on bail, only if the offence of which he was convicted was a bailable offence.¹ But now, the appellate Court can release the accused on bail whether the offence is bailable or not.² See also sections 496 to 498.

7. High Court — Sub-section (2). — Sub-section (2) confers on the High Court the same powers as it confers on an appellate Court. The High Court can exercise this power, even after the appellate Court rejects an application under this section, though in such cases it would exercise it only if the order of the appellate Court is manifestly wrong or where no discretion has been exercised at all. The High Court has

Note 4

1. ('91) 2 Weir 536 (536), *Government Pleader v. Kodu Moidin Rowther*. ('69) 12 Suth W R Cr 47 (47, 48) : 3 Beng L R App 50, *In re Kishen Soonder*.
2. ('68) 4 Mad H C R App i (ii). ('69) 12 Suth W R Cr 47 (47) : 3 Beng L R App 50, *In re Kishen Soonder*. [See however ('81) 7 Cal L R 393 (395), *In re Okhoy Kumar*. (Bail granted by Court passing sentence to enable accused to appeal—Legality of sentence not affected.)]
3. ('91) 2 Weir 536 (536), *Government Pleader v. Kodu Moidin Rowther*.
4. ('15) AIR 1915 P C 29 (30) : 42 Cal 739 : 16 Cri L Jour 494 : 42 Ind App 133 (P C), *Dalmukund v. Emperor*.

Note 5

1. ('15) AIR 1915 Mad 1067 (1068) : 16 Cr.L.J. 134, *Emperor v. Krishna Pandaram*.

Note 5a

1. ('26) AIR 1926 Nag 279 (280) : 27 Cri L Jour 319, *Sheikh Karim v. Emperor*.

Note 6

1. (1865) 3 Suth W R Cr 57 (57), *Queen v. Mooralji Kinkur Mookerjee*. (The sentence however could be suspended in case of non-bailable offence.)
2. See ('36) AIR 1936 All 656 (656) : 37 Cri L Jour 1017, *Dhanpal v. Emperor*. (Considerations that might weigh when bail should or should not be granted.)

unfettered powers to grant bail, yet in exercising these powers it ought to have regard to the limitations imposed on lower appellate Courts.¹

Section 426
Notes 7-8

On the question whether the High Court can suspend the execution of sentence² or grant bail³ pending the hearing of an appeal to the Privy Council, against its own sentence, it has been held that it can do so under its inherent jurisdiction under S. 561A.

8. Exclusion of time — Sub-section (3). — Under sub-s. (3), when the appeal fails, the time during which the accused is released under this section should be excluded in computing the term of which he is sentenced. But it is only when he is *released* and not where his sentence has been suspended that the term is to be excluded.¹

The sub-section does not mean that the period during which a person is released under this section should be excluded from the *term* of punishment to which he has been sentenced. What the sub-section means is that in *calculating* the term, the period of release should be left out of account.²

427.* When an appeal is presented under section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

Section 427

Arrest of accused in
appeal from acquittal.

1. Scope of the section. — This section was added to the Code in 1892. Even before it was added it was held that the High Court had the power to re-arrest the accused pending the disposal of an appeal

* 1882 : S. 427; 1872 and 1861 — Nil.

Note 7

1. ('26) AIR 1926 Nag 279 (280) : 27 Cri L Jour 319, *Shaikh Karim v. Emperor*.
2. ('24) AIR 1924 Cal 545 (552) : 26 Cri L Jour 52, *Barendra v. Emperor*.
3. ('27) AIR 1927 All 97 (98) : 49 All 247 : 27 Cri L Jour 1377, *Ram Saroop v. Emperor*. (Inherent power to grant bail should be exercised where the sentence would expire before the Privy Council appeal can be disposed of.)
[See however ('37) AIR 1937 Nag 181 (182) : 38 Cr. L. J. 384 : ILR (1937) Nag 236, *Bashiruddin Ahmed v. Emperor*. (High Court has no power to grant bail before appeal to Privy Council is filed.)]
See also S. 498 Note 4 and S. 561A Note 5.

Note 8

1. ('91) 2 Weir 536 (537), *Government Pleader v. Kodu Moidin Rowther*.
2. ('36) AIR 1936 All 12 (13) : 36 Cri L Jour 1479, *Narain Singh v. Emperor*. (The period during which a person is released on bail cannot reduce the term of sentence.)
- ('34) AIR 1934 All 845(845,846) : 57 All 264 : 36 Cr. L. J. 177, *Darsu v. Emperor*. (Do.)
[See also ('36) AIR 1936 All 107 (109) : 58 All 589 : 36 Cri L Jour 155, *Emperor v. Masuria*. (Person bound over released on bail under S. 498 — Period of release should be excluded in calculating the term.)]

Section 427
Note 1

against his acquittal.¹ This section only gives statutory effect to that power.²

Section 428

428.* (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

* Code of 1882 : S. 428 — Same.

Code of 1872 : S. 282, paras. 1, 3 and 4.

282. In any case in which an appeal has been allowed, the appellate Court, if it thinks further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the appellant to be necessary, may either make such further inquiry and take such additional evidence itself, or may direct such inquiry to be made and additional evidence to be taken.

When the evidence has not been taken before itself, the result of the further inquiry and the additional evidence shall be certified to the appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

Unless the appellate Court otherwise directs, the presence of the appellant may be dispensed with when the further inquiry is made or evidence taken.

Code of 1861 : S. 422.

422. In any case in which an appeal has been allowed, it shall be competent to the appellate Court, if it think further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary, to direct such enquiry to be made and additional evidence to be taken. The result of the further enquiry and the additional evidence shall be certified to the appellate Court, and the appellate Court shall thereupon proceed to pass such judgment, sentence, or order as to such Court shall seem right.

Section 427 — Note 1

1. ('79) 2 All 340 (341, 342) (FB), *Empress of India v. Mangu*.
(('76) 1 Cal 281 (282), *Queen v. Gobind Tewari*.
[See (1865) 3 Suth W R Cr 4 (5), *Queen v. Madarce Chowkcedar*.]
[See also ('69) 1869 Rat 17 (18), *Reg. v. Gopala Shiru*.
(('79) 2 All 386 (389), *Empress of India v. Karim Baksh*.]
2. ('87) 9 All 528 (529) : 1887 A W N 156, *Queen-Empress v. Gobardhan*.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter xxv, as if it were an inquiry.

Section 428
Notes 1-2

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and object of the section. 3. "Appeal under this chapter." 4. "If it thinks additional evidence to be necessary." 5. "Shall record its reasons." 6. "Direct it to be taken by a Magistrate." | <ol style="list-style-type: none"> 7. "Shall certify such evidence to the appellate Court," etc. — Sub-clause (2). 8. Presence of accused while additional evidence is taken—Sub-clause (3). 9. Procedure in taking additional evidence — Sub-clause (4). 10. Appeal or revision. |
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Other Topics (miscellaneous)

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|---|--|
| <p>Act 11 of 1846 and rules—Further evidence by High Court on appeal from Agent of Mewar Estates. See Note 3.</p> <p>Additional evidence and Ss. 195 and 476. See Note 9.</p> <p>Additional evidence not to fill up gap in prosecution case. See Note 4.</p> <p>Additional evidence or remand under S. 423. See Notes 4 and 6.</p> <p>Additional evidence — Where formal proof is wanted. See Note 4.</p> <p>Chemical examiner's report—No order as to its admission — Nor record of reasons — Effect. See Note 5.</p> <p>Discretion in taking additional evidence. See Note 4.</p> <p>Disposal of appeal by appellate Court itself after fresh evidence. See Note 7.</p> <p>Examination of accused after additional evidence. See Note 9.</p> <p>Inapplicable to S. 125. See Note 3.</p> <p>Inapplicable to S. 437. See Note 3.</p> <p>Inapplicable to S. 476B. See Note 3.</p> <p>Inherent power of supplementing evidence under S. 476B. See Note 3.</p> | <p>Judgment after additional evidence — Original or appellate — Legislative changes. See Note 10.</p> <p>"Necessary"—Explained. See Note 4.</p> <p>No evidence at all—Section inapplicable. See Note 4.</p> <p>No record of reasons. See Note 5.</p> <p>No reference to police for further investigation. See Note 6.</p> <p>No report or finding. See Note 6.</p> <p>Object of record of reasons. See Note 5.</p> <p>Object of the section. See Notes 2 and 4.</p> <p>Order for further evidence—Withdrawal of appeal and cancellation of order. See Note 10.</p> <p>Presence of accused — Legislative changes. See Note 8.</p> <p>Proceedings where additional evidence taken. See Notes 2 and 3.</p> <p>Proof of sanction under S. 196 — Not proper. See Note 2.</p> <p>Record of reasons—Legislative changes. See Note 5.</p> <p>Sections 540, 375 and 439—O. 41, R. 27, Civil Procedure Code. See Note 2.</p> |
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1. Legislative changes. — Under the Code of 1872, additional evidence could be taken only upon any point "bearing upon the guilt or innocence of the appellant."¹ These words were omitted in the Code of 1882.

2. Scope and object of the section. — This section is analogous to O. 41, R. 27 of the Civil Procedure Code, and enables the appellate Court to take additional evidence,¹ but having regard to the difference

Section 428 — Note 1

1. ('75) 23 Suth W R Cr 34 (35), *Sheikh Mohamad Golab v. Mohabeer Singh*. (Thus evidence as to place of assault was held to have no bearing on the merits of the case and the appellate Court was directed to decide the case on the evidence already before it.)

Note 2

1. ('33) AIR 1933 Cal 364 (365) : 60 Cal 814 : 34 Cri L Jour 320, *Amarchand v. Emperor*. (No question of taking additional evidence but one of referring certain matter to Local Government under ordinance (10 of 1932) S. 48 (2) — S. 428 Cr. P. C., is inapplicable.)
- ('28) AIR 1928 Bom 241 (242) : 52 Bom 686 : 29 Cr. L. J. 990, *Bansi Lal v. Emperor*. (Evidence was admitted as there was no question of surprise in this case.)

Section 427
Note 1

against his acquittal.¹ This section only gives statutory effect to that power.²

Section 428

428.* (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

* Code of 1882 : S. 428 — Same.

Code of 1872 : S. 282, paras. 1, 3 and 4.

282. In any case in which an appeal has been allowed, the appellate Court, if it thinks further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the appellant to be necessary, may either make such further inquiry and take such additional evidence itself, or may direct such inquiry to be made and additional evidence to be taken.

When the evidence has not been taken before itself, the result of the further inquiry and the additional evidence shall be certified to the appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

Unless the appellate Court otherwise directs, the presence of the appellant may be dispensed with when the further inquiry is made or evidence taken.

Code of 1861 : S. 422.

422. In any case in which an appeal has been allowed, it shall be competent to the appellate Court, if it think further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary, to direct such enquiry to be made and additional evidence to be taken. The result of the further enquiry and the additional evidence shall be certified to the appellate Court, and the appellate Court shall thereupon proceed to pass such judgment, sentence, or order as to such Court shall seem right.

Section 427 — Note 1

1. ('79) 2 All 340 (341, 342) (FB), *Empress of India v. Mangu*.

('76) 1 Cal 281 (282), *Queen v. Gobind Tewari*.

[See (1865) 3 Suth W R Cr 4 (5), *Queen v. Madarce Chowkeedar*.]

[See also ('69) 1869 Rat 17 (18), *Reg. v. Gopala Shiru*.

('79) 2 All 386 (389), *Empress of India v. Karim Baksh*.]

2. ('87) 9 All 528 (529) : 1887 A W N 156, *Queen-Empress v. Gobardhan*.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter xxv, as if it were an inquiry.

Section 428
Notes 1-2

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes. 2. Scope and object of the section. 3. "Appeal under this chapter." 4. "If it thinks additional evidence to be necessary." 5. "Shall record its reasons." 6. "Direct it to be taken by a Magistrate." | <ol style="list-style-type: none"> 7. "Shall certify such evidence to the appellate Court," etc. — Sub-clause (2). 8. Presence of accused while additional evidence is taken—Sub-clause (3). 9. Procedure in taking additional evidence — Sub-clause (4). 10. Appeal or revision. |
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Other Topics (miscellaneous)

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|---|--|
| <p>Act 11 of 1846 and rules—Further evidence by High Court on appeal from Agent of Mewar Estates. See Note 3.</p> <p>Additional evidence and Ss. 195 and 476. See Note 9.</p> <p>Additional evidence not to fill up gap in prosecution case. See Note 4.</p> <p>Additional evidence or remand under S. 423. See Notes 4 and 6.</p> <p>Additional evidence — Where formal proof is wanted. See Note 4.</p> <p>Chemical examiner's report—No order as to its admission — Nor record of reasons — Effect. See Note 5.</p> <p>Discretion in taking additional evidence. See Note 4.</p> <p>Disposal of appeal by appellate Court itself after fresh evidence. See Note 7.</p> <p>Examination of accused after additional evidence. See Note 9.</p> <p>Inapplicable to S. 125. See Note 3.</p> <p>Inapplicable to S. 437. See Note 3.</p> <p>Inapplicable to S. 476B. See Note 3.</p> <p>Inherent power of supplementing evidence under S. 476B. See Note 3.</p> | <p>Judgment after additional evidence — Original or appellate — Legislative changes. See Note 10.</p> <p>"Necessary"—Explained. See Note 4.</p> <p>No evidence at all—Section inapplicable. See Note 4.</p> <p>No record of reasons. See Note 5.</p> <p>No reference to police for further investigation. See Note 6.</p> <p>No report or finding. See Note 6.</p> <p>Object of record of reasons. See Note 5.</p> <p>Object of the section. See Notes 2 and 4.</p> <p>Order for further evidence—Withdrawal of appeal and cancellation of order. See Note 10.</p> <p>Presence of accused — Legislative changes. See Note 8.</p> <p>Proceedings where additional evidence taken. See Notes 2 and 3.</p> <p>Proof of sanction under S. 196 — Not proper. See Note 2.</p> <p>Record of reasons—Legislative changes. See Note 5.</p> <p>Sections 540, 375 and 439—O. 41, R. 27, Civil Procedure Code. See Note 2.</p> |
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1. Legislative changes. — Under the Code of 1872, additional evidence could be taken only upon any point "bearing upon the guilt or innocence of the appellant."¹ These words were omitted in the Code of 1882.

2. Scope and object of the section. — This section is analogous to O. 41, R. 27 of the Civil Procedure Code, and enables the appellate Court to take additional evidence,¹ but having regard to the difference

Section 428 — Note 1

1. ('75) 23 Suth W R Cr 34 (35), *Sheikh Mohamad Golab v. Mohabeer Singh*. (Thus evidence as to place of assault was held to have no bearing on the merits of the case and the appellate Court was directed to decide the case on the evidence already before it.)

Note 2

1. ('33) AIR 1933 Cal 364 (365) : 60 Cal 814 : 34 Cri L Jour 320, *Amarchand v. Emperor*. (No question of taking additional evidence but one of referring certain matter to Local Government under ordinance (10 of 1932) S. 48 (2) — S. 428 Cr. P. C., is inapplicable.)
- ('28) AIR 1928 Bom 241 (242) : 52 Bom 686 : 29 Cr. L. J. 990, *Bansi Lal v. Emperor*. (Evidence was admitted as there was no question of surprise in this case.)

Section 428
Note 2

in language between the two sections the decisions passed under the Civil Procedure Code are not a trustworthy guide in interpreting this section.^{1a} In this Code itself there are other sections which empower Courts to take additional evidence. See sections 540, 375 and 439.

The object of the section is to see that justice is done between the prosecutor and the person prosecuted.² The object is also "the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate or the vindication of a wrongfully accused person's innocence, where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth."³ In *Varadarajulu v. Emperor*,⁴ Wallis, C. J., observed :

"It would not be creditable to the administration of justice or in accordance with modern ideas on the subject that a conviction or a charge if otherwise sustainable should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite [sanction of the Local Government under S. 196], not affecting the merits, a misconception which was shared by the trial Magistrate."

Another reason for the enactment of this section is to save public time by taking only the additional evidence necessary instead of remanding the whole case for examining once again the witnesses already examined.⁵

The additional evidence can be taken in appeals against conviction or appeals against acquittal.⁶ It can be taken for the prosecution or for the defence.⁷ Section 307 provides that the High Court has, in proceedings under that section, all the powers of an appellate Court. The High Court can, therefore, on a reference under S. 307, call for further evidence under this section.⁸

Section 439 also provides specifically that the High Court in revision may exercise the powers under this section.⁹

1a. ('28) AIR 1928 Mad 1174 (1175) : 30 Cr.L.J. 133, *Subramania Iyer v. Emperor*. (This section is not limited to reception of merely formal evidence.)

2. ('26) AIR 1926 Lah 309 (310) : 7 Lah 148 : 27 Cr. L. J. 463, *Dulla v. Emperor*. (Evidence necessary for correct finding—Action under this section is justified.)

('25) AIR 1925 Pat 450 (452) : 4 Pat 204 : 27 Cr. L. J. 524, *Gulji Mian v. Emperor*.

3. ('72) 18 Suth W R Cr 31 (32) : 9 Beng L R App 31, *In re Udai Chand Mukhopadhyaya*.

('25) AIR 1925 Pat 526 (528) : 26 Cri L Jour 1171, *Aktar Hussain v. Emperor*.

4. ('20) AIR 1920 Mad 928 (929) : 42 Mad 885 : 20 Cr.L.J. 455 (SB). (Before exercising its power under this section the Court must be satisfied that the case is one of formal proof only.)

5. ('18) AIR 1918 All 133 (134) : 19 Cri L Jour 485, *Ishwar Prasad v. Emperor* [See ('35) AIR 1935 Nag 125 (127) : 31 Nag L R 246 : 36 Cri L Jour 740, *Potram v. Emperor*. (If appellate Court considers additional evidence necessary, it should proceed under this section—It cannot order a re-trial with the condition that the evidence already on record should be taken into consideration.)]

6. ('14) AIR 1914 Mad 628 (631) : 38 Mad 1028 : 15 Cri L Jour 236, *In re Sinnu Goundan*.

7. ('25) AIR 1925 Mad 106 (109, 111) : 25 Cr. L. J. 401, *In re Narayana Menon*.

('28) AIR 1928 Mad 1174 (1175) : 30 Cr. L. J. 133, *Subramania Iyer v. Emperor*.

8. ('29) AIR 1929 Cal 244 (246) : 56 Cal 566 : 30 Cri L Jour 1031, *Debendra Narayan v. Emperor*.

('73) 20 Suth W R Cr 1 (5), *Queen v. Koonjo*.

See also S. 307 Note 14.

9. ('35) AIR 1935 Pat 208 (209) : 14 Pat 455 : 36 Cri L Jour 1048, *Bal Kishun Das v. Emperor*.

See also the case cited below.¹⁰

Section 428
Notes 2-3

3. "Appeal under this Chapter." — The powers under this section can be exercised only where, *firstly* there is an *appeal* and, *secondly* the appeal is one *under this Chapter* (chapter XXXI). A proceeding under s. 125 of the Code is not an *appellate* proceeding and consequently this section does not apply.¹ A proceeding under s. 437 of the Code is one in *revision* and this section has no application to such a proceeding also.² An appeal under s. 476B of the Code is one under chapter XXXV and not *under this Chapter* and consequently this section does not apply.³ It has, however, been held in the under-mentioned cases⁴ that independently of this section the appellate Court in an appeal under s. 476B, has an *inherent* power to *itself* take evidence and complete an enquiry which it finds to be incomplete. See also section 476B Note 4.

An appeal under s. 250, sub-s. (3), must be considered to be one under this chapter inasmuch as the forum of such an appeal is to be ascertained only by virtue of the provisions of this chapter; the appellate Court may, therefore, record additional evidence in such cases.⁵

It has been held by the Oudh Chief Court that in an appeal to the Sessions Court from the judgment of an *Assistant Sessions Judge*, the former has no power under this section to record additional evidence or to direct such evidence to be taken and that the language of sub-s. (1) shows that it is only when a Sessions Court is sitting to hear an appeal from a judgment of a Magistrate that it has got such power.^{5a}

It has been held in the undermentioned case⁶ that s. 4 of Act XI of 1846 read with R. 44 of the Rules under that Act, empowers the High Court to resort to this section in appeals against convictions by the

10. ('40) AIR 1940 Oudh 396 (397) : 41 Cri L Jour 725 : 189 Ind Cas 258 (259), *Emperor v. Madho Singh*. (Appellate Magistrate passing order that before giving decision evidence of certain witnesses is to be recorded—Decision given without recording such evidence — Procedure held irregular.)

Note 3

1. ('19) AIR 1919 Pat 171 (172) : 20 Cri L Jour 221, *Mt. Narain v. Emperor*.
2. ('07) 6 Cri L Jour 357 (358) : 6 C L J 251, *Moni Mohun v. Ishwar Chunder* ('82) 1882 All W N 146 (147), *Empress v. Sanwallia*.
3. ('28) AIR 1928 Mad 391 (392) : 51 Mad 603 : 29 Cri L Jour 445, *Sami Vannia Nainar v. Periaswami Naidu*.
- ('10) 11 Cr. L. J. 280 (281) : 33 Mad 90 : 5 I. C. 881, *Krishna Reddy v. Emperor*. (Case under old S. 195, sub-s. (6).)
- ('07) 5 Cr. L. J. 288 (289) : 30 Mad 311 : 17 M L J 123 : 2 M L T 84, *Rama Iyer v. Venkatachala Padayachi*. (Do.)
4. ('31) AIR 1931 Lah 761 (762) : 13 Lah 342 : 33 Cri L Jour 178 (FB), *Dhanpat Rai v. Balak Ram*.
- ('31) AIR 1931 Sind 115 (115) : 25 Sind L R 68 : 33 Cri L Jour 43, *Ramchand Bansi Ram v. Lila Ram*.
- ('21) AIR 1921 Mad 453 (454) : 44 Mad 47 : 22 Cri L Jour 372, *In re Subbasari*. (It was also held that an application against an order granting sanction was not an appeal.)
5. ('30) AIR 1930 Mad 483 (484) : 53 Mad 688 : 31 Cr L J 602, *Seeniah Naidu v. Abdul Wahab*.
- 5a. ('35) AIR 1935 Oudh 402 (403) : 36 Cri L Jour 844, *Hori Lal v. Emperor*.
6. ('16) AIR 1916 Bom 313 (314, 315) : 17 Cri L Jour 533, *Emperor v. Khalpa Ranchod*.

Section 428
Notes 3-4

Agent of the Mewar Estates in West Khandesh. See also the under-mentioned case.⁷

4. "If it thinks additional evidence to be necessary." — It has been held in the undermentioned cases,¹ that the power to take additional evidence should not be exercised for the purpose of filling a gap in the prosecution case when the necessary evidence was available to the prosecution at the hearing and ought to have been produced then. In *Varadarajulu Naidu v. Emperor*,² Wallis, C. J., has held that action can be taken under this section to supply a defect in formal proof but that before additional evidence is allowed the Court should be satisfied that the case is one of *formal* proof only. In the cases cited below,³ it has been held that it is not correct to hold that the provisions of the section are to be invoked only for supplying formal proof. In *Akhtar Hussain v. Emperor*,⁴ Macpherson, J., observed as follows:

"In India the *onus* is placed on the Court not merely to listen to the evidence, but to inquire to the utmost into the truth of the matter, and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the appellate Court by S. 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice: on the contrary the enactment is, like the other provisions referred to, directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of case. The conditions for the exercise of the power are set out in the section itself, and within these limits it is contemplated that the power will be exercised . . .

7. ('34) AIR 1934 Mad 55 (59): 57 Mad 259: 35 Cri L Jour 511, *Mahomed Naina Marikayar v. Ahmad*. (Appeal to High Court from order under S. 19 of Fugitive Offenders Act, 1881 — High Court can direct additional evidence, though Act does not define powers of appellate Court.)

Note 4

1. ('37) AIR 1937 Mad 181 (181, 182): 38 Cr. L. J. 257, *In re Hanumanthappa*. (The object of S. 428, Criminal P. C., is not for the purpose of enabling the prosecution to produce evidence which could easily have been produced at the first trial—It is not to enable the prosecution having failed once to have an opportunity of trying the case all over again.)
- ('35) AIR 1935 Oudh 402 (404): 36 Cr. L. J. 844: 11 Luck 231, *Hori Lal v. Emperor*. (If the Government Pleader takes upon himself the responsibility of not producing a certain eye-witness, then it is not the duty of the appellate Court to fill up the gap in the prosecution evidence by summoning that witness.)
- ('35) AIR 1935 Mad 325 (326): 37 Cr. L. J. 99, *In re United Motor Finance Co. Ltd.*
- ('25) AIR 1925 Lah 85 (86): 5 Lah 404: 26 Cr. L. J. 320, *Emperor v. Jaswant Rai & Co.*
- ('82) 5 All 217 (221): 1882 A W N 227, *Empress of India v. Fateh*.
- ('74) 21 Suth W R Cr 13 (14), *Queen v. Madhub Chunder Giri*.
- ('13) 36 Mad 457 (467): 12 I. C. 961: 12 Cr. L. J. 585, *Jeremiah v. Vas*.
- ('20) AIR 1920 Mad 928 (932, 933): 42 Mad 885: 20 Cr. L. J. 455 (SB), *Varadarajulu Naidu v. Emperor*. (Per Sadasiva Iyer, J.)
- [See ('28) AIR 1928 Bom 241 (242): 52 Bom 686: 29 Cr. L. J. 990, *Bansilal v. Emperor*.]
2. ('20) AIR 1920 Mad 928 (929): 42 Mad 885: 20 Cr. L. J. 455 (SB).
3. ('25) AIR 1925 Mad 106 (109, 111): 25 Cr. L. J. 401, *In re Narayana Menon*.
- ('28) AIR 1928 Mad 1174 (1175): 30 Cr. L. J. 133, *Subramania Ayyar v. Emperor*. [See also ('30) AIR 1930 Mad 854 (855): 54 Mad 63: 32 Cri L Jour 109, *Konda Reddi v. Mangala Babanna*. (Additional evidence which will explain, clear up or perhaps supplement evidence in support of a charge which has resulted in a conviction, can be taken.)
- ('26) AIR 1926 Lah 309 (309, 310): 7 Lah 148: 27 Cr. L. J. 463, *Dulla v. Emperor*.]
4. ('25) AIR 1925 Pat 526 (528, 529): 26 Cr. L. J. 1171.

the appellate Court is by no means condemned to countenance a miscarriage of justice because the prosecutor or even the trial Court fails to realize the necessity of bringing certain evidence on the record, even if that evidence is not purely formal."

Section 428
Note 4

In the undermentioned Madras case⁵ it has been explained that the word "necessary" does not import that it is impossible to pronounce judgment without the additional evidence. There may be many cases where judgment can be pronounced without any additional evidence, but there are cases where it is necessary as a general measure of justice to record additional evidence.

The necessity for taking additional evidence under this section must be determined on the particular facts of each case.⁶ But it has been held that the necessity for additional evidence must be apparent from the record in the case and must not be derived from external information.^{6a} The discretion vested in the Court of appeal should not be exercised arbitrarily⁷ but only when the interests of justice demand such a procedure.⁸

No hard and fast rule can, however, be laid down. The appellate Court will not exercise the power under this section when there is no evidence at all; but where there is some *prima facie* evidence bearing

5. ('25) AIR 1925 Mad 106 (108): 25 Cri L Jour 401, *In re Narayana Menon*. (In this case accused were allowed to adduce additional evidence so that defence may have every opportunity of putting forward anything that might help their case.)

6. ('11) 12 Cri L Jour 585 (590, 591): 36 Mad 457 : 12 I C 961, *Jeremiah v. Vas*. (The language of the section seems to indicate cases where the evidence on the record is unsatisfactory or leaves the Court in state of doubt.)

6a. ('06) 3 Cri L Jour 234 (236): 12 Bur L R 21, *Emperor v. Nga Po Gyi*. (Affidavits showing that the evidence of civil surgeon was incorrect as the facts were not accepted as it was held that they would throw entirely new aspect on the case.)

7. ('10) 11 Cr. L. J. 571 (574): 8 Ind Cas 145 (Mad), *In re Bhami Luxuman Shanbaga*.

('20) AIR 1920 Mad 928 (930, 933): 42 Mad 885 : 20 Cri L Jour 455 (S B), *Varadarajulu v. Emperor*. (Discretion should be exercised against the accused only in exceptional cases.)

('82) 5 All 217 (221): 1882 A W N 227, *Empress of India v. Fateh*.

8. ('35) AIR 1935 All 63 (64) : 36 Cr. L. J. 117, *Sarnam Singh v. Emperor*. (Prosecution bound to produce a certain report not producing it — Accused applying as soon as it comes to his knowledge.)

('31) 1931 Mad W N 731 (732), *Subba Reddi v. Emperor*.

('28) AIR 1928 Bom 241 (242) : 52 Bom 686 : 29 Cr. L. J. 990, *Bansilal v. Emperor*. (In this case there was no surprise — Evidence had been already tendered but it was such as should not have been admitted by the trial Court — Held, appellate Court was justified in taking additional evidence.)

('01) 25 Mad 627 (631), *King-Emperor v. v. Alexander Allan*. (Attention was not clearly drawn in trial Court to an important question in the case.)

('23) AIR 1923 Mad 600 (601) : 24 Cr. L. J. 403, *In re Cholancherri Ayamma*.

('63) 1883 Rat 190 (191), *Queen-Empress v. Shivanna*. (Offence of bigamy — Fact of first marriage was uncontested in Courts below, the High Court directed evidence to be taken as to truth and legality of the first marriage.)

('21) AIR 1921 All 215 (216) : 27 Cr. L. J. 813, *Nagina v. Emperor*.

[See ('83) 5 All 217 (221) : 1882 A W N 227, *Empress of India v. Fateh*.]

('29) AIR 1929 Cal 244 (246) : 56 Cal 566 : 30 Cri L Jour 1031, *Debendra Narayan v. Emperor*.

('21) AIR 1921 Mad 687 (688) : 23 Cri L Jour 700, *In re Ramaswami Tevan*.]

[See also ('14) AIR 1914 All 538 (540) : 16 Cr. L. J. 49, *Dick v. Emperor*.]

Section 428
Note 4

upon the guilt or innocence of the accused, the appellate Court may act under this section.⁹

It has been held in the following cases that the taking of additional evidence is not an improper exercise of discretion :

- (1) Where the trial Court fails to call witnesses who are known to be in a position to speak to important relevant facts but who have not been called by either party.^{9a}
- (2) Where the Court of first instance refuses to take the evidence offered either on the erroneous view as to its inadmissibility or for any other reason.¹⁰
- (3) Where an appellate Court finds that certain documents admitted in evidence have not been proved according to law, that the examination of the accused under S. 342 is not satisfactory and that the accused should be examined afresh.^{10a}
- (4) Where the prosecution witnesses have not been cross-examined at the trial, the witnesses not having been recalled after charge, and the accused wishes their evidence to be brought before the appellate Court.^{10b}
- (5) Where the accused complains that a confession has been obtained from him by undue influence or force and where the trial Court fails to inquire into the allegations.¹¹
- (6) Where the accused is said to be insane and the medical or expert evidence has not been taken on the point.¹²

The Court of appeal has also under S. 423, the power to remand the whole case for re-trial.^{12a} Whether a remand under that section or taking additional evidence under this section is the proper procedure will depend upon the facts of each case,¹³ but where an illegality in the conduct of the case has been committed, as for instance the non-compliance with the provisions of S. 256 or S. 342, the proper course would be

9. ('72) 18 Suth W R Cr 31 (32) : 9 Beng L R App 31, *In re Udaichand Mukhopadhyaya*. (Per Kemp, J.)

9a. ('38) AIR 1938 Mad 900 (902) : 40 Cri L Jour 35, *In re Donald Dixon*. (In such a case, the appellate Court should avail itself of the power under this section.)

10. ('96) 19 Mad 375 (381) : 6 M L J 195, *Queen-Empress v. Virasami*. (There was refusal to take evidence on the ground that witnesses were not material.)

('11) 12 Cri L Jour 585 (591) : 12 I C 961 : 36 Mad 457, *Jeremiah v. Vas*.

('83) 2 Weir 480 (480), *In re Iyachi Kone*.

('11) 12 Cri L Jour 412 (420) : 11 I C 596 (Lah), *Bhagwan Kaur v. Emperor*.

('87) 1887 Rat 347 (349), *Queen-Empress v. Bhabhutgar*.

('07) 5 Cri L Jour 164 (167, 168) : 9 Bom L R 148 : 31 Bom 218, *Emperor v. Isap Mahmud*.

10a. ('36) AIR 1936 Pat 438 (439) : 37 Cr. L. J. 906, *Sri Krishna Prasad v. Emperor*. (In ordering additional evidence to be taken it would be quite proper to direct a further examination of the accused at the same time.)

10b. ('38) AIR 1938 Cal 781 (782) : 1 L R (1939) 1 Cal 205 : 40 Cr. L. J. 47, *Munshi v. Muza ffar*.

11. ('86) 1886 Rat 242 (244), *Queen-Empress v. Bhagi*. (Case of retracted confession.)

('71) 8 Bom H C R Cr 126 (149), *Reg. v. Kashinath*.

(1864) 2 Bom H C R Cr 398 (399), *Reg. v. Ganu Bapu*.

12. (1864) 1 Suth W R Cr 1 (1), *Queen v. Sheikh Mustafa*.

('10) 11 Cr. L. J. 105 (105) : 4 I. C. 985 (Lah), *Chajju Mal v. Emperor*.

12a. ('36) AIR 1936 Pat 438 (439) : 37 Cr. L. J. 906, *Sri Krishna Prasad v. Emperor*.

13. ('66) 2 Bom H C R Cr 395 (396, 397), *Reg. v. Kalla Lakhmaji*.

('19) AIR 1919 Cal 862 (872) : 19 Cr. L. J. 753, *Grande Venkata Ratnam v. Corporation of Calcutta*. (Case of great public importance—Re-trial was ordered.)

to remand the case.¹⁴ An order setting aside the conviction and sending the case back for further evidence but not for complete trial is illegal.¹⁵

Section 428
Notes 4-6

5. "Shall record its reasons." — The provision was first introduced in the 1898 Code. Whenever additional evidence is now taken under this section reasons for the same should be given.¹ This provision is a guarantee against the appellate Court exercising its powers arbitrarily.²

In an appeal against the conviction of an accused for possession of cocaine, the appellate Court sent for the Chemical Examiner's report which was not tendered in evidence in the lower Court, and without any formal order admitting this further evidence and without recording the reasons for taking such additional evidence, admitted the report and ultimately dismissed the appeal. It was held that the additional evidence ought not to have been perused in appeal unless the provisions of this section were complied with.³

It has, however, been held that the mere fact that reasons have not been recorded is not an illegality vitiating the trial and that the defect is curable under S. 537 if it has not caused a failure of justice.⁴

6. "Direct it to be taken by a Magistrate." — The Court can only direct additional evidence to be taken by a Magistrate. It cannot call for a *report* from such Magistrate¹ or a *finding* on such additional evidence² and act thereon,³ nor can it send the case to the

14. ('29) AIR 1929 Bom 309 (310, 311, 313) : 53 Bom 578 : 31 Cr. L. J. 309, *Emperor v. Lakshman Ramshet*.

('25) AIR 1925 Cal 172 (172) : 26 Cr. L. J. 313, *Abdus Samad v. Emperor*.

(1900) 2 Bom L R 542 (544), *Queen-Empress v. Nasarwanji*.

15. ('36) AIR 1936 Pat 438(439); 37 Cr.L.J.906, *Sri Krishna Prasad v. Emperor*.

Note 5

1. ('24) AIR 1924 All 193 (194) : 26 Cr.L.J. 200, *Wali Muhammad v. Emperor*.

('26) AIR 1926 Lah 309 (309) : 7 Lah 148 : 27 Cri L Jour 463, *Dulla v. Emperor*.

('10) 11 Cr.L.J. 571 (574) : 8 Ind Cas 145 (Mad), *In re Bhami Luzuman Shanbaga*.

('10) 11 Cri L Jour 734 (734) : 8 Ind Cas 943 (Mad), *In re Chintalapudi Kotiah*.

(Appellate Court in admitting additional evidence did not conform to the provisions of this section—The appeal was directed to be reheard.)

2. ('20) AIR 1920 Mad 928(933); 42 Mad 885 : 20 Cr.L.J. 455 (S B), *Varadarajulu Naidu v. Emperor*.

3. ('24) AIR 1924 All 193 (194) : 26 Cr. L. J. 200, *Wali Muhammad v. Emperor*.

4. ('30) AIR 1930 Mad 483 (484) : 53 Mad 638 : 31 Cr.L.J. 602, *Secniah v. Abdul*.

('11) 12 Cri L Jour 240 (241) : 10 Ind Cas 290 (Mad), *Emperor v. Karnan Benu*.

[See ('10) 11 Cr. L. J. 734 (734) : 8 I. C. 943 (Mad), *In re Chintalapudi Kotiah*.

(In this case reasons were not recorded and the judgment seemed to be influenced by irregularly admitted additional evidence—Rehearing of appeal was ordered.)

Note 6

1. ('25) AIR 1925 Pat 450 (452) : 4 Pat 204 : 27 Cri L Jour 524, *Guhi Mian v. Emperor*. (A report as to what happened in Court.)

2. ('15) AIR 1915 Mad 756 (756) : 16 Cri L Jour 79, *Muthukaruppan v. Vellaya*.

('11) 12 Cr.L.J. 240 (241); 10 Ind Cas 290 (Mad), *Emperor v. Karnan Benu*.

('34) AIR 1934 Lah 316 (316); 35 Cri L Jour 1166, *Mahammad Din v. Emperor*.

(S. 428 does not allow the trial Court to re-decide the case.)

('69) 3 Bom L R App Cr 62 (64).

('16) AIR 1916 Pat 219 (221); 17 Cr.L.J. 332; 1 Pat L J 99, *Gajanand v. Emperor*.

[See ('18) AIR 1918 Pat 582 (583); 19 Cr.L.J. 77, *Bhaso Singh v. Emperor*. (Appellate Court ordering re-trial and at the same time directing that evidence on the record should be treated as evidence in the case—Held, order was irregular.)]

3. ('16) AIR 1916 Mad 775 (775, etc.); 16 Cr.L.J. 767, *Sudalaimuthu v. Enan*.

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police for further investigation.⁴

A Court or Magistrate who is directed to take additional evidence can take only such evidence as has been directed or asked to be taken, and not more; whereas if the case is remanded under S. 423 the accused is entitled to lead such additional evidence as he may desire.⁵

7. "Shall certify such evidence to the appellate Court," etc. — Sub-clause (2). — The Magistrate directed to take additional evidence under this section should promptly comply with the same¹ and certify the evidence to the appellate Court which after perusing the additional evidence should itself dispose of the appeal.²

8. Presence of accused while additional evidence is taken — Sub-clause (3). — Under the corresponding section of the Code of 1872 the presence of the appellant could be dispensed with unless the appellate Court otherwise directed. Under the later Codes, the evidence should ordinarily be taken in the *presence* of the accused, though the Court has power to dispense with such presence.¹ If the original trial had been with a jury or assessors, it is not necessary that the additional evidence should be taken in the presence of the jury or the assessors.²

9. Procedure in taking additional evidence—Sub-clause (4). — In taking additional evidence under this section the provisions contained in chapter XXV, *viz.*, S. 353, etc., should be followed.¹

If during the reception of the additional evidence by the Magistrate any offence against public justice as is mentioned under S. 195 is

4. (1900) 1900 All W N 130 (130), *Empress v. Maheshri*.

5. ('06) 3 Cri L Jour 304 (305); 3 C L J 303, *Mir Sarwarjan v. Emperor*.
[See also ('37) AIR 1937 Nag 285 (286); I L R (1937) Nag 541: 38 Cri L Jour 1058, *Sheoram v. Emperor*. (Appellate Court can direct the taking of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that the accused persons may be given a chance of adducing further evidence—*Obiter*.)]

Note 7

1. (1865) 4 Sath W R Cr Cir 1 (1): Circular No. 11 of 20th November 1865.
2. ('16) AIR 1916 Mad 775 (776, 778): 16 Cr. L. J. 767, *Sudalaimulku Chettiar v. Enan Samban*.
- ('15) AIR 1915 Mad 756 (756): 16 Cri L Jour 79, *Muthukaruppan Servai v. Vellayya Kudumban*.

Note 8

1. ('28) AIR 1928 Bom 200 (200): 52 Bom 699: 29 Cri L Jour 972, *Narayan Keshav v. Emperor*. (S. 342 does not apply to evidence taken under the present section.)
('06) 3 All L Jour 112n (112n), *Sheo Achal v. Emperor*.
('91) 13 All 171 (188): 1891 A W N 48, *Queen-Empress v. Pohpi*.
('06) 3 Cr. L. J. 376 (378): 29 Mad 100, *Suryanarayana Row v. Emperor*. (Accused cannot be compelled to be present at the time of taking additional evidence.)
2. ('38) AIR 1938 Cal 781 (781): I L R (1938) 1 Cal 205: 40 Cr. L. J. 47, *Munshi v. Muzaffar*.
('07) 6 Cri L Jour 154 (159): 11 C W N 904, *Emperor v. Jasha Bewa*.
('93) 15 All 136 (137): 1893 A W N 50, *Queen-Empress v. Ram Lall*.
See also S. 285 Note 5.

Note 9

1. ('10) 11 Cri L Jour 734 (734): 8 I. C. 943 (Mad), *In re Chintalapudi Kotiah*.
[See also ('83) 1883 A W N 226 (226), *Empress v. Ashiq Hussain*. (Appellate Court ordering that the evidence should be taken again—Memorandum of prior examination should not be read out and the witness be asked if it was correct.)]

committed, such Magistrate is competent to prefer a complaint with reference to the same under S. 476.² As to the necessity of examining the accused after additional evidence is taken, see Note 9 to S. 312.

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10. Appeal or revision. — Under S. 422 of the Code of 1861, where a Court of appeal took additional evidence and disposed of the appeal, the judgment was considered to be an original judgment and it was held that an appeal lay against such judgment to the High Court on the merits.¹ The section was amended in 1869, and since then a judgment passed by the appellate Court after taking the additional evidence was held to be only as appellate judgment from which there was no appeal.²

A Court of revision will not interfere with an order under this section made by a Court of appeal unless it is satisfied that the appellate Court had committed an error of law which has prejudiced the accused on the merits.³

An appeal was pending before the first class Magistrate. He ordered some additional evidence to be taken under this section. One of the parties to the appeal filed a petition before the Additional District Magistrate who withdrew the appeal to his file and disposed of it without taking the additional evidence. It was held that he had the power to do so and that he was not bound by the opinion of the first class Magistrate.⁴ It was observed that:

"Under S. 423 the appellate Court, if it thinks additional evidence necessary, may take such evidence before deciding the appeal, but there is nothing in the Code of Criminal Procedure or any reason to render it illegal or irregular for the appellate Court to dispense with such evidence if further consideration or argument leads the Court to the conclusion that such evidence is not necessary."

429.* When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing

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Procedure where Judges of Court of Appeal are equally divided.

* 1882 : S. 429; 1872 : S. 271 para. 8; 1861 — Nil.

('21) AIR 1921 All 215 (216) : 27 Cri L Jour 813, *Nagina v. Emperor*. (Using evidence under S. 288.)]

2. ('71) 15 Suth W R Cr 64 (66), *Queen v. Buktear Maifaraz*.

Note 10

1. (1865) 2 Suth W R Cr 13 (14, 24), *Queen v. Mohesh Chunder*.

2. ('71) 15 Suth W R Cr 33 (34), *In re Dhunobur Ghose*.

(1900) 27 Cal 372 (375) : 4 C W N 497, *Queen-Empress v. Isahak*, (Under S. 422 before the amendment of 1869, appellate Court was required to pass such judgment or sentence or order as it deemed fit but this is not the case now. The appellate Court has now only to proceed to dispose of the appeal.)

('69) 6 Bom H C R Cr 64 (66), *Reg. v. Nantanram Uttamram*. (Do.)

3. ('25) AIR 1925 Pat 526 (530) : 26 Cr. L. J. 1171, *Akhtar Hussain v. Emperor*. (Order admitting additional evidence was not interfered with.)

('18) AIR 1918 Pat 272 (272, 273) : 19 Cr. L. J. 902 : 3 Pat L Jour 632, *Mahomed v. Emperor*. (Revisional Court set aside the order refusing to take additional evidence.)

4. ('08) 7 Cr. L. J. 329 (330) : 31 Mad 277 : 18 M L J 89, *In re Alagu Ambalam*. See also S. 407 Note 4.

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(if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Synopsis

1. Scope and applicability of the section.
2. "Case."
3. "Judgment or order shall follow such opinion."
4. Appeal.

Other Topics (miscellaneous)

Death or transportation—Difference of view as to—Effect. See Note 3.	Revisions—Section 439. See Note 1.
Difference of view — No ground for acquittal. See Note 3.	Scope of enquiry before third Judge. See Note 2.
Inapplicability to bails. See Note 1.	Section 195 — Inapplicability of this section to. See Note 1.
Inapplicability to revisions under section 107, Government of India Act. See Note 1.	Several accused—Difference of view as to one only. See Note 2.
Legislative changes. See Note 1.	Third Judge not to disagree on agreed points. See Note 2.
Letters Patent. See Notes 1 and 4.	Whole case is before third Judge and not merely points of difference. See Note 2.
No reference to Full Bench by the third Judge. See Note 1.	
Reference under S. 307. See Note 1.	

1. Scope and applicability of the section. — This section provides for the procedure to be followed where the Judges of the Court of appeal are equally divided in opinion. This provision was first introduced in the Code of 1872. Before that year such cases were governed by the Letters Patent. Under the Letters Patent before its amendment in 1928 the opinion of the senior Judge prevailed and no reference to a third Judge was allowed.¹ As regards the amendment in 1928, see Letters Patent (Calcutta), clause 36.

The section applies not only to appeals but also to revision petitions by virtue of S. 439, sub-s.(1).²

The same procedure has been provided for such cases in a reference under S. 378 for confirmation of death sentence. The principle of this section applies to a reference under S. 307.³

The powers conferred by the Code under S. 195, sub-s.(6) (now repealed)⁴ or over applications for bail⁵ are not, however, part of the appellate and revisional jurisdiction conferred under Chapters XXXI and XXXII of the Code and consequently, where there is a difference of opinion this section does not apply; but clause 36 of the Letters Patent applies.

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1. ('70) 2 N W P H C R 117 (119, 121) (FB), *Queen v. Nym Singh*. ('68) 10 Suth W R Cr 45 (45) : 2 Beng L R 25 (FB), *Queen v. Kazim Thakoor*.
2. ('32) 1932 Mad W N 873 (888), *Kunhambu v. Local Fund Overseer, Chirakkal*.
3. ('91) 15 Bom 452 (474, 475), *Queen-Empress v. Dada Ana*. (It is the just and the best procedure to follow.)
[See also ('06) 3 Cr. L. J. 371 (374) : 29 Mad 91, *Emperor v. Chellan*. ('77) 1 Cal L Rep 275 (275, 287), *Empress v. Mukhun Kumar*.]
4. ('16) AIR 1916 Mad 1110 (1119) : 39 Mad 750 : 13 Cr. L. J. 209 (FB), *Bapu v. Bapu*. (Application to High Court to revoke a sanction granted by lower Court or to give sanction refused by it.)
[See ('12) 13 Cr. L. J. 19 (20) : 13 I. C. 211 (Mad), *Muthuvarapu Seshiah v. Gatram Ramiah*. ('12) 13 Cr. L. J. 291 (292, 293) : 14 I. C. 755 (Cal), *Mathura Sahu v. Damri Ram*.]
5. ('09) 9 Cr. L. J. 409 (413) : 1 I. C. 910 : 36 Cal 174, *Jamini Mullick v. Emperor*.

It was held that this section did not apply to revision petitions preferred to the High Court under s.107 of the Government of India Act of 1915 as such petitions were outside the powers conferred by the Code. Such cases were governed by the Letters Patent.⁶ Under s.224 of the Government of India Act of 1935 the High Court has no revisional jurisdiction over the judicial orders of subordinate Courts.

A third Judge to whom reference is made, under this section, cannot make a reference to a Full Bench.⁷

2. "Case." — Where upon a difference of opinion between two Judges the 'case' is laid before a third Judge, the *whole case* is referred to a third Judge and not merely the point or points *upon which the Judges differ*; it is the duty of the third Judge to consider *all* the points involved before he gives his opinion.¹ The third Judge should not, however, differ on a point on which both the referring Judges agreed unless there are strong grounds to do so. Such cases may occur where the Judges are agreed that an accused cannot be acquitted but differ whether he ought to be convicted or whether a new trial should be ordered,² or where they are agreed that the accused is guilty but disagree on a subsidiary point, *e. g.*, a consequential order under s.517 of the Code.³

In cases, however, where there are two or more accused, and the Judges are agreed in opinion with regard to *one* of them, but are divided as regards the others, the case which is laid before the third Judge is only the case of the accused with regard to whom there is a difference of opinion.⁴

3. "Judgment or order shall follow such opinion." — Where a case is referred to a third Judge, he is entitled to give his own opinion, and it will be according to such opinion that judgment will follow.¹ He need not necessarily decide the case according to the

6. ('20) AIR 1920 Cal 417 (419) : 47 Cal 438 : 21 Cr. L. J. 25, *Motiram Bewah v. Mrijan Sardar*.

('20) AIR 1920 Cal 824 (829) : 22 Cr. L. J. 99, *India Iron and Steel Co., Ltd. v. Banso Gopal Tewari*.

7. ('25) AIR 1925 Cal 1040 (1045, 1046) : 26 Cr. L. J. 915, *Ishan Chandra Samanta v. Hriday Krishna Bosc*.

Note 2

1. ('10) 11 Cri L Jour 515 (517, 518) : 7 I. C. 641 : 38 Cal 202, *Sarat Chandra v. King-Emperor*.

('32) 1932 Mad W N 873 (888, 889), *Kunhambu v. Local Fund Overseer, Chirakkal*. (Per Pandalai, J.)

('27) AIR 1927 Bom 177 (182) : 51 Bom 310 : 28 Cri L Jour 373, *Sejmal Punan-chand v. Emperor*.

[See ('30) AIR 1930 Sind 225 (241) : 31 Cr. L. J. 1026, *Mohamed Yusuf v. Emperor*. (A reference under s. 9 (c) of the Sind Courts Act.)]

2. ('19) AIR 1919 Cal 862 (870) : 19 Cri L Jour 753, *Grande Venkata Ratnam v. Corporation of Calcutta*.

[See ('30) AIR 1930 Sind 225 (241) : 31 Cri L Jour 1026, *Mohammad Yusuf v. Emperor*. (Question as to sentences to be passed was referred.)]

3. ('32) 1932 Mad W N 873 (891), *Kunhambu v. Local Fund Overseer, Chirakkal*. (Per Waller, J.)

4. ('10) 11 Cri L Jour 515 (517, 518) : 7 Ind Cas 641 : 38 Cal 202, *Sarat Chandra Mitra v. Emperor*.

('31) AIR 1931 Lah 513 (520) : 32 Cri L Jour 868, *Ahmad Sher v. Emperor*.

Note 3

1. ('10) 11 Cr. L. J. 515 (517, 518) : 7 Ind Cas 641 : 38 Cal 202, *Sarat Chandra v. Emperor*.

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opinion of the Judge who was in favour of an *acquittal*.² Where the Judges are agreed as to the guilt of the accused in a murder case but differ as to whether the sentence should be one of transportation for life or of death, the High Court of Calcutta has held that the fact that there is such a difference of opinion is itself a ground for holding that the death penalty should not be awarded, though the rule is not an inflexible one and cannot be considered to prevent the third Judge to whom a reference is made under this section, from considering the case for himself and to judge for himself whether death penalty should or should not be given.³

4. Appeal. — Under clause 41 of the Letters Patent no appeal lies to the Privy Council, from the judgment of a Judge of a High Court on a reference to him on difference between two other Judges of the same Court.¹

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430.* Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII.

Finality of orders on appeal.

1. Scope of the section. — Sections 407 to 415A, provide for appeals against convictions, and S. 417 for appeals against acquittals, in trials. An appeal is, to all intents and purposes, a trial.¹ Therefore, in the absence of a specific provision to the contrary, it would be open to contend that a conviction by an *appellate* Court is also open to appeal under the said provisions. This section is intended to negative such a result and provides that an appellate judgment or order is *final*,^{1a} subject to the provisions of S. 417 and Chapter XXXII (revision). A sentence is said to be final when it cannot be set aside or interfered with in any manner by any Court.²

* 1882 : S. 430; 1872 : S. 285; 1861 : S. 428.

2. See ('87) 1887 All W N 125 (127), *Empress v. Bundu*. (Dissenting from 1886 All W N 275.)

See also S. 378 Note 2.

3. ('30) AIR 1930 Cal 193 (198) : 31 Cr. L. J. 817, *Emperor v. Dukari Chandra*. See also S. 378 Note 3.

Note 4

1. ('13) 14 Cr. L. J. 672 (672) : 21 Ind Cas 912 (Cal), *Atauar Singh v. Emperor*.

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1. See Note 18 to S. 423.

1a. See the cases cited in the following foot-notes.

[See also ('73) 1873 Pun Re No. 6 Cr. p. (6), *In re a reference from Commissioner, Rawalpindi*. (Case under the Code of 1872—No appeal from appellate Court's order enhancing sentence.)

('23) AIR 1923 All 473 (474) : 45 All 143 : 24 Cri L Jour 766, *Kale v. Emperor*. (High Court has no power to review its own order dismissing a criminal appeal and confirming the conviction and sentence.)

('66) 5 Suth W R Cr 61 (63, 64) : Beng L R Sup Vol 436, *Queen v. Godai Raout*. (Do.)

('72) 17 Suth W R Cr 2 (2), *In re Krishno Churn and Moheram of Assam*. (Do.)

('72) 17 Suth W R Cr 47 (47, 49) : 9 Beng L R 6, *Queen v. Chandra Jugi*. (Do.)]

2. ('86) 12 Cal 536 (538), *Dular Dat Rai v. Nijbat Hosein*.

This section does not, in any way, affect the provisions of S. 369, which, by force of S. 424, is applicable to judgments in appeals also.

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Reading the two sections together, as they ought to be, it follows that an appellate Court, like the trial Court, cannot alter or review its own judgment or order. Nor is such judgment or order open to any *further appeal* except as provided by section 417.

The question has arisen as to whether a judgment given in an appeal without hearing the appellant or his pleader is a bar to the Court reconsidering the matter subsequently either by directly reviewing its previous decision or by way of entertaining a fresh appeal or application for the same purpose. The answer to the question depends largely upon a consideration of the provisions of Ss. 421 and 423. Section 421 lays down the conditions, on the fulfilment of which an appellate Court is entitled to dismiss an appeal summarily. These conditions vary with two classes of appeals, which may, for the sake of convenience of expression, be called *jail appeals*, that is, appeals which are presented through the officer in charge of the jail and *non-jail appeals* which would include all other appeals.

As regards jail appeals, S. 421 requires the Court to peruse the petition of appeal and the copy of the judgment under appeal before dismissing it. If this is done, the judgment of dismissal is final and cannot, under the provisions S. 369, be altered or reviewed by the same Court, as for example, by entertaining a fresh appeal or application in respect of the same matter,³ even though the appellant was actually

3. ('24) AIR 1924 Oudh 425 (425) : 25 Cri L Jour 1313, *Ram Autar v. Emperor*. (Dissenting from A I R 1916 Oudh 85.)

('40) AIR 1940 Oudh 371 (375) : 41 Cr. L. J. 682, *Mt. Raj Kumari v. Emperor*. (Jail appeal summarily dismissed — Dismissal order becomes final as soon as it is dated and signed — Affixing of Court's seal by Bench reader is ministerial act and not quasi-judicial and is not essential to create finality—Represented appeal filed subsequent to aforesaid order is not maintainable — Dissenting from AIR 1916 Oudh 85.)

('40) AIR 1940 Oudh 369 (371) : 41 Cri L Jour 711, *Jodha v. Emperor*. (A represented appeal under the provisions of S. 419 is not maintainable after a jail appeal filed under the provisions of S. 420 has been summarily dismissed.)

('39) AIR 1939 Rang 392 (393) : 41 Cri L Jour 108 : 1940 RLR 145, *The King v. Nga Ba Sain*. (Recommendation for enhancement of sentence of accused made after his jail appeal against conviction has been dismissed summarily—Accused is not again entitled to show cause against his conviction — He can only show cause against enhancement of sentence.)

('36) AIR 1936 Oudh 219 (222):37 Cr.L.J. 362:12 Luck 30, *Ram Jas v. Emperor*. (Summary dismissal of a jail appeal is a bar to a subsequent entertainment of another appeal presented by the same prisoner through counsel.)

('19) AIR 1919 Cal 409 (410) : 46 Cal 60 : 20 Cr.L.J. 265, *Rajab Ali v. Emperor*.

('23) AIR 1923 Mad 426 (427):46 Mad 382 : 24 Cr. L. J. 439, *Kunhahamad Haji v. Emperor*. (Dismissal of jail appeal as time-barred — Decision is one on the merits.)

('26) AIR 1926 All 178 (179):48 All 208:26 Cr.L.J. 1621, *Emperor v. Mewa Ram*. (In this case the High Court under its revisional jurisdiction set aside the order of dismissal of appeal passed by the Sessions Judge.)

('22) AIR 1922 All 480 (481):44 All 759:23 Cr.L.J. 505, *Khiali v. Emperor*. (There cannot be more than one judicial determination upon the question raised by the appeal.)

('23) AIR 1923 Oudh 56 (56) : 23 Cri L Jour 148 : 24 Oudh Cas 304, *Gaya Din v. Emperor*. (Dissenting from A I R 1916 Oudh 85.)

('82) 2 Weir 475 (475), *In re Naga*.

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not heard in the matter.⁴ The reason is that in jail appeals this section does not make it essential that the *appellant should be heard* before the appeal is dismissed.⁵ On the other hand, where the Court dismisses a jail appeal without perusing the petition of appeal or the copy of the judgment accompanying it, it will be acting without jurisdiction and the dismissal is not a valid judgment or order which is entitled to that finality which is conferred on judgments by S. 369; a subsequent appeal or application in respect of the same matter is open to consideration on its merits.⁶

As regards non-jail appeals, S. 421 imposes an additional duty on the appellate Court, besides that of a perusal of the petition of appeal and of the copy of the judgment appealed against; and that is, that the appellant or his pleader should have had a reasonable opportunity of being heard in support of the appeal, before it is dismissed summarily. Where these conditions are satisfied and the appeal is dismissed, the dismissal is final and cannot be reconsidered in any manner such as the entertainment of a fresh appeal or application for the same purpose,⁷ even though the appellant or his pleader was absent at the hearing and was consequently not heard.⁸ But where no such opportunity has been given, the dismissal of the appeal would be without jurisdiction and will not bar a reconsideration of the matter.⁹

Where an appeal is not summarily dismissed under S. 421, the Court is bound to give notice to the parties under S. 422, send for the records of the case from the lower Court, peruse the same, and hear the parties if they appear, before making a final order in the appeal.

(35) AIR 1935 Pat 426 (427) : 37 Cri L Jour 58 : 14 Pat 392, *Pem Mahton v. Emperor*. (The Code does not confer more than one right of appeal.)

[See however ('34) AIR 1934 All 988 (988) : 36 Cr. L. J. 300, *Lachhman Chamar v. Emperor*. (It is the practice of the Allahabad High Court that a summary dismissal of jail appeal does not debar an appeal by a pleader.)]

4. ('26) AIR 1926 Mad 420 (420) : 27 Cr. L. J. 184, *In re Arumugha Padayachi*.

5. ('23) AIR 1923 Mad 426 (432) : 24 Cri L Jour 439 : 46 Mad 382, *Kunahamad Haji v. Emperor*.

(35) AIR 1935 Pat 426 (427) : 37 Cr. L. J. 58 : 14 Pat 392, *Pem Mahton v. Emperor*.

6. See ('34) AIR 1934 All 206 (207) : 56 All 299 : 35 Cr. L. J. 441, *Bansgopal v. Emperor*. (Appeal filed without copy of judgment dismissed—*Held*, the order of dismissal amounted to order of rejection of appeal and therefore appeal could be reheard.)

7. ('35) AIR 1935 Sind 84 (85) : 29 S. L. R. 203 : 36 Cr. L. J. 831 (F B), *Shahu v. Emperor*.

(95) 19 Bom 732 (734), *Queen-Empress v. Bhimappa*. (Dismissal on the ground of limitation—The dismissal must be deemed to have been made after perusal of the petition and judgment.)

(04) 1 Cr. L. J. 329 (330) : 6 Bom L R 360, *Emperor v. Raghunath Ramchandra*. (Do.)

8. ('26) AIR 1926 Lah 196 (197) : 27 Cri L Jour 23, *Nasar Muhammad Khan v. Hara Singh*. (The order dismissing the appeal summarily did not even state that there was no sufficient ground for interference as required by S. 421.)

(35) AIR 1935 Sind 84 (86) : 29 S. L. R. 203 : 36 Cri L Jour 831 (FB), *Shahu v. Emperor*.

(79) 4 Bom 101 (103), *Empress v. Mahomed Yasin*. (Even if the records are not called for.)

(87) 1887 Pun Re No. 24 Cr, p. 48 (48), *Nihala v. Empress*.

9. ('12) 13 Cri L Jour 710 (711) : 16 I. C. 518 (Mad), *Ranga Rao v. Emperor*.

(25) AIR 1925 Lah 355 (356) : 26 Cri L Jour 1169, *Muhammad Sadiq v. Emperor*.

(73) 7 Mad H C R App xxix (xxix). (Such power should be sparingly used.)

(12) 13 Cri L Jour 710 (711) : 16 I. C. 518 (Mad), *Ranga Rao v. Emperor*. (But a revision petition dismissed for default cannot be reheard.)

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If these conditions are fulfilled the judgment or order of the appellate Court is not open to reconsideration by the same Court and is final. The fact that the parties or their pleaders were not present notwithstanding the opportunity given to them, and were consequently not heard, does not affect the finality of the appellate judgment or order.¹⁰ But where the conditions of ss. 422 and 423 are not fulfilled, as where an appeal is dismissed merely for *default of appearance* of the parties,¹¹ or when no notice has been given to the parties as to the date and place of hearing,¹² or the parties though present are not heard, the judgment will be without jurisdiction and will not be a bar to a subsequent reconsideration of the same matter.

Where a convicted person has preferred both a jail appeal and an appeal through a pleader and both of them are pending and the Court dismisses the former summarily in ignorance of the latter appeal, still, it cannot set aside the order of dismissal,¹³ but the High Court in revision can set aside such order.^{13a}

It has been held by the High Courts of Madras and Bombay that the dismissal of an appeal under s. 421 on the ground that the appeal is barred by limitation is a valid judgment and is final.¹⁴ A contrary view has however been expressed in the undermentioned case.¹⁵ It is submitted that the latter view is incorrect.

A was charged with offences under ss. 302 and 304 of the Penal Code. At the trial, he was acquitted of the offence under s. 302 and was convicted of the offence under s. 304. A's appeal against his conviction under s. 304 was dismissed by the High Court. Then the Provincial Government appealed against A's acquittal of the offence under s. 302: It was held that the order of the High Court passed in A's

10. ('23) AIR 1923 Pat 297 (298) : 26 Cri L Jour 419, *Kabir Shah v. Emperor*. (Not clear from facts as to whether party was given notice probably he was given.)

11. ('09) 9 Cr. L. J. 553 (554) : 2 I. C. 247 : 5 Nag LR 76, *Ratanchand v. Emperor*. (Order of dismissal was held not to be a judgment and hence S. 369 was held to be inapplicable.)

('23) AIR 1923 Mad 426 (432, 433) : 46 Mad 382 : 24 Cri L Jour 439, *Kunhahamad Haji v. Emperor*. (When criminal appeal or revision is dismissed for default of appearance, there is no decision on merits and therefore there is no proper disposal of it according to law and the Court may re-hear it.)

('09) 3 Ind Cas 393 (394) : 10 Cr. L. J. 287 (Cal), *Bibhuti Mohan Roy v. Dasimonidassi*. [See also ('19) AIR 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265, *Rajab Ali v. Emperor*.]

See also S. 423 Note 4.

12. ('19) AIR 1919 Cal 409 (410) : 46 Cal 60 : 20 Cr. L. J. 265, *Rajab Ali v. Emperor*. ('09) 9 Cri L Jour 553 (554, 555) : 5 N L R 76 : 2 I. C. 247. *Ratanchand v. Emperor*.

13. ('26) AIR 1926 All 178 (179) : 48 All 208 : 26 Cri L Jour 1621, *Emperor v. Mewa Ram*. (Although in such a case Court dismissing the appeal has no power to set aside the dismissal, the High Court has such a power in exercise of its revisional jurisdiction.)

13a. ('26) AIR 1926 All 178 (179) : 48 All 208 : 26 Cri L Jour 1621, *Emperor v. Mewa Ram*.

('06) 4 Cri L Jour 373 (373) : 3 A L J 693, *Bhawani Dehal v. Emperor*.

14. ('23) AIR 1923 Mad 426 (427) : 46 Mad 382 : 24 Cr. L. J. 439, *Kunhahamad Haji v. Emperor*.

('95) 19 Bom 732 (734), *Queen-Empress v. Bhimappa*.

15. ('34) AIR 1934 All 206 (207) : 56 All 299 : 35 Cri L Jour 441, *Bansgopal v. Emperor*. (The appeal was dismissed for failure to file copy of judgment—Held the appeal must be described as rejected and not dismissed in such cases.)

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appeal from his conviction under S. 304 did not preclude the High Court from hearing the appeal against his acquittal.¹⁶ See also the undermentioned decision.¹⁷

2. Temporary dismissal of appeal.—The temporary dismissal of an appeal is a procedure unknown to the law. An appellate Court cannot, therefore, dismiss an appeal till the decision of a civil suit between the parties.¹ The appellate Court can, however, postpone the decision of an appeal in suitable cases.²

3. Effect of dismissal of appeal on application under section 439 for enhancement of sentence. — See Notes to section 439.

16. ('32) AIR 1932 Nag 121 (123, 124) : 28 Nag L R 233 : 33 Cr. L. J. 849 (FB), *Mohammadi Gul Rohilla v. Emperor*. (Overruling AIR 1932 Nag 73.)
See also S. 417 Note 3.

17. ('40) AIR 1940 Oudh 396 (397) : 41 Cr. L. J. 725, *Emperor v. Madho Singh*. (Appellate Court in course of hearing of appeal ordering that evidence of certain witnesses should be recorded by trial Court — Appellate Court then disposing of appeal though such evidence not recorded — Procedure irregular.)

Note 2

1. ('18) AIR 1918 All 247 (248) : 19 Cri L Jour 358 (359), *Lachhmi Narain v. Bindraban*.

2. ('18) AIR 1918 All 247 (248) : 19 Cri L Jour 358 (359), *Lachhmi Narain v. Bindraban*. See also S. 421 Note 1.

References to Official Reports are invariably given in all cases found in the Official Reports.

The Synopsis for each Section shows where exactly to look for the point required.

Remarks in the footnotes amplify and illustrate the principles in the commentary.

A. I. R. COMMENTARIES JUDICIALLY NOTICED

**A. I. R. 1940 Oudh 305 at 307 =
I. L. R. 15 Luck. 537 at 543.**

"Learned counsel for the respondent has referred to Chitaley's Indian Limitation Act, 1938 Edn., at p. 653 where he says:

"Thus, where a person admits the
. the admission."

(In the present case the balance is proved by the evidence of the claimant and its existence is not denied in the written statement.) Reference has also been made to a passage on p. 666 which runs as follows:

"Thus, an acknowledgment of a debt need not specify any precise sum as due'."

A. I. R. 1940 Peshawar 24 at 25.

"At Note 10 to O. 21, R. 15 of Chitaley's Civil Procedure Code (2nd Edn.) the following comments are made as regards the right of appeal against an order made under O. 21, R. 15:

"The question whether of the non-applicant decree-holder'."

**A. I. R. 1940 Allahabad 263 at 266 =
I. L. R. (1940) All. 396 at 406.**

"In Chitaley's Criminal Procedure Code, (1st Edn.), vol. 1, p. 797, the learned commentators say: 'It is Evidence Act.' I agree with their conclusion."

**A. I. R. 1939 Oudh 284 at 285 =
I. L. R. 15 Luck. 19 at 23.**

"I take the following passage based on various rulings from p. 701 of Chitaley's Commentary on the Code of Criminal Procedure (1st Edn.): 'On the making of an Section 517'."

**A. I. R. 1939 Oudh 116 at 117 =
I. L. R. 14 Luck. 538 at 541.**

"A reference to the Notes to O. 40, R. 1 on the subject of the appointment of a receiver in execution proceedings both in Chitaley's Code of Civil Procedure (2nd Edn.) and the latest edition of Katju and Das's Code of Civil Procedure makes it quite clear that there is no such principle as the one suggested by learned counsel."

A. I. R. 1939 Oudh 86 at 89.

"According to Chitaley, (Civil Procedure Code) 2nd Edn. vol. 1, p. 517, Note 7:

'A debt debt'."

A. I. R. 1939 Lahore 356 at 357.

"As pointed out in A I R 1921 Lah 369 and A I R 1928 All 236 the absence of a shifting balance is not decisive: see also cases collected in Chitaley's Limitation Act, (1st Edn.) vol. 2, p. 1362 *et seq.*"

A. I. R. 1938 Peshawar 4 at 5.

"The general result of this conflict has been clearly set out in Note No. 9 of the commentary on that Rule (viz.; O. 22, R. 4) in Chitaley's Code of Civil Procedure (2nd Edn.) and virtually all the cases which have been referred to in the course of that Note have been cited before us as well as some other rulings in addition."

**A. I. R. 1938 Oudh 146 at 147 =
I. L. R. 14 Luck. 116 at 118.**

"As has been pointed out in Chitaley's discussion of this matter in his Notes to S. 115 at pages 924 and 925 of Vol. 1, Edn. 2 of the Civil P. C., the Allahabad view originally depended on a distinction between cases in which the application had been rejected and cases where it had been accepted."

**A. I. R. 1938 Oudh 45 at 47 and 48 =
I. L. R. 13 Luck. 689 at 693 and 695.**

"The learned counsel (for appellant) maintained that that case stands alone, and he has pointed out to us that in the Commentary on the Civil Procedure Code by Chitaley and Annaji Rao this case is submitted to have been wrongly decided: *vide* the Commentary, vol. 1, (Edn. 2), p. 478, (Note 9, F. N. 4).

"In my opinion, the contention of the learned counsel for the appellant must be accepted'."

**A. I. R. 1938 Nagpur 122 at 123. =
I. L. R. 1938 Nag. 106 at 108.**

"It was assumed by the Taxing Judge (Bose J.) in his order of reference that the present case was similar because he assumed that there was no difference for these purposes between a plaint and a memorandum of appeal. This we think is wrong although there are a larger number of rulings collected at p. 44 of Vol. 1 of Chitaley's Civil Procedure Code (2nd Edn.) which take that view."

A. I. R. 1938 Lahore 345 at 346.

"The learned counsel for the present respondents also quoted A. I. R. 1932 All. 446, A. I. R. 1933 All. 264 (a judgment by a Full Bench, one member of which was the present Hon'ble Chief Justice of the Lahore High Court) and the remarks in the Commentary of Mr. Chitaley's Criminal Procedure Code, (1st Edn.) vol. 1, p. 676."

A. I. R. 1938 Lahore 220 at 222.

"(The amended Rule will be found printed at pp. 252-3 of Chitaley's Code of Civil Procedure, Edn. 2.)"

**A. I. R. 1938 Calcutta 730 at 733 =
I. L. R. (1939) 1 Cal. 112 at 120.**

"The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act (1st Edn., 1938), pp. 567 to 572."

**A. I. R. 1938 Calcutta 287 at 289 & 290 =
I. L. R. (1938) 1 Cal. 53 at 58 and 60.**

"In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, (2nd Edn.) at p. 1388, I find the following comment: 'The first . . . parties'."

"The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions'."

A. I. R. 1937 Rangoon 391 at 392.

"The learned authors of the Code of Criminal Procedure by Chitaley and Annajirao, Edn. 1, Vol. 1, at p. 200 say: 'Thus an . . . Proviso.'"

"I agree with this view."

A. I. R. 1937 Peshawar 81 at 81.

"Learned counsel has been unable to show me any decided case in which action of that nature amounts to a public nuisance, and the Commentary in Chitaley's Civil Procedure Code (2nd Edn.) certainly indicates the contrary."

A. I. R. 1937 Peshawar 41 at 41.

"On p. 1480 of Mr. Chitaley's commentary on the Civil Procedure Code (Edn. 1) it is noted that 'where a plaint is presented on the re-opening date after court-holidays and

the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays.' This note is supported by reference to rulings in Nagpur, Lahore, Madras and Calcutta Courts, though a Calcutta ruling to contrary is also noted. The proposition as stated appears to me to be correct."

A. I. R. 1937 Peshawar 13 at 15.

"In this connexion we may quote the following Note No. 4 from Mr. Chitaley's Commentary (2nd Edn. p. 1855) under R. 53 which is as follows: 'Other decrees. — A decree . . . this rule'."

A. I. R. 1937 Oudh 481 at 483 =**I. L. R. 13 Luck. 560 at 565 & 566.**

"Messrs. Chitaley and Annaji Rao in their Commentary on the Code (2nd Edn. p. 2347) express the opinion that the present cl. (d) of R. 5 of O. 33 gives effect to the view taken in the Full Bench decision of the Allahabad High Court reported in 7 All 661, and other cases."

A. I. R. 1937 Nagpur 268 at 269 =**I. L. R. 1937 Nag. 519 at 520.**

"It appears that the weight of authority is in favour of the view that the Appellate Court has such powers. The dissentients from that view are limited to the High Courts of Allahabad and Rangoon and the Chief Court of Oudh: See also Chitaley and Rao's Code of Civil Procedure, (2nd Edn.) Vol. 1, page 712."

A. I. R. 1937 Nagpur 216 at 217 =**I. L. R. 1938 Nag. 280 at 282.**

"In Chitaley and Rao's Civil Procedure Code, Edn. 2, p. 2091 under O. 22, R. 1, it is remarked:

"If, in the first Court, the . . . either party."

"I agree with these remarks which would apply to a dismissal of the suit in appeal. It is further remarked on the authority of 34 Mad loc. cit. that the appeal cannot be continued even in respect of costs or other relief which are merely incidental to the main reliefs. I accordingly uphold the contention of the respondent'."

